

COMPLAINT NUMBER	17/012
APPEAL NUMBER	17/007
COMPLAINANT	A. Macdonald
APPLICANT	Uber NZ
ADVERTISER	Uber NZ
ADVERTISEMENT	Uber NZ, Out of Home
DATE OF MEETING	9 June 2017
OUTCOME	Upheld, Appeal Dismissed

SUMMARY

The Complaints Board ruled on 14 March 2017 the complaint made by A. Macdonald was Upheld.

The Advertiser, Uber NZ, appealed the decision to the Chairperson of the Appeal Board who accepted the appeal application and referred it to the Appeal Board.

The Appeal Board considered all the matters afresh relating to the claim in the advertisement: "Background checks on every driver. We get Becky's life story before you do." The majority was of the view the factual claim coupled with the hyperbolic statement implied a comprehensive background check which overrepresented the depth of the checks and was likely to mislead consumers.

In accordance with the majority, the Appeal Board ruled the complaint was Upheld and Dismissed the appeal.

Please note this headnote does not form part of the Decision.

APPEAL BOARD DECISION

The Complaints Board ruled on 14 March 2017 the complaint made by A. Macdonald was Upheld.

The Advertiser, Uber NZ, appealed the decision to the Chairperson of the Appeal Board who noted its concern the Complaints Board may not have been aware of the full context in which the billboard advertisement was displayed and all relevant information.

The Chairperson ruled the appeal was Accepted under grounds (ii) and (v) to be placed before the Appeal Board for determination.

The Chairperson directed the Appeal Board to consider the advertisement with reference to Basic Principle 4 and Rule 2 of the Code of Ethics. This required the Appeal Board to consider whether the advertisement contained any statement or visual presentation or

created an overall impression which directly or by implication, omission, ambiguity or exaggerated claim was misleading or deceptive, was likely to deceive or mislead the consumer, made false and misleading representation, abused the trust of the consumer or exploited his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading). The Appeal Board was also required to consider whether the advertisement had been prepared with a due sense of social responsibility to consumers and society.

The Appeal Board confirmed its role was to consider the matter de novo that is, starting from the initial complaint and reviewing all subsequent correspondence, rulings, and submissions, considering the matter afresh.

The Appeal Board confirmed the advertisement before it for adjudication was a billboard advertisement for Uber which shows a photo of a woman standing in a room full of shelved documents. The text next to her says "Background checks on every driver. We get Becky's life story before you do."

The Appeal Board ruled the complaint was Upheld and the Appeal was Dismissed.

The Complaints Board Decision

The Complainant said the advertisement was misleading as it misrepresented the background checks of its drivers by implying they were more in-depth and was of the view they were illegal.

The Advertiser said the billboard was factually accurate and they do require thorough background checks on all their driver partners. Prior to becoming a driver partner, each person must undergo a criminal conviction history check, conducted by the Ministry of Justice, and have a driving demerit points and suspension history check conducted via the New Zealand Transport Agency.

The Complaints Board said the advertisement created a misleading impression for the consumer about the level of detail of Uber's background checks when the factual claim "Background checks on every driver" was read in conjunction with the following statement "We get Becky's life story before you do."

The Complaints Board ruled the complaint was Upheld.

Advertiser's Appeal

The Advertiser, Uber NZ, appealed the Complaints Board Decision to Uphold the complaint stating: "Uber considers that the Complaints Board may not have been aware of the full context in which the billboard advertisement was displayed and all relevant information."

The Advertiser submitted the statement "background checks on every driver" was factually accurate and the statement "We get Becky's life story before you do" was puffery and light hearted humour.

The purpose of the advertisement, as explained by the Advertiser, was to "correct the misconception... that Uber does not carry out backgrounds checks on its driver partners." The Advertiser provided examples of media articles to demonstrate the wider context of the advertisement in support of the purported misconceptions. The Advertiser said the statement in the advertisement "background checks on every driver" was factually accurate as all driver partners must undergo a criminal traffic background check via the Ministry of Justice and a driving history check conducted via the New Zealand Transport Agency.

The Advertiser submitted that the current vetting procedures of NZTA principally rely on a discretionary “fit and proper person” check for traditional small passenger drivers and “the legislative framework provides only limited guidance for how this should be conducted, although certain criteria that the NZTA must and may consider are provided.”

The Advertiser said while the Uber background checks were different to the P Endorsement background checks required for traditional small passenger drivers, the Uber App provided broader safety features, stating in part: “every trip with Uber in New Zealand takes place between registered drivers and riders, who are presented with identifying information before the trip commences. Each trip is GPS tracked, and digital records are retained and made available to riders and drivers. Importantly, after every trip, riders and drivers can provide digital feedback, which is backed by a 24/7 customer support team reviewing feedback, and a rating system where ratings are visible to drivers and riders before any trip begins. This means, in addition to background checks which are undertaken prior to any driver providing a trip using the Uber app, riders and drivers enjoy the additional safety benefits of real time feedback after every trip.”

Regarding the statement “We get Becky’s life story before you do”, the Advertiser submitted “most passengers will have experienced sitting in the back of a commercial passenger service and listening to a driver explain their ‘life story’” and, as such, the statement was both puffery and light hearted comedic hyperbole as it is not possible that Uber could literally know the complete life story of each driver partner nor would consumers assume they would.

In response to the allegation from the Complainant that the background checks conducted by Uber were illegal, the Advertiser stated, in part: “It is incorrect and inaccurate to refer to Uber’s background checks as illegal; the checks are undertaken by the NZTA and the Ministry of Justice respectively. In a broader contextual sense, following a comprehensive review into whether the small passenger service regulations are fit for purpose and flexible enough to accommodate new technologies (such as ridesharing apps), the Government has committed to overhaul small passenger services by removing outdated rules and bringing the sector into the 21st century. This has been a very comprehensive and public review process and it is not the place of the complainant to make a determination of the appropriate background check requirements for ridesharing as the basis of an advertising complaint.”

Complainant’s response to the Appeal

The Complainant responded to the points raised in the Appeal application and refuted the arguments put forward by the Advertiser.

In addressing the articles provided by the Advertiser to contextualise the advertisement as a response to inaccurate media coverage, the Complainant said, “the statement most people just read headlines is without justification or relevance.”

The Complainant was of the view the advertisement compared Uber’s background checks to those carried out by NZTA, implying they were superior and questioned whether a billboard was an appropriate medium to disseminate information about Uber’s policy. In their mind, a disclaimer, should have been used to clarify the claim.

Appeal Board deliberation

The Appeal Board carefully considered all the information provided to it and confirmed its jurisdiction extended to the content of the billboard. It said it was required to determine whether the billboard before it was in breach of the Advertising Codes, taking in to account the likely consumer takeout of the advertisement from the perspective of its likely audience.

The Appeal Board acknowledged the wider debate raised by both parties and the review of Small Passenger Services Supporting Regulations currently being conducted by the Ministry of Transport. It confirmed its jurisdiction was limited to the billboard advertisement subject to complaint before it.

The Appeal Board then examined the statement in the advertisement: “Background checks on every driver. We get Becky’s life story before you do.”

The majority of the Appeal Board said the claim “Background checks on every driver. We get Becky’s life story before you do” implied a comprehensive background check which was not supported by the evidence provided to it. While it took into account all driver partners had to get a criminal traffic background and driving history check, the factual claim coupled with the hyperbolic statement: “We get Becky’s life story before you do” created an overall misleading impression. It said the advertisement could mislead consumers as it gave the impression the background checks conducted by Uber were more in-depth than the evidence demonstrated.

The majority of the Appeal Board said the advertisement overrepresented the depth of the background checks and was likely to mislead consumers in breach of Rule 2. Therefore, the advertisement had not been prepared with a due sense of social responsibility to consumers as required by Basic Principle 4 of the Code of Ethics.

A minority of the Appeal Board disagreed and was of the view the statement “Background checks on every driver” was factually correct. It also took a wider interpretation of ‘background’ to encompass the information provided by the Uber app which features recent driver history, ratings and GPS tracking, as a form of background information also available to the consumer. The minority said the statement “We get Becky’s life story before you do” was clear comedic hyperbole and most consumers would be aware it was a reference to the conversational nature of small passenger service drivers which was intended to be humorous.

As such, the minority was of the view the advertisement was not in breach of the Code of Ethics.

However, in accordance with the majority, the Appeal Board ruled the complaint was Upheld and the Appeal was Dismissed.

Decision: Complaint Upheld, Appeal Dismissed.

DESCRIPTION OF ADVERTISEMENT

The billboard advertisement for Uber shows a photo of a women standing in a room full of shelved documents. The text next to her says “Background checks on every driver. We get Becky’s life story before you do.”

COMPLAINT FROM A. MACDONALD

The Complainant made the following complaint to the Advertising Standards Authority:

I am submitting a complaint against Uber Technologies New Zealand Technologies Limited regarding their billboard on the corner of Pitt street and Hobson street in Auckland. On April

21st 2016 Uber Nz removed the requirements for their drivers to have a passenger Endorsement license from the NZTA to drive as a private hire driver under the uber platform. This is illegal and removes the Fit and Proper background check that is required under NZ law. Uber have replaced this comprehensive check with their own third party ministry of justice and driving history check which does not meet NZ law or the NZTA requirements and is severely lacking in its history of the driver. The NZTA has sent out over 2,000 letter to would be drivers stating that the background checks are not sufficient and are in fact illegal along with media scrutiny and government clearly stating these background checks are mandatory and by not complying this is an illegal act.

UBER NZ has purposely put this billboard up misrepresenting their knowledge of the background of a driver and is entirely misleading about the legality of the background check and to what extent the background check is carried out. Ubers background check is a simply ministry of justice check and driver history check which can only see convictions in New Zealand and does not take into account any overseas history, charges laid or pending against a person and falls short of any New Zealand requirements by a long way, I have the NZTA letters which I am happy to send you that have been sent to every driver so they understand their obligations and believe this billboard is a blatant tactic to mislead the public as to the extent of its checks. I am available for comment at anytime and believe this billboard and its advertising to be in direct violation of a fair representation of the companies process.

RESPONSE FROM ADVERTISER: UBER NZ

Thank you for bringing this complaint to our attention. We take our obligations – both in relation to our advertising and to undertaking background checks on Uber driver partners – very seriously.

The billboard in question is factually correct and compliant with the Advertising Standards Codes of Practice, including Basic Principle 4, Rule 2. The safety of our riders and Uber driver partners is of the utmost importance and, as such, we require thorough background checks on all driver partners. Prior to completing the process to become a driver partner with the Uber application, each person must undergo:

- a criminal conviction history check which is conducted via a third party government agency, the Ministry of Justice. For further information about this process please visit this website: <https://www.justice.govt.nz/criminal-records/>; and
- a driving demerit points and suspension history check conducted via the New Zealand Transport Agency. For further information about this process please visit this website: <http://www.nzta.govt.nz/driver-licences/getting-a-licence/confirming-your-licencedetails/demerit-points-and-suspension-history/>

In addition, each business day (in Wellington) Uber receives an update on driver partners when their p-endorsement or license has been revoked, or the status of their p-endorsement or license has lowered. Following this update, Uber removes the partner's access to the Uber app in circumstances where the partner no longer meets Uber's requirements.

It is factually correct and substantiated that Uber does carry out "background checks on every driver". The reference to Uber getting "Becky's life story before you do" is a light hearted play on the common scenario of riders hearing the driver's life story during the trip. We do not consider that any reasonable consumer would expect Uber to know the entire life story of each driver. In our view, there is no risk of the billboard being misleading or breaching Rule 2.

APPEAL APPLICATION FROM RUSSELL MCVEAGH FOR UBER NZ:

Introduction

1. We act for Uber NZ ("**Uber**") and we are in receipt of your letter dated 24 March 2017, which attached a copy of the decision for Complaint 17/012 ("**Decision**").
2. Our client wishes to thank the Authority for withholding publication of the Decision until Uber has had an opportunity to consider its appeal. Uber has now carefully reviewed the Decision and it has decided to make an appeal. Uber considers that the Complaints Board may not have been aware of the full context in which the billboard advertisement was displayed and all relevant information.
3. We set out below additional information, which was not previously available to the Complaints Board and which is now provided to address the particular issues raised by the ASA in its Decision. We then deal with the specific grounds on which the appeal is made. We trust this will enable the Appeal Board to re-hear the complaint, and form a different view to the Complaints Board.
4. If the Appeals Board has any questions before considering the appeal, please let us know.

The advertisement

Context for the advertisement

5. Prior to the advertisement being published, there had been extensive media coverage, both in New Zealand and globally, concerning purported (and false) safety concerns with Uber and misconceptions regarding the background checks on driver partners. As a snapshot and in order to provide context for the Appeals Board, we have been able to ascertain a number of online articles with inflammatory and (in our view) misleading headlines, which have contributed to this general misconception. In our experience, consumers frequently rely on headlines for the main message in the story. Such headlines have been published in the media recently, including in the *New Zealand Herald* and via articles on the Stuff website.¹

Advertisement not misleading, especially in context

6. The purpose of the advertisement was to correct a misconception among some of the general public that Uber does not carry out background checks on its driver partners. This is why the main message in the advertisement, which is in bold font and significantly larger font than any other text in the advertisement states "Background checks on every driver."
7. This statement is factually correct and conveys the message it was intended to convey. The following background checks are required for each driver partner:
 - (a) Prior to completing the sign-up process they must undergo:
 - (i) a criminal and traffic background check which is conducted via a third party

¹ See by way of example "*Passenger safety at 'risk' with 1700 Uber drivers who haven't been vetted properly*" and "*Taxis face rigorous safety standards – Uber doesn't*".

government agency, the Ministry of Justice. For further information about this process please visit this website: <https://www.justice.govt.nz/criminal-records/>; and

- (ii) a driving history check conducted via the New Zealand Transport Agency.
- (b) In addition, each business day Uber receives an update on driver partners when their P Endorsement or licence has been revoked, or the status of their P Endorsement or licence has lowered. Following this update, Uber removes the driver partner's access to the Uber app in circumstances where the driver partner no longer meets Uber's requirements. This service is provided by the New Zealand Transport Agency to Uber.
8. The reference to Uber getting Becky's "life story" is both puffery and a light hearted attempt at humour. We consider this meets the threshold of "obvious hyperbole" in Rule 2. The New Zealand courts have been clear that the "*public is accustomed to the use of puffery in advertising*",² and it is expected that reasonable consumers will realise the statements should not be relied upon and, as a result, "puffs" are not usually capable of being misleading or deceptive.³ The Commerce Commission has also recognized this in its various publications on the Fair Trading Act, and we note that there is a puffery exception in the new unsubstantiated representations provisions in the Fair Trading Act.
9. In our experience, most passengers will have experienced sitting in the back of a commercial passenger service and listening to a driver explain their "life story". It is not possible that Uber would literally know the complete life story of each driver partner. Similarly, it is not possible that a taxi company or another transport service would know the complete life story of each of its drivers. No background check (including the P Endorsement background checks) could ever reveal the "life story" of anyone.
10. As such, no reasonable consumer would consider that a reference to "background checks" and Uber getting "Becky's life story" implies that Uber receives details of every driver partner's life story in any literal sense (including childhood, personal circumstances, etc). The Court of Appeal has made it clear that the ASA needs to consider how the typical consumer would understand the message, not what the complainant or the Appeals Board (with their personal knowledge) understands the message to mean. New Zealand consumers "will not be lacking in perception and can be expected to bring to bear a reasonable degree of common sense".⁴ To such an ordinary consumer, the Ministry of Justice Background Check and the NZTA Driver History Check driver partners are required to have would meet the definition of a "background check".

Uber's required background checks may not be exactly the same as P Endorsement background checks, but Uber's service provides at least equal safety outcomes

² See *Luxottica Retail New Zealand Ltd v Specsavers New Zealand Ltd* (2011) 13 TCLR 449 (HC) at [43] affirming *Energizer Australia Pty Ltd v Gillette Australia Pty Ltd* (2001) 189 ALR 480 (FCA). Note the decision of the High Court in *Luxottica* was overturned on appeal, however the general principle that the public expect puffery was not affected.

³ L Trotman and D Wilson *Fair Trading: Misleading or Deceptive Conduct* (LexisNexis NZ Limited, Wellington, 2006) at 114-115.

⁴ *Unilever New Zealand Ltd v Cerebos Gregg's Ltd* (1994) 6 TCLR 187 at 10.

11. Uber was mindful of its legal obligations, including the Code of Ethics, when preparing the billboard. Uber does not at any time state that the background checks it requires for driver partners are the same as the checks required for a P Endorsement (in fact, there is no comparative language used at all). The statement is simply that background checks are provided. This is accurate, as thorough background checks are in fact required for each driver partner. It would not be possible in the context of a billboard advertisement for Uber to explain what background checks it undertakes and then compare these with the checks undertaken by other services. Nor would this be appropriate.
12. In any event, even if the Appeals Board were to consider the billboard implied that Uber's own background check process was as comprehensive as the NZTA's process (which Uber disputes) Uber would like to put forward additional information demonstrating how this is not misleading: Uber's background checks when coupled with Uber's broader safety features (made possible by new technology) means the Uber app provides safety outcomes which are equivalent to, if not greater than, the safety outcomes offered by traditional passenger transport services, such as taxi services.
13. A detailed description summary of Uber's broader safety features is provided as Annexure A. In summary, every trip with Uber in New Zealand takes place between registered drivers and riders, who are presented with identifying information before the trip commences. Each trip is GPS tracked, and digital records are retained and made available to riders and drivers. Importantly, after every trip, riders and drivers can provide digital feedback, which is backed by a 24/7 customer support team reviewing feedback, and a rating system where ratings are visible to drivers and riders before any trip begins. This means, in addition to background checks which are undertaken prior to any driver providing a trip using the Uber app, riders and drivers enjoy the additional safety benefits of real time feedback after every trip.
14. This information is only being provided now in response to the Complaint Board's focus on this comparison in its decision - Uber did not initially appreciate this as a relevant issue.
15. Further, the complainant alleges that Uber has misrepresented the legality of its background checks. It is incorrect and inaccurate to refer to Uber's background checks as illegal; the checks are undertaken by the NZTA and the Ministry of Justice respectively. In a broader contextual sense, following a comprehensive review into whether the small passenger service regulations are fit for purpose and flexible enough to accommodate new technologies (such as ridesharing apps), the Government has committed to overhaul small passenger services by removing outdated rules and bringing the sector into the 21st century. This has been a very comprehensive and public review process and it is not the place of the complainant to make a determination of the appropriate background check requirements for ridesharing as the basis of an advertising complaint.

Grounds for appeal

16. With reference to Rule 6.4 of the Second Schedule of the Advertising Standards Complaints Procedures, Uber makes this appeal on the following grounds:
 - (a) 6.4(b) – as mentioned above, new evidence has been provided to address the issues raised by the ASA in its decision, including relevant media articles and information about Uber's safety processes.

- (b) 6.4(e) – it is in the interest of natural justice that the matter be reheard. As explained to the Authority when Uber requested that the decision was not published until an appeal had been made, any decision in this matter could have serious ramifications because:
- (i) there is likely to be publicity following release of any decision;
 - (ii) given the subject nature of the complaint and the anticipated publicity, there could be adverse effects if consumers are led to incorrectly believe that Uber is not taking appropriate checks of driver partners - something Uber strongly disputes given the thorough background checks required and the broader safety outcomes achieved by the Uber app. These adverse effects would affect both Uber and, most importantly, driver partners, which we believe would be both unfair, disproportionate and potentially irremediable;
 - (iii) as far as we are aware, the Authority has not previously considered the type of statements in the billboard, and so they should be fully considered in light of all available information;
 - (iv) the Complaints Board's decision does not appear to engage with the relevant case law, which is directly relevant to how the advertisement (and its representation concerning background checks for every driver) would be viewed by ordinary consumers.

Conclusion

17. As noted in its initial response, Uber takes this matter and any claims that it has acted unfairly and unlawfully very seriously. Uber appreciates the steps taken by the Authority to date and it requests that its appeal be heard by the Appeal Board.
18. If Uber can be of any further assistance, or the Appeals Board requires any additional information, please let us know.

Annex A: Background checks

NZTA's current vetting procedures rely on a largely discretionary "fit and proper person" check. The legislative framework provides only limited guidance for how this should be conducted, although certain criteria that the NZTA must and may consider are provided.

Uber obtains criminal and traffic conviction records from the Ministry of Justice and driving history checks from the NZTA. Uber does not accept driver partners through this process with any disclosable convictions. In addition, Uber does not accept partners with a record of a reckless driving or drink driving. As discussed in more detail below, transport law does not require such high standards.

In theory, the NZTA and Ministry of Justice checks are not identical. Both checks investigate criminal and traffic convictions. However, the current NZTA check also assesses pending charges and police warnings, and applicants must procure a criminal record from overseas if they have spent more than twelve months abroad.

In practice, however, it is likely that these additional checks do not deliver better public safety outcomes for the following three reasons:

1. **Data is not available to support superior safety claims.** Uber's position is that its background check process, especially when viewed in the context of

the wider safety features that technology makes possible with Uber, delivers appropriate safety outcomes. Uber asked NZTA under the *Official Information Act* whether people might be captured by the P Endorsement check, but not by its parallel process. The NZTA was unable to provide this information (without a significant fee and a delay of 74 weeks). Uber is not aware of any evidence that the differences in the NZTA P Endorsement check lead to greater safety outcomes for that process.

2. **Regulations permit a lower threshold to accredit drivers.** Unknown to the public, regulations stipulate relatively lax standards. Transport law permits some serious convicted offenders - including those convicted of certain non-sexual assault, manslaughter, terrorism, property, or fraud offences - to be accredited to drive a commercial vehicle.⁵ By comparison, Uber does not accept partners through its parallel onboarding process with any criminal convictions. Over the past few months, a number of current P Endorsement holders underwent Uber's onboarding process. Uber's background checks disclosed that these P Endorsement holders include:
 - a. At least three individuals convicted of mid-range drink driving (three, four and eight years ago)
 - b. One individual convicted of careless driving causing death or injury (four years ago)
 - c. One individual routinely demerited for speeding (one year ago)
 - d. One individual convicted of driving while disqualified (six years ago)
 - e. One individual convicted of assaulting a female (six years ago)
3. **Regulations fixate on technicalities at the expense of ordinary people.** NZTA has refused to issue P Endorsements to political refugees from Iran,⁶ Myanmar⁷ and Somalia⁸ because — despite making statutory declarations under oath attesting to their overseas record — the refugees could not obtain a traffic history from the Iranian, Myanmar or Somali authorities. These decisions and subsequent litigation have been criticised in court.

These observations indicate that the existing NZTA vetting regime does not meaningfully improve safety outcomes. Put another way, Uber believes its background check process delivers sensible safety outcomes.

Finally, Uber's background checks should also be viewed in the context of the service provided. Ridesharing mitigates many of the safety risks associated with point-to-point transport - for both riders and driver partners. Ridesharing trips involve the following features:

⁵ See, eg, *Land Transport Act 1998 s 29A*.

⁶ *NZTA v Moradi*.

⁷ *Thet v NZTA: see Mahmed for summary*.

⁸ *Mahmed v Land Transport New Zealand*.

- **Registered drivers.** Only registered drivers can connect with passengers. In New Zealand, all Uber partners must meet Uber's background check process. In the event that a driver or vehicle no longer meets applicable requirements, Uber can automatically suspend access to the app.
- **Identification.** The Uber app enables passengers to verify the identity of drivers, and drivers to verify the identity of passengers. Identification helps to prevent poor or unsafe behaviour.
- **GPS tracking.** Every Uber trip is tracked by GPS, and passengers can share their route in real time with friends or family.
- **Digital records.** Passengers and drivers can access a digital record of every trip, including details of the route and the fare. Digital records can help to resolve disputes over the fare, the route, or the behaviour of drivers or passengers.
- **Feedback.** Passengers and drivers can provide digital feedback after each trip. Feedback encourages high quality service, and helps to identify poor quality drivers and vehicles.
- **Support.** Passengers and drivers can register feedback through the app. Uber's 24/7 support team reviews feedback swiftly — often within minutes. In the event of a complaint, Uber can automatically suspend riders or drivers pending further inquiry.
- **Enforcement.** Uber's dedicated 24/7 Law Enforcement Response Team works with police and regulators to assist investigations pursuant to a valid legal process.

These systems can mitigate the most serious and most common risks in the incumbent industry, such as rider and driver behaviour, fare evasion, fare gouging, and mishandled complaints.

RESPONSE TO APPEAL FROM THE COMPLAINANT, A MACDONALD:

I'll talk first to the specific numbered points Russell McVeigh have given, then summarize and counter argue.

5.They "contextualize" by providing reference to "misleading" news reports. They refer to two specific articles, which were both on

[Stuff.co.nz](http://www.stuff.co.nz):

-i. <http://www.stuff.co.nz/business/81770081/Passenger-safety-at-risk-with-1700-Uber-drivers-who-haven-t-been-vetted-properly>, dated July 5, 2016 in which Jo Moir directly reports the words of Kate Styles, the National Operations Manager of the NZTA, who points out that up until April (2016) NZTA were satisfied with Uber's compliance, but afterwards 'Uber currently only does a driver license check and a Ministry of Justice check with its drivers, which is "only a small part of what drivers would normally go through in a vetting process," Styles said.'. I'm unsure what part of this is "misleading". It the statement of the senior bureaucrat directly responsible for making this judgment, quoted in context. NZTA is the New Zealand Transport Authority, directly responsible for all aspects of the policy and enforcement of the laws regarding passenger hire services.

-i <http://www.stuff.co.nz/dominion-post/comment/72252694/taxis-face-rigorous-safety-standards--uber-doesnt>, dated September 22 2015. The date alone should cause anyone

reading this opinion to question how much an attempt to hoodwink them is being made. This is well before Uber dropped it's compliance to all of NZ's passenger hire licensing laws (April 2016). It does not fall into the time period that this complaint to the ASA is being made. Even with that in mind, it is hardly "misleading", since it is clearly the opinion of a partisan party, Executive Director of the NZ Taxi Federation Roger Heale, and is clearly stated as such in the opening paragraph. Not that anything he says is actually untrue. At the time, and subsequently, Taxis require internal cameras and Ubers do not. This was done due to many, many historic allegations of assaults on both drivers and passengers, and has subsequently massively improved the safety of both parties.

This contextualization is itself misleading. The statement that most people just read headlines is without justification or relevance in claims that these articles are misleading.

6. The claim appears to be that so long as the public is generally misled because they only read headlines in newspapers, therefore it is OK to mislead with counter headlines in a prolonged billboard advertising campaign. Presumably the ASA can make up its own mind how OK that really is. There is no way to target the specific people who might have thought that it was literally true that Uber carries out no background checks. The claim that the purpose was to correct only the misconceptions of that subset of the hundreds of thousands of people seeing the billboards is spurious. We claim that the purpose was indeed to equivocate the background checks to those of the NZTA, indeed it was to claim that they are superior to the NZTAs checks.

7. This is a particularly misleading point. It presents two points:

-a That Uber conducts background checks via the Ministry of Justice, and a driving history check by the NZTA

-b Drivers who have had their P endorsements lapse are cut off from the platform after notifications

You could be forgiven for thinking that they are referring to the same people in a) and b) because it reads that way. They are not. The background checks and driving history are given to every driver since April (Uber claims), but only a subset of drivers have P endorsements since then. Those who do not have a P endorsement will not have it lapse and will not be disconnected. The legal drivers are still subjected to the pre-April Uber rules. Those without P endorsements undergo no such troubles.

It's worth noting right here that Uber's claims about how the background checks are actually used is something they have never backed up with a shred of evidence. Their internal processes are opaque to all outside observation. There is no official policy, not even any clear chain of responsibility. No external audits are conducted. No legal requirements are referred to. Nor could they be, because such audits would instantly disqualify their claims that these background checks are sufficient to put drivers on the road.

But the implication of the advertising is that they are sufficient. This is deliberately misleading.

8 & 9. We feel no need to lecture the ASA on the laws relating to puffery, especially using cases that have been overturned. We accept that the claim of having Becky's life story before she does is obvious hyperbole. This complaint is about the claims relating to background checks, not other ridiculously inflated and obviously false claims that appear on a regular basis from Uber.

10. The summarization 'To such an ordinary consumer, the Ministry of Justice Background Check and the NZTA Driver History Check driver partners are required to have would meet the definition of a "background check".', is a statement about common sense that we dispute. We consider that the general public would consider a "background check" to be something undertaken via a duly appointed agency for the purpose of establishing "fitness for purpose". In the case of seeking the background of a professional passenger driver, this would presumably be a look at whether that driver has the required licenses for the job. Certainly that is what I personally would want to hear about the pilot of my airplane, if I heard that my airline conducted background checks. Their flying background, including where and when they got their license to fly passengers, and whether it is up to date. "Have they recently had their general health checked" comes to mind as something that Uber simply does not require of any of their drivers, whereas it is not possible to get a P Endorsement without that. "Do they understand the law?" would be another good one, and all P Endorsed drivers have passed several extensive tests of their knowledge of the laws of passenger service driving. "Do they understand the dangers of driving when they are very tired?" would be an especially salient one, since Uber does nothing to enforce the driving time laws beyond making sure drivers do not exceed 70 hours in a week. There is a case before the courts at the moment involving one such driver who worked all day in another job and then drove all night, crashing in the small hours, injuring two passenger and damaging 3 cars. He was a typical "illegal" driver who had passed all the "background checks".

11. The summarization 'It would not be possible in the context of a billboard advertisement for Uber to explain what background checks it undertakes and then compare these with the checks undertaken by other services. Nor would this be appropriate.' brings again into question whether or not billboards are an appropriate vehicle for informing the public about Uber's compliance, if they claim that they literally can't put in the simple nuance that the background checks are not generally sufficient to put their drivers on the road, under NZ law. It would not be at all difficult to simply put in one of the usual disclaimers at the bottom of an ad "The background checks conducted by Uber are not identical to those required for passenger service licensing under the laws of NZ". When making highly specific claims (as Uber seem to be claiming that they were doing), one should make it clear just how specific those claims actually are.

12, 13, 14. Uber seems to be claiming here that they have the right to ignore the law because the law is wrong. We claim that they do not have this right any more than any other entity in NZ does. In 14, their claim is that the Board focusing on this question was something they could not initially appreciate. We find this entirely unbelievable in light of Uber's generally well known strategy of direct antagonism towards sovereign law in nearly every territory they operate in. It is disingenuous in the extreme. Perhaps it's "a puff", and we are to treat 14 as a lighthearted attempt at humour.

15. This is disingenuous as well. The complainant did not say that it was illegal to conduct background checks. The reference to the illegality of the checks is to the illegality of using those checks as sufficient grounds to put a driver on the road in NZ picking up passengers for hire. Uber does not get to decide NZ law on this. Many drivers (several hundred at least) have faced charges in courts for following Uber's policy on this.

There is a review of the law under way. It has not yet passed into law even now, more than a full year after Uber decided that the laws do not apply to it. No driver has yet been able to use the law review as a defence, any more than any other member of the public could. Maybe they could ask for retrospective compensation after the law change, but the law has not changed, and it still may not change.

General Response

It seems important in the case of a claim of misleading advertising for us to consider exactly who is being misled. Uber's defence seems to focus only on passengers and their rights, something that is consistent generally with their corporate behaviour. But another party that could suffer considerably from being misled in this way is the drivers themselves. Not only did Uber put up these billboards, but they subsequently have hired thousands of drivers on the terms that the billboard implies - that their background checks are sufficient. Many of these drivers have suffered considerably from this deception when they have found out for the first time from a police officer that they are breaking many laws and are up for thousands of dollars worth of fines. That Uber pays these fines directly does not really compensate any of the people harmed in this way for a situation that could easily have been remedied if the company considered truth more important than industry domination. In fact, such payment is evidence of an organization run by scofflaws.

Passengers could also be harmed. I referred above to passengers injured in a crash that may have resulted from an ignorant driver falling asleep at the wheel momentarily because he was literally unaware of the very sensible laws relating to work times in NZ, laws that have reduced on road fatalities considerably in an industry where poor pay often causes employees to work ridiculously long hours. Do we actually have to wait for the first Uber fatality due to their deception before any regulatory authority takes direct steps against Uber? Other attempts to find them accountable have stalled because Uber has argued that their literally do not actually employ drivers in this country. The claim is that Uber in NZ is only a marketing branch of Uber BV in the Netherlands. Well, in this case, it is the marketing arm that is directly responsible. They had a duty of care not to mislead the public about their operation. They can hardly claim that they were unaware of the way that they have run their operation in NZ, since they literally produce all of the documentation by which the hiring of drivers is organized.

RESPONSE TO APPEAL FROM THE MEDIA: APN OUTDOOR

APN Outdoor referred the ASA to the Advertiser's agency, Mediacom.

RESPONSE TO APPEAL FROM THE AGENCY: MEDIACOM NZ

Mediacom had nothing to add to the Advertiser's response.

CODE OF ETHICS

Basic Principle 4: All advertisements should be prepared with a due sense of social responsibility to consumers and to society.

Rule 2 Truthful Presentation: Advertisements should not contain any statement or visual presentation or create an overall impression which directly or by implication, omission, ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading).

SUMMARY OF COMPLAINTS BOARD DECISION

The billboard advertisement for Uber shows a photo of a woman standing in a room full of shelved documents. The text next to her says "Background checks on every driver. We get Becky's life story before you do."

The Complainant said Uber NZ has misrepresented its knowledge of the background of its drivers and the legality of its background checks. The Complainant said on 21 April 2016 Uber NZ removed the requirement for their drivers to have a passenger endorsement licence from the NZTA to drive as a private hire driver under the Uber platform.

The Advertiser said the billboard is factually correct and they do require thorough background checks on all their driver partners. Prior to becoming a driver partner, each person must undergo a criminal conviction history check, conducted by the Ministry of Justice, and have a driving demerit points and suspension history check conducted via the New Zealand Transport Agency.

The Complaints Board said the advertisement implies that Uber has in-depth knowledge about the background of its drivers and this could create a misleading impression for the consumer about the level of detail of Uber's background checks.

The Complaints Board ruled the complaint was Upheld.

SUMMARY OF CHAIRMAN'S RULING TO ACCEPT APPEAL APPLICATION

The Advertising Standards Complaints Board ruled on 14 March 2017 that the complaint made was upheld. The Advertiser appealed the Ruling.

This application was considered by the Chairperson of the Appeal Board. The Chairperson noted the Applicant's view that the Complaints Board may not have been aware of the full context in which the billboard advertisement was displayed and all relevant information.

The Chairperson ruled the appeal was Accepted under grounds (ii) and (v) to be placed before the Appeal Board for determination.



COMPLAINT NUMBER	17/012
COMPLAINANT	A Macdonald
ADVERTISER	Uber NZ
ADVERTISEMENT	Uber NZ, Out of Home
DATE OF MEETING	14 March 2017
OUTCOME	Upheld

SUMMARY

The billboard advertisement for Uber shows a photo of a woman standing in a room full of shelved documents. The text next to her says “Background checks on every driver. We get Becky’s life story before you do.”

The Complainant said Uber NZ has misrepresented its knowledge of the background of its drivers and the legality of its background checks. The Complainant said on 21 April 2016 Uber NZ removed the requirement for their drivers to have a passenger endorsement licence from the NZTA to drive as a private hire driver under the Uber platform.

The Advertiser said the billboard is factually correct and they do require thorough background checks on all their driver partners. Prior to becoming a driver partner, each person must undergo a criminal conviction history check, conducted by the Ministry of Justice, and have a driving demerit points and suspension history check conducted via the New Zealand Transport Agency.

The Complaints Board said the advertisement implies that Uber has in-depth knowledge about the background of its drivers and this could create a misleading impression for the consumer about the level of detail of Uber’s background checks.

The Complaints Board ruled the complaint was Upheld.

[No further action required]

Please note this headnote does not form part of the Decision.

COMPLAINTS BOARD DECISION

The Chair directed the Complaints Board to consider the advertisement with reference to Basic Principle 4 and Rule 2 of the Code of Ethics. This required the Complaints Board to consider whether the advertisement contained anything which, either directly or by

implication, was likely to deceive or mislead the consumer and if it had been prepared with a due sense of social responsibility to consumers and to society.

The Complaints Board ruled the complaint was Upheld.

The Complaint

The Complainant said Uber NZ has misrepresented its knowledge of the background of its drivers and the legality of its background checks.

The Complainant said on 21 April 2016 Uber NZ removed the requirement for their drivers to have a passenger endorsement licence from the NZTA to drive as a private hire driver under the Uber platform. This removes the Fit and Proper background check required under NZ law. Uber has replaced this comprehensive check with their own third party Ministry of Justice and driving history check, which does not take into account any overseas history, charges laid or pending against a person and falls short of any New Zealand requirements by a long way.

The Advertiser's Response

The Advertiser said the billboard is factually correct and they do require thorough background checks on all their driver partners. Prior to becoming a driver partner, each person must undergo a criminal conviction history check, conducted by the Ministry of Justice, and have a driving demerit points and suspension history check conducted via the New Zealand Transport Agency. In addition, Uber receives daily updates on when their driver partners P-endorsement or licence has been revoked.

The Advertiser said the reference to Uber getting "Becky's life story before you do" is "a light hearted play on the common scenario of riders hearing the driver's life story during the trip. We do not consider that any reasonable consumer would expect Uber to know the entire life story of each driver."

The Complaints Board Discussion

Having considered all the information provided, the Complaints Board turned to consider whether the advertisement had breached Basic Principle 4 or Rule 2 of the Code of Ethics.

The Complaints Board said the advertisement implies that Uber has in-depth knowledge about the background of its drivers. This is because the two statements in the advertisement, when read together, create this impression, that is, Uber says it does "Background checks on every driver" and "We get Becky's life story before you do."

The Complaints Board said the reference to knowing the "life story" of its driver Becky, implies Uber has extensive knowledge of its drivers generally.

The Complaints Board noted the background checks Uber uses for its prospective drivers are not as comprehensive as those required by the NZTA for taxi drivers. Uber does not require drivers to hold a passenger, or "P" endorsement, which includes a Police check, a fit-and-proper person inspection and regular checks after a driver has been employed.

The Complaints Board said that in the context of a wider public debate about appropriate standards for passenger services, this advertisement could create a misleading impression for the consumer about the level of detail of Uber's background checks.

Therefore, the Complaints Board was unanimous in its view the advertisement was likely to mislead or deceive consumers and had not been prepared with the requisite sense of social responsibility. The Complaints Board ruled the advertisement was in breach of Basic

Principle 4 and Rule 2 of the Code of Ethics.

Accordingly, the Complaints Board ruled the Complaint was Upheld.

Decision: Complaint Upheld

DESCRIPTION OF ADVERTISEMENT

The billboard advertisement for Uber shows a photo of a woman standing in a room full of shelved documents. The text next to her says "Background checks on every driver. We get Becky's life story before you do."

COMPLAINT FROM A MACDONALD

I am submitting a complaint against Uber Technologies New Zealand Technologies Limited regarding their billboard on the corner of Pitt street and Hobson street in Auckland. On April 21st 2016 Uber Nz removed the requirements for their drivers to have a passenger Endorsement license from the NZTA to drive as a private hire driver under the uber platform. This is illegal and removes the Fit and Proper background check that is required under NZ law. Uber have replaced this comprehensive check with their own third party ministry of justice and driving history check which does not meet NZ law or the NZTA requirements and is severely lacking in its history of the driver. The NZTA has sent out over 2,000 letters to would be drivers stating that the background checks are not sufficient and are in fact illegal along with media scrutiny and government clearly stating these background checks are mandatory and by not complying this is an illegal act.

UBER NZ has purposely put this billboard up misrepresenting their knowledge of the background of a driver and is entirely misleading about the legality of the background check and to what extent the background check is carried out. Uber's background check is a simply ministry of justice check and driver history check which can only see convictions in New Zealand and does not take into account any overseas history, charges laid or pending against a person and falls short of any New Zealand requirements by a long way, I have the NZTA letters which I am happy to send you that have been sent to every driver so they understand their obligations and believe this billboard is a blatant tactic to mislead the public as to the extent of its checks. I am available for comment at anytime and believe this billboard and its advertising to be in direct violation of a fair representation of the companies process.

CODE OF ETHICS

Basic Principle 4: All advertisements should be prepared with a due sense of social responsibility to consumers and to society.

Rule 2 Truthful Presentation: Advertisements should not contain any statement or visual presentation or create an overall impression which directly or by implication, omission, ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading).

RESPONSE FROM ADVERTISER: UBER NZ

Thank you for bringing this complaint to our attention. We take our obligations – both in relation to our advertising and to undertaking background checks on Uber driver partners – very seriously.

The billboard in question is factually correct and compliant with the Advertising Standards Codes of Practice, including Basic Principle 4, Rule 2. The safety of our riders and Uber driver partners is of the utmost importance and, as such, we require thorough background checks on all driver partners. Prior to completing the process to become a driver partner with the Uber application, each person must undergo:

- a criminal conviction history check which is conducted via a third party government agency, the Ministry of Justice. For further information about this process please visit this website: <https://www.justice.govt.nz/criminal-records/>; and
- a driving demerit points and suspension history check conducted via the New Zealand Transport Agency. For further information about this process please visit this website: <http://www.nzta.govt.nz/driver-licences/getting-a-licence/confirming-your-licencedetails/demerit-points-and-suspension-history/>

In addition, each business day (in Wellington) Uber receives an update on driver partners when their p-endorsement or license has been revoked, or the status of their p-endorsement or license has lowered. Following this update, Uber removes the partner's access to the Uber app in circumstances where the partner no longer meets Uber's requirements.

It is factually correct and substantiated that Uber does carry out "background checks on every driver". The reference to Uber getting "Becky's life story before you do" is a light hearted play on the common scenario of riders hearing the driver's life story during the trip. We do not consider that any reasonable consumer would expect Uber to know the entire life story of each driver. In our view, there is no risk of the billboard being misleading or breaching Rule 2.