

COMPLAINT NUMBER	17/303
COMPLAINANT	C. Webb
ADVERTISER	New Zealand National Party
ADVERTISEMENT	National Party, Twitter
DATE OF MEETING	7 September 2017
OUTCOME	Not Upheld

SUMMARY

The National Party posted a video on Twitter about their support of farmers and regional New Zealand. The post said “WATCH: Labour has plans for regional New Zealand and they are not good ones. #LetsTaxThis.” The video showed farm scenes and on-screen text said: “Let’s work with farmers. Not against them.” The video is interrupted with a message featuring the New Zealand Labour Party logo and states the following on-screen:

“Labour. Tax Agenda:

- A water tax
- A capital gains tax
- Farming into the ETS
- Land taxes & wealth taxes.”

The advertisement concludes with the on-screen message: “Only National will deliver for regional NZ. Party vote National. Authorised by G Hamilton, 41 Pipitea St, Wellington.”

The Complainant’s view was that the use of the red colour and Labour Party logo was misleading as it implied it was the official position of the Labour Party and gave the impression Labour intends to implement a Capital Gains Tax if elected.

The Advertiser said the advertisement presented the National Party view that Labour will consider implementing a Capital Gains Tax if they are elected to parliament and the use of the Labour Party logo and red colour highlighted the contrast in the parties policies on tax. The Advertiser said the context of the advertisement, the theme music and the National Party logo, made it clear the advertisement was the opinion of the National Party.

The Complaints Board said the advertisement presented the National Party’s opinion on the kinds of tax the Labour Party may introduce if elected which was part of a political discourse allowed under the provisions of Rule 11 of the Code of Ethics. Further, the Complaints Board said the reference to ‘Labour’s Tax Agenda’ in the context of an advertisement on Twitter did not meet the threshold to be likely to mislead voters into thinking the Labour Party was going to introduce a Capital Gains Tax if elected and therefore, was not in breach of Rule 2 of the Code of Ethics.

The majority of the Complaints Board said the brief use of the colour red and Labour Party logo in the advertisement did not reach the threshold to be misleading when the overall context, medium and political nature of the advertisement were considered.

A minority disagreed. It said the use of the Labour Party logo could give the impression it was the official position of the Labour Party, not the opinion of the National Party, and the use of an opposition party logo in political advertising presenting opinion, was likely to cause confusion for consumers.

However, in accordance with the majority, the Complaints Board ruled to Not Uphold the complaint.

[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 Rules 2 and 11 of the Code of Ethics. This required the Complaints 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 Complaints Board was also required to consider whether the advertisement had been prepared with a due sense of social responsibility to consumers and society.

The Complaints Board said advertisement before it fell into the category of advocacy advertising and noted the requirements of Rule 11 of the Code of Ethics. The Complaints Board noted Rule 11 allowed for expression of opinion in advocacy advertising, provided that the expression of opinion is robust and clearly distinguishable from fact. Also applicable were the Advocacy Principles, developed by the Complaints Board in previous Decisions for the application of Rule 11. These said:

1. That Section 14 of the Bill of Rights Act 1990, in granting the right of freedom of expression, allows advertisers to impart information and opinions but that in exercising that right what was factual information and what was opinion, should be clearly distinguishable.
2. That the right of freedom of expression as stated in Section 14 is not absolute as there could be an infringement of other people's rights. Care should be taken to ensure that this does not occur.
3. That the Codes fetter the right granted by Section 14 to ensure there is fair play between all parties on controversial issues. Therefore in advocacy advertising and particularly on political matters the spirit of the Code is more important than technical breaches. People have the right to express their views and this right should not be unduly or unreasonably restricted by Rules.
4. That robust debate in a democratic society is to be encouraged by the media and advertisers and that the Codes should be interpreted liberally to ensure fair play by the contestants.

5. That it is essential in all advocacy advertisements that the identity of the advertiser is clear.

The Complaints Board ruled the complaint was Not Upheld

The Complaint

The Complainant was concerned the claim in the advertisement that Labour's tax agenda includes a Capital Gains Tax was misleading in two ways. The Complainant said Labour's position on the Capital Gains Tax issue was clearly publicised with the Labour leader, Jacinda Arden, explaining she would set up a tax working group rather than committing to implementing specific taxes. Therefore, the Complainant said the claim was likely to mislead voters. Further, the Complainant said the use of the red colour and Labour Party logo was misleading as it implied it was the official position of the Labour Party.

The response from the Advertiser, New Zealand National Party

The Advertiser said the advertisement presented the National Party view that Labour will consider implementing a Capital Gains Tax if they are elected to parliament. The Advertiser said it did not state or imply the Labour Party would implement a Capital Gains Tax, but simply stated it was on the Agenda. The Advertiser said the main message of the advertisement was that National will not implement such taxes.

The Advertiser provided media reports to support their view that Labour might implement a Capital Gains Tax, quoting from MP for Te Atatu, Phil Twyford, Deputy Leader of the Labour Party, Grant Robertson and Leader of the Labour Party, Jacinda Ardern. The Advertiser said, in part: "while it is opinion that Labour will introduce a CGT, it is a fact that National will not, this is a concrete position. The advertisement highlights this contrast between the two positions, and it does not do it in a misleading or deceptive way."

In addressing the rationale for using the Labour Party logo in the advertisement, the Advertiser said it highlights "the approach of the opposition, to which this advert is designed to paint a contrast." The Advertiser refuted the allegation that the use of the Labour Party logo and red colour were likely to mislead voters into thinking it was directly from the Labour Party. The Advertiser said the advertisement was clearly a National Party advertisement, including the National Party logo and authorisation and stating, in part: "there is far more to suggest this is a National Party production than a Labour Party production, hence the requisite clarity."

Complaint Board Discussion

The Complaints Board said the advertisement was an advocacy advertisement and had met the identification requirement of advocacy advertising under Rule 11 of the Code of Ethics. It said the advertisement was posted by the National Party on Twitter and promoted National's view on 'Labour's plans for regional New Zealand'. It said the advertisement encouraged people to give their party vote to National, predominately showing their logo and an authorisation statement at the end of the advertisement.

Having established the advertisement was from a political party, the Complaints Board noted that political advertisements were not only acceptable, but encouraged as they were an essential and desirable part of the functioning of a democratic society. The Complaints Board also observed that in a free and democratic society, differences of political opinion should be openly debated without undue hindrance or interference from authorities such as the Complaints Board, and in no way should political parties, politicians, lobby groups or advocates be unnecessarily fettered by a technical or unduly strict interpretation of the rules and regulations. Therefore, the Complaints Board considered the rest of the complaint in conjunction with this liberal interpretation under the application of the Advocacy Principles.

“Labour. Tax Agenda”

The Complaints Board considered whether the reference to Labour’s tax agenda in the advertisement, which included a reference to Capital Gains Tax, was likely to mislead voters.

The Complaints Board agreed with the Advertiser that the advertisement did not state Labour *would* introduce a Capital Gains Tax if elected, but that it was ‘on Labour’s Agenda’. The Complaints Board said most people would interpret the reference to ‘Labour’s Tax Agenda’ and the list of taxes to mean they were taxes that were being discussed by Labour, not that they would become law if Labour was in Government. The Complaints Board also took into account the wider context of the claim in relation to Labour’s well publicised position on evaluating potential taxes through a working group and noted that position had been subject to wide public debate.

The Complaints Board said the advertisement presented the National Party’s opinion on the kinds of tax the Labour Party may introduce if elected and was part of the political discourse allowed under the provisions of Rule 11 of the Code of Ethics. Further, the Complaints Board said the reference to ‘Labour’s Tax Agenda’ in the context of a National Party advertisement was unlikely to mislead voters into thinking the Labour Party was going to introduce a Capital Gains Tax if elected and was not in breach of Rule 2 of the Code of Ethics.

Labour Party logo

The Complaints Board noted the advertisement used the Labour Party logo and the colour red when referring to ‘Labour’s Tax Agenda’ which the Complainant said gave the misleading impression it was the official position of the Labour Party.

The majority of the Complaints Board said the brief use of the colour red and logo in the advertisement did not reach the threshold to be misleading when the overall context, medium and political nature of the advertisement were considered.

The majority said the context and medium in which the advertisement appeared were crucial in its determination in this instance. It noted the advertisement had been posted on the official New Zealand National Party Twitter account and took into account social media platforms, such as Twitter, allowed for direct interactions between Advertisers and consumers, sometimes acting as a forum for public debate. It said the Labour Party logo appeared for only a brief time in the advertisement and the theme music, predominate use of the National Party colour, logo and call to action to ‘Party Vote National’ took prevalence over the Labour Party reference. The majority also took into account Labour’s well publicised position on setting up a tax working group which had been subject to wide political debate and which most people would be aware of.

The majority said when considered in its entirety, it was unlikely people would think the use of the Labour Party logo in the advertisement would give the impression it was Labour’s official position on tax. It said the overall context of the advertisement saved it from being likely to mislead or deceive consumers and it had been prepared with a due standard of social responsibility to consumers and society. The majority ruled the advertisement was not in breach of Basic Principle 4 or Rule 2 or 11 of the Code of Ethics.

A minority disagreed. It said the use of the Labour Party logo could give the impression it was the official position of the Labour Party, not the opinion of the National Party. The minority cautioned that it was imperative in political advertising that opinion was presented as such and the use of an opposition political party logo could create a misleading impression. The minority said the use of the Labour logo implied the information cited under the logo had been taken directly from Labour Party policy which was likely to mislead consumers in breach of Rules 2 and 11 of the Code of Ethics. The minority said this part of the advertisement had not been

prepared with a due sense of social responsibility and was also in breach of Basic Principle 4 of the Code of Ethics.

Summary

The Complaints Board said the advertisement presented the National Party's opinion on the kinds of tax the Labour Party may introduce if elected which was part of a political discourse allowed under the provisions of Rule 11 of the Code of Ethics. Further, the Complaints Board said the reference to 'Labour's Tax Agenda' in the context of an advertisement on Twitter did not meet the threshold to be likely to mislead voters into thinking the Labour Party was going to introduce a Capital Gains Tax if elected and therefore, was not in breach of Rule 2 of the Code of Ethics.

The majority of the Complaints Board said the brief use of the colour red and Labour Party logo in the advertisement did not reach the threshold to be misleading when the overall context, medium and political nature of the advertisement were considered.

A minority disagreed. It said the use of the Labour Party logo could give the impression it was the official position of the Labour Party being cited, not the opinion of the National Party about Labour's position, and the use of an opposition party logo in political advertising presenting opinion, was likely to cause confusion for consumers.

However, in accordance with the majority, the Complaints Board ruled to Not Uphold the complaint.

DESCRIPTION OF ADVERTISEMENT

The National Party posted a video on Twitter about their support of Farmers and regional New Zealand. The post said "WATCH: Labour has plans for regional New Zealand and they are not good ones." The video showed farm scenes and on-screen text said: "Let's work with Farmers. Not against them." The video is interrupted with a fake Labour Party message featuring the Labour Party logo and states the following on-screen:

- "Labour. Tax Agenda:
- A water tax
 - A capital gains tax
 - Farming into the ETS
 - Land taxes & wealth taxes."

The advertisement concludes with the on-screen message: "Only National will deliver for regional NZ. Party vote National. Authorised by G Hamilton, 41 Pipitea St, Wellington."

COMPLAINT FROM CAROL WEBB, WHANGANUI

I consider the NZ National Party advertisement that came to my attention on Twitter at approximately 7pm on Saturday September 2 – specifically the claim that what is described as the Labour Party 'tax agenda' includes "A capital gains tax" – is untrue and therefore is in breach of the ASA's Basic Principle No. 3 namely:

No advertisement should be misleading or deceptive or likely to mislead or deceive the consumer.

The ad can be viewed at this link (NB the screen with the offending and misleading claim appears at 10seconds approx:

<https://twitter.com/NZNationalParty/status/903858620349145088>

Labour's position on the capital gains tax issue has been well canvassed, particularly in the days immediately preceding the appearance of this campaign advertisement.

In this clip Labour leader Jacinda Ardern makes clear that the issue of whether or not to introduce a capital gains tax, should she lead the next government, will depend on the recommendations of a tax working group that would consider taxation issues ie no decision has been made at this time. You can see her state her position at this link:

<http://bit.ly/2wvY2xo>

She had not resiled from that position at the time the ad appeared on the National Party's twitter account on the evening of Saturday Sept 2. Therefore the ad is clearly intended to mislead AND deceive the consumer (in this case the NZ public and especially voters). I also consider the use of the Labour Party red colour and registered logo at the top of the panel to be misleading and intended to deceive, implying it is an official Labour Party production.

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).

Rule 11 Advocacy Advertising - Expression of opinion in advocacy advertising is an essential and desirable part of the functioning of a democratic society. Therefore such opinions may be robust. However, opinion should be clearly distinguishable from factual information. The identity of an advertiser in matters of public interest or political issue should be clear.

Advocacy Principles

1. That Section 14 of the Bill of Rights Act 1990, in granting the right of freedom of expression, allows advertisers to impart information and opinions but that in exercising that right what was factual information and what was opinion, should be clearly distinguishable.
2. That the right of freedom of expression as stated in Section 14 is not absolute as there could be an infringement of other people's rights. Care should be taken to ensure that this does not occur.
4. That the Codes fetter the right granted by Section 14 to ensure there is fair play between all parties on controversial issues. Therefore in advocacy advertising and particularly on political matters the spirit of the Code is more important than technical breaches. People have the right to express their views and this right should not be unduly or unreasonably restricted by Rules.
4. That robust debate in a democratic society is to be encouraged by the media and advertisers and that the Codes should be interpreted liberally to ensure fair play by the contestants.

5. That it is essential in all advocacy advertisements that the identity of the advertiser is clear.

RESPONSE FROM ADVERTISER, NEW ZEALAND NATIONAL PARTY

We refer to the similar complaints to ASA regarding National Adverts in 2005 and 2013, which you attached in your earlier correspondence. On both of these occasions the complaint was not upheld. We refer the complaints board to the Code of Ethics provisions used in the prior complaints, as they also apply here. In particular, Rule 11 should be applied as follows.

Misleading Content

Code of Ethics Rule 11 – Fact and Opinion Must be Clearly Distinguishable

The complaint gives the impression that the advert has misled the public into believing National's opinion on Labour's tax agenda has been conveyed as fact.

It is our position that the representation in the advertisement was that Labour will consider implementing a Capital Gains Tax (CGT), hence having it on the "agenda", not that it has confirmed that it definitely will implement one. Regardless this was not the point of the advertisement, the point was that National will not implement such a tax.

Due to Phil Twyford, Grant Robertson and Jacinda Ardern's comments (examples provided below) confirming that a CGT is not off the table, Labour's policy compared with National's is opinion mixed with fact. While it is opinion that Labour will introduce a CGT, it is a fact that National will not, this is a concrete position. The advertisement highlights this contrast between the two positions, and it does not do it in a misleading or deceptive way.

It is stated in the advocacy principles that these "Codes should be interpreted liberally". Because the opinion in the advert is edging towards fact, there is all the more reason to interpret the Code liberally.

Misleading Use of Logo

Code of Ethics Rule 11 – The Identity of an Advertiser in Matters of Public Interest or Political Issue Should be Clear

The requisite clarity that this is a National Party production comes from the theme music, the last screen and authorisation.

The last thing the viewer sees is the National Party logo and authorisation. There is far more to suggest this is a National Party production than a Labour party production, hence the requisite clarity.

The use of the Labour Party logo achieves the purpose of highlighting the approach of the opposition, to which this advert is designed to paint a contrast. The Labour logo does not provide umbrella cover to the whole production, the National Party logo does this by being at the end (along with an ask for your Party vote). By being in the middle, the impression is that the Labour logo is being used as an example of policy approach contrast in a predominantly National production.

National does not believe we have breached either of these aspects of the Code.

Senior Labour politicians on CGT

In addition to public comments from Mr Twyford saying a CGT is "on the table", and Mr Robertson says "it won't include the family home" in a media clip where he talks about exemptions of a CGT, he also says "this is the direction of travel". These statements align with Ms Ardern's statements and strongly indicate that a CGT is not off the table hence is on the "agenda".

Phil Twyford on taxes at meet the politicians evening

Weir House Hall of Residence at Victoria University

Thursday 10 August

"We've also promised that we will convene a tax working group in our first term of government because we want to redesign a fairer and more efficient tax system that will tilt the tax system away from speculation and towards the productive economy that generates jobs and exports.

Now you mentioned that we took a capital gains tax into the last two elections. We concluded from our experience that it's a tough ask to sell a comprehensive capital gains tax from opposition. It's much easier when you have an army of public servants when you're in government and you have a much bigger megaphone to do that.

So with our tax working group and our position on tax in the first three years – capital gains tax will be on the table, a land value tax will be on the table, asset and wealth taxes, so we can look at the problems within our tax system in the whole and design a fairer and more efficient tax system."

RNZ: Jacinda Ardern won't rule out capital gains tax

9:45 am on 22 August 2017

<http://www.radionz.co.nz/news/political/337723/video-jacinda-ardern-won-t-rule-out-capital-gains-tax>

Ms Ardern told *Morning Report* she would get an advisory group to look at the possibility of a widespread capital gains tax (CGT).

"I am happy to rule out the family home because that is part of what Labour's values on this have always been, we've consistently said that we do not believe that any future possible CGT would apply to the family home.

"Beyond that, I am leaving it to a group of experts to work through what we need to do more broadly when it comes to our taxation in New Zealand."

Ms Ardern said it was important to assess whether or not a five-year capital gains tax was appropriate, or if something even wider was needed.

Newsroom: Election 2017 Live: Ardern again under gun over CGT

01 SEP 2017

<https://www.newsroom.co.nz/2017/09/01/45581/election-2017-live-dissecting-the-debate-picking-through-the-poll>

She told reporters she had spoken to her deputy Kelvin Davis and set him straight on Labour's intention to introduce a possible capital gains tax without taking it to the electorate in 2020.

Davis had been confused on *The AM Show* this morning, citing the former Labour leader Andrew Little's position on any new tax, which was to campaign on the change before bringing it in.

"I've been absolutely clear and have absolutely maintained my right as leader to make sure when that tax working group reports back that I am able to act in government in the best interests of New Zealand to try to address the housing crisis," Ardern said.

"I've spoken with Kelvin, I didn't see the piece so I'm not entirely sure what was said but I'm very clear on our position. He's certainly now very clear on our position."

Davis absolutely supported her stance.

Asked why she would not take the issue to another election for a mandate, Ardern cited National's example when it came to power in 2008 and commissioned a tax review, ultimately leading to an increase in GST. "He [Bill English] saw fit to act on that as he saw fit in the best interests of New Zealand. The difference is that he wasn't quite as open about intent before the election."

"I don't want to be in a position where that working group comes back and there's some ideas in there that could make a difference for that next generation to get into housing and to deal with some of the inequity in our tax system and to have to sit on that for another couple of years just doesn't feel right to me.

"My view is though that certainly voters still get a way to feed back to us whether they think we are right or not. There will be another election probably 18 months within us acting on that review and if they don't agree with what we've done, I'm sure they will tell us that."

She denied it was a way of introducing a capital gains tax without having to say she was going to do so. "No, because I've been really clear with people. I expect to get scrutiny over that but I would rather be transparent around our direction of travel than say nothing at all."

It was a government's prerogative to act on the information a tax working group would give it. "But of course I'm setting out a few values, a few expectations going in; my expectation that it would never be on the family home and our major driver for this that it be around affordability issues, particularly in Auckland."

Labour leader Ardern maintains 'right and ability' to introduce Capital Gains Tax if working group suggests it next term; Would exempt 'family home'

<http://www.interest.co.nz/property/89327/labour-leader-ardern-maintains-right-and-ability-introduce-capital-gains-tax-if>

Posted in [Property](#) August 15, 2017 - 01:06pm

Labour Party leader Jacinda Ardern is not ruling out introducing a capital gains tax (CGT) on rental/investment properties or second homes next term, saying Labour will listen to what their planned tax working group says on the issue sometime before 2020. Labour will not take a CGT to the electorate this time around though, she said.

RESPONSE FROM MEDIA, TWITTER