

<b>COMPLAINT NUMBER</b>	18/216
<b>APPEAL NUMBER</b>	18/013
<b>APPLICANT</b>	N Smale
<b>ADVERTISER</b>	The Trusts
<b>ADVERTISEMENT</b>	The Trusts, Digital Marketing, Brochure
<b>DATE</b>	5 November 2018
<b>OUTCOME</b>	Appeal Allowed Complaint Settled

## SUMMARY

The Complaints Board ruled on 11 September 2018 the complaint made by N Smale about the website, print and brochure advertisements for The Trusts was Not Upheld.

The Complainant appealed the Decision to the Chairperson of the Appeal Board, challenging the interpretation of the advertisements and the evidence considered by the Complaints Board.

The Complainant said the likely consumer takeout of the advertisements would be that the incidence of alcohol-related crashes was lower and therefore better in West Auckland. The Complainant said this would be interpreted as fact by the average consumer rather than opinion. The Complainant said this is misleading as the comparison between West Auckland and the other urban areas is not meaningful due to the population disparities of the various regions.

The Advertiser said it did not consider that the statements made in the advertisements were misleading. The Advertiser said the advertisements were no longer in circulation. The statements were based on published reports namely: Auckland Regional Public Health's *Service Need Assessment Community Action on Alcohol Policy* and the Auckland Council's *Local Alcohol Policy Research Report* and referred to New Zealand Transport Agency data.

The Appeal Board discussed its interpretation of the likely consumer takeout and the intent of the Advertiser. It agreed the purpose of the advertisements was to promote The Trusts and encourage the public to continue to support the current system operating in West Auckland.

The Appeal Board noted the Advertiser's view that the statistics were legitimate and obtained from published reports.

The Appeal Board took the view that 'incidence' means the 'rate' or 'frequency' of an event occurring and that the 'lowest number' and 'lowest incidence' have different meanings. The Appeal Board said the use of data that was not adjusted according to the populations of the

areas of Auckland being compared, did not support the benefit claimed by The Trusts, and therefore was likely to mislead consumers.

The Appeal Board agreed the advertisements were advocacy advertisements and considered whether the application of Rule 11 of the Code of Ethics and the Advocacy Principles saved the advertisements from being in breach of Rule 2 of the Code of Ethics.

The Appeal Board unanimously agreed the statements in the advertisements were not saved by Rule 11.

The Board noted that during the complaints process, the Advertiser had taken self-regulatory action by removing the statements from its website and given an assurance not repeat them in print media in the current form. The Appeal Board therefore ruled the Appeal was Allowed and the Complaint was Settled.

**Decision: Appeal Allowed, Complaint Settled**

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

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**APPEAL BOARD DECISION**

The Complaints Board ruled on 11 September 2018 the complaint made by N Smale about the website, print and brochure advertisement for The Trusts was Not Upheld.

The Complainant appealed the Decision, challenging the interpretation of the evidence considered by the Complaints Board.

The Chairperson ruled the appeal was Accepted under Ground (iii), evidence provided to the Complaints Board has been misinterpreted to the extent that it has affected the decision. The complaint was to be placed before the Appeal Board for determination.

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 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 Complaints Board to consider whether the advertisement was likely to mislead or deceive consumers by exaggerated claim, omission or ambiguity and whether the advertisement had been prepared with a due sense of social responsibility to consumers and society.

The Appeal Board also considered the application of Rule 11 in relation to advocacy advertisements.

**The Appeal Board ruled the Appeal was Allowed and the Complaint was Settled.**

**The Complaint**

The Complainant's initial complaint said it was misleading for the Advertiser to claim the lowest incidence of alcohol related crashes in urban Auckland as the use of absolute numbers is not a reasonable basis for comparison between geographic areas of different sizes and populations.

In the Appeal application, the Complainant said the likely consumer takeout of the advertisements would be that the incidence of alcohol related crashes is lower and therefore better in West Auckland. The Complainant said this would be interpreted as fact by the average consumer rather than opinion and is misleading as the comparison between West Auckland and the other urban areas is not meaningful due to the population disparities of the various regions.

### **The Advertiser's Response to the Appeal**

The Advertiser maintained the statements in question do not qualify as 'advertisements' as they are not intended to influence the viewer and referred to *Electoral Commission v Cameron* [1997] 2 NZLR 421 [*Cameron*] regarding the scope of the jurisdiction of the ASA.

The Advertiser said it did not consider that the statements made in the advertisements were misleading. The Advertiser said the advertisements were no longer in circulation. The statements were based on published reports namely: Auckland Regional Public Health's *Service Need Assessment Community Action on Alcohol Policy* and the Auckland Council's *Local Alcohol Policy Research Report* and referred to New Zealand Transport Agency data.

The Advertiser provided an affidavit from Simon Wickham, Chief Executive for the West Auckland Trust Services Limited (WATS). The affidavit said the publications had used a legitimate statistic and statement from a trusted source and maintained the repetition of the statements from the ARPH report were of benefit to the community.

### **Preliminary Matters**

#### *Jurisdiction*

The Appeal Board noted that the Appeal response from the Advertiser raised the application of *Cameron* and the definition of an advertisement.

The Appeal Board said *Cameron*, which dealt with matters relating to the ASA's jurisdiction, referred to a definition of 'advertisement' which was amended following the publication of the Decision in 1997 and has been further amended to the current definition of an advertisement which states:

"Advertising and advertisement(s) are any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed."

Under the current definition of 'advertising', the Appeal Board said the website, mailer and pamphlet publications and the messages conveyed fell within this definition and there was no issue regarding jurisdiction to consider whether there had been a Code breach.

#### *Grounds for Appeal*

As a point of clarification, the Appeal Board noted that while the Appeal Ruling had referred to the Grounds for Appeal under (i) to (v), the correct numbering in the current ASA Rules is (a) to (e) of Rule 6.4 of the Second Schedule.

### **The Appeal Board Discussion**

The Appeal Board carefully considered all the information provided by the Complainant and the Advertiser and reviewed the advertisements.

*Consumer Takeout*

The Appeal Board noted the Complaints Board considered the likely consumer takeout of the advertisement was that the Advertiser, as a community-based licencing trust, was attributing the “lowest incidence of alcohol related crashes in Auckland Council urban zone areas” to the existence of The Trusts.

The Appeal Board noted the Complainant considered the likely consumer takeout is that the incidence of alcohol related crashes is lower and therefore better and that this benefit is attributable to The Trusts.

The Advertiser said it had quoted a legitimate statistic from a credible source and that it was not intended to influence the viewer to one view or another, nor direct the viewer to its business.

The Appeal Board discussed its interpretation of the likely consumer takeout and the intent of the Advertiser. It agreed the purpose of the advertisements was to promote The Trusts and why the public should continue to support the current system operating in West Auckland.

The Appeal Board said by using statements such as “It’s Working” in the print advertisement and “Is it working? It sure is!” on the website advertisement, the Advertiser is attributing a benefit. In the Appeal Board’s view, the statements convey that having The Trusts in this area contributed to the “lowest incidence of alcohol-related crashes” in Auckland Council urban zone areas.

*Are the statements misleading?*

The Appeal Board noted the focus of the Complaints Board’s decision was the interpretation of the term ‘incidence’. The liberal application of the Code provided for under advocacy advertising allowed The Trusts to claim West Auckland had the lowest absolute number of alcohol related crashes. This was supported by data in third party reports.

In paragraph 20 of the Affidavit of Simon Wickham, which was provided to the Appeal Board, Mr Wickham states in part:

“I refute that it was ever our intention to mislead the public. In my view, the Trusts formed the view that the difference between the urban west and the remainder of urban Auckland was the lower number of alcohol outlets, which resulted in a potential for this lower rate of incidents of alcohol crashes. But that is not what the statement said; it simply repeated what was in the ARPH Report:

*“Is it working? It sure is! According to the Auckland Regional Public Health Service, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas.”*”

In considering whether the statements in the advertisements were likely to be misleading, the Appeal Board considered the following factors:

- The age of the data and whether this was clear in the advertisements
- The availability of more up-to-date data
- The benefit claim made in relation to the data

The Appeal Board took the view that ‘incidence’ means the ‘rate’ or ‘frequency’ of an event occurring and that the ‘lowest number’ and ‘lowest incidence’ have different meanings. The Appeal Board said the use of data that was not adjusted according to the populations of the areas of Auckland being compared, did not support the benefit claimed by The Trusts, and therefore was likely to mislead consumers.

The Appeal Board noted using data that was six years old, where more up-to-date information was available, created risk for advertisers, particularly if the age of the data is not clear in the advertisement and consumers may believe it to be current.

*Are the statements saved by Advocacy?*

The Appeal Board confirmed the advertisement before it fell into the category of advocacy advertising and noted the requirements of Rule 11 of the Code of Ethics. The Appeal 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 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 rights 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 Appeal Board confirmed the identity of the Advertiser was clear. The Board acknowledged the importance of organisations promoting their views to consumers and agreed a liberal interpretation of the Codes was appropriate.

However, the Appeal Board considered the statements made by The Trusts convey a message that they contributed to the "lowest incidence of alcohol-related crashes" in Auckland Council urban zone areas. Reliance on data that was not adjusted by population size for the populations of the areas of Auckland was likely to mislead consumers and the statements were not saved by the Advocacy Principles or Rule 11 of the Code of Ethics.

The Appeal Board ruled there had been a breach of Basic Principle 4 and Rule 2 of the Code of Ethics and the Appeal was Allowed.

The Appeal Board noted that during the complaints process, the Advertiser had taken self-regulatory action by removing the statements from its website and given an assurance not to repeat them in print media in the current form. The Appeal Board acknowledged the statements had been removed and said the complaint was settled.

The Appeal Board therefore ruled the Appeal was Allowed and the Complaint was Settled.

**Decision:** Appeal **Allowed**, Complaint **Settled**

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### **DESCRIPTION OF ADVERTISEMENT**

Three medium types were used to advertise The Trusts message that West Auckland has the lowest incidence of alcohol related crashes in Auckland's urban zones.

The print advertisement in the 'Our West' mailer publication said: "According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas"

The Trusts website advertisement, [www.thetrusts.co.nz](http://www.thetrusts.co.nz), said: "Is it working? It sure is! According to the Auckland Regional Public Health Service, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas."

The Pamphlet advertisement said: "It's working! According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in the Auckland Council urban zone areas."

### **APPEAL APPLICATION FROM N SMALE**

I would like to lodge an appeal on the basis that evidence was misinterpreted to the extent it affected the decision. I will also provide new evidence which I believe affects the assessment of the likely consumer take-out from the advertisement.

In the decision dated 11 September 2018, the Complaints Board assessed the likely consumer takeout of the advertisement:

*The Complaints Board began by discussing the likely consumer take-out of the advertisement and whether the claims were misleading based on the average consumer's interpretation. The Board said the consumer take-out would be that Advertiser, as a community-based licencing trust, was attributing the "lowest incidence of alcohol related crashes in Auckland Council urban zone areas" to the existence of The Trusts.*

The Complaints Board noted that the definition of incidence is:

*the occurrence, rate, or frequency of a disease, crime, or other undesirable thing*

The Complaints Board agreed that the meaning was open to interpretation. Regarding the average consumer's interpretation, the board ruled as follows:

*The majority of the Complaints Board said that to the average consumer, the word 'incidence' would most likely mean the number of crashes over a given time. Using this definition of the word 'incidence' the advertisement was factually correct to state West Auckland had the lowest incidence, based on the substantiation provided by the Advertiser.*

*A minority of the Complaints Board disagreed and said its understanding was that 'incidence' meant rate. Therefore, the evidence provided did not substantiate the claim being made, as the rate would take into account the lower population of West Auckland. The minority said the word 'incidence' was a public policy term and should*

*not have been used by the Advertiser in conjunction with Government reports if the intended use of the word was in relation to a number and not a rate.*

The Complaints Board's decision hinged on their assessment of the most likely interpretation of the term 'incidence'.

In this appeal, I argue that:

- the advertisement infers that West Auckland's crash incidence is not only lower, but also **better** than Auckland's other urban areas
- the **benefit is interpreted as a fact**, and not the opinion of the Advertiser
- the evidence provided by the Advertiser does not substantiate that benefit because it does not enable a **meaningful comparison**
- due to their lack of knowledge/experience, along with the credibility of the advertiser and referenced source (NZTA / ARPHS), the average consumer would not think twice about the exact definition of the term 'incidence' beyond it being a reasonable measure of 'how much / how many'; one that enables a **meaningful comparison**

To avoid any confusion, I believe there are two elements of the likely consumer take-out from the advertisement:

- i. That the incidence of alcohol related crashes is lower, **and therefore better**, in West Auckland than other urban areas of Auckland
- ii. That this benefit is attributable to The Trusts

My complaint (and appeal) relates to the first element (i) above. I do not contest the Advertiser's right to advocate that they influence alcohol related harms in their districts (ii), as that is the nature of advocacy and is clearly the opinion of the Advertiser. However, it is my view that the first element of the likely consumer take-out (i):

- would be interpreted as a fact (and not the opinion of the Advertiser)
- is misleading because the basis of the comparison (between West Auckland and the other urban areas) is neither reasonable nor justifiable and **the comparison is consequently not meaningful**

I substantiate my argument as follows:

1. Would the average consumer infer that there is a **benefit**?

The text of the advertisement reads as follows:

*It's working! According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas*

The text of the advertisement positions the statement about crash incidence immediately after the statement "It's working!". The average consumer will imply from this statement that West Auckland enjoys a benefit relative to the other urban areas; i.e. that West Auckland's alcohol-related crash incidence is not only lower, but **better** than other urban areas.

Put in very simple terms:

- Crashes are bad
- Less crashes is good
- West Auckland has less crashes than other urban areas

- The number of crashes in West Auckland is **better** than other urban areas

Without “It’s working!”, I contend that the average consumer would still infer a benefit (simply because why else would the advertiser make the statement); however, the use and positioning of the phrase “It’s working!” makes it absolutely clear.

The advertisement therefore not only makes an explicit **comparison** between the urban areas (“the **lowest** incidence”) but, because there is an implication of a benefit, it also implies that it is a **meaningful comparison** (i.e. the comparison has enabled the judgement of better / worse).

Importantly, because the comparison is attributed to the NZTA / ARPHS, the implied benefit is not presented as the opinion of the Advertiser, but as a fact: “According to NZTA...”.

## 2. But **isn’t lower always better**?

It could be argued that (in the context of undesirable things such as alcohol related crashes), that lower is always better. However, this is only true when the basis for comparison is reasonable.

Consider the following:

- Are 5 crashes in one day better than 500 crashes in one year?
- Are 10 crashes on one road better than 50 crashes across a suburb?
- Are 200 crashes in 2018 better than 500 crashes in 2011-2015?

It is clear that to make a judgment of better / worse, the basis for comparison must be sufficiently reasonable to enable a **meaningful comparison**.

Therefore, because a benefit is implied, the average consumer will assume that the comparison made (“lowest incidence”) is based on a definition of ‘incidence’ that enables a **meaningful comparison**.

## 3. What information is available to consumers / what cues are there that influence their take-out

New evidence is presented here regarding the knowledge / experience of the average consumer and their level of trust in the Advertiser.

With reference to Rule 2 - Truthful Presentation, this evidence supports the argument that the Advertiser has abused the trust of the consumer and exploited his/her lack of knowledge or experience.

*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).*

### 3.1 What does ‘incidence’ mean to the average consumer?

The meaning of the term ‘incidence’ in the advertisement is highly ambiguous. No information is provided to the consumer to ascertain:

- Whether the observations were made recently (e.g. is the data from 2010 or 2017?)
- Over what period are the observations (e.g. 1 month, 1 year, multiple years)
- The severity of the crashes (e.g. is it all crashes or just serious/fatal crashes?)
- Whether the incidence is calculated as a rate per unit time (e.g. crashes per year or month)
- Whether the incidence is calculated per unit population (e.g. crashes per 100 residents), per vehicle usage (e.g. crashes per vehicle kilometres travelled [VKT]) or any number of other possible analysis approaches

When combinations of the above are considered, there are clearly a large number of possible specific definitions of the term 'incidence of alcohol related crashes'.

It is relevant now to consider how familiar the public is with such data and whether such data is readily available.

- The average consumer is highly unlikely to regularly read crash analysis statistics. It is even less likely that they are familiar with how the statistics are broken down within Auckland.
- The "ARPHS Needs Assessment Report 2012" is not readily publicly available (I was unable to find it published anywhere on the internet)
- The relevant NZTA data is not published publicly, and was only made available to me by making a direct request to the NZTA. NZTA crash data available online (CAS open data) does not enable analysis by Auckland's urban areas.

Therefore, in the absence of specific information in the advertisement or sufficient knowledge / experience of crash statistics data, the average consumer is unlikely to assume any specific meaning of the term 'incidence' other than it being some sort of measure of "how many". Instead, in the context of a comparison being made, the average consumer will simply assume that the definition of incidence used has enabled a **meaningful comparison**. This is reinforced by the attribution of the comparison to the NZTA / ARPHS.

More specifically, in the absence of information, knowledge or cues to the contrary; the average consumer would assume:

- The incidence data is **reasonably recent**
- That the comparison is made between incidence data relating to the **same time-period** (i.e. not comparing 2010 data for West Auckland with 2016 data in other regions)
- That '**incidence**' is defined in such a way that it **enables a meaningful comparison** between the zones

Please note:

- I do not argue that there is a best or most appropriate definition of incidence that should have been or should be used
- I do contend that there are definitions which are more appropriate than others
- An advocacy advertiser need not be limited to analysing / interpreting data in a way that is entirely conventional, but their analysis / interpretation should be **justifiable**. For example, a comparison between 2 months data and 12 months data would not normally be justifiable
- In this case, the data provided by the Advertiser does not substantiate the implied claim that West Auckland's crash incidence is **better** than other urban zones. The evidence provided by the Advertiser does not enable a **meaningful comparison**

3.2 Would the average consumer know how NZTA's urban zone areas are defined?

The critical shortcoming in the data substantiating the claim is the failure to account for the inconsistent scale/size of NZTA's urban zone areas.

In the text of the advertisement, comparison is made between "West Auckland" and the other "Auckland Council urban zone areas".

The average consumer is not aware of the relative size of these zones and this lack of knowledge influences their likely take-out of the advertisement.

NZTA's urban zone areas are not familiar to the general public. They are based on a grouping of local board areas, the grouping of which appears to be specific to the NZTA. In my research, I have found NZTA's urban zones to be referenced only in Road Safety Briefing Notes from the NZTA – the most recent dating from 2011. Google searches do not easily uncover the definitions of these zones. They are not available on the NZTA website. The map showing the definitions of the zones was provided to me by the NZTA following an email request.

Therefore, the average consumer would not know if there are four or fourteen urban zones. The average consumer would certainly not be aware that there are just four urban zones in Auckland (West, South, Central, North) and two rural zones (South, North).

Whilst some consumers will be aware that West Auckland is less populous than South or North or Central Auckland, they would not be aware for example, that the NZTA definition of Urban South includes East Auckland. The average consumer would have no idea if West Auckland was being compared to the entirety of South Auckland, or smaller areas such as Papakura or Manukau.

Therefore, in the absence of specific information in the advertisement or any knowledge / experience of NZTA's urban zones (or cues to the contrary), the average consumer would not think twice about the definition of the zones, but instead simply assume that the definition of 'incidence' for each zone has enabled a **meaningful comparison** between the zones, however they be defined.

### 3.3 Comparison limited to "lowest" / scale of differences omitted

The text of the advertisement states that "West Auckland has the lowest incidence of alcohol related crashes". No specific information or cues are provided which indicate the size of the difference.

Should the data have been provided (or if the consumer was familiar with the data) the substantial differences between zones would have given the consumer an important cue regarding the comparison being made.

Data is provided here to illustrate the scale of the differences between zones:

Data from Figure 17 (page 29) of the report "ARPHS Needs Assessment Report 2012" (approximate 2010 figures taken from the graph):

- Urban Central 400 crashes
- Urban South 400 crashes
- Urban North 190 crashes
- Urban West 140 crashes

More recent NZTA data (total number of alcohol related crashes 2012-2017) [rounded to the nearest 10]:

- Urban Central 1,670
- Urban South 1,690
- Urban North 740
- Urban West 650

By only stating the difference as “lowest”, in combination with the lack of knowledge / familiarity of the consumer and poor public availability of the data, the Advertiser has exploited the consumer’s lack of knowledge/experience and has misled the average consumer to believe that West Auckland’s incidence of alcohol related crashes is better than other urban zones, when by any reasonable analysis it is not.

#### 3.4 The credibility of the Advertiser and NZTA / Auckland Regional Public Health Service

The advertiser is a community owned organisation with a stated purpose of serving its community (“Giving Back”) and governed by a democratically elected board of members. Last financial year, it distributed \$1M of funds to community groups through its Million Dollar Mission. These distributions are widely publicised in West Auckland.

The Advertiser therefore enjoys a level of goodwill and trust from the target audience (West Auckland residents) more so than most commercial or other advocacy advertisers. This makes the average consumer less cynical about information they communicate relative to other advocacy advertisers (for example political parties, environmental organisations, social campaigners etc).

The advertisement also attributes the comparison (not just the data) to a public agency: “According to the Auckland Regional Public Health Service” or “According to NZTA” depending on the medium. This lends further credibility to the comparison being made.

The average consumer of this advertisement is therefore more likely to assume the comparison is being made on a sound basis; one which has enabled a reasonably **meaningful comparison**.

NB - To avoid any confusion, I am not arguing that the Advertiser be held to a higher standard than other advocacy advertisers. However, I am arguing that the average consumer will consider the Advertiser relatively trustworthy and that level of trust would influence their take-out from the advertisement.

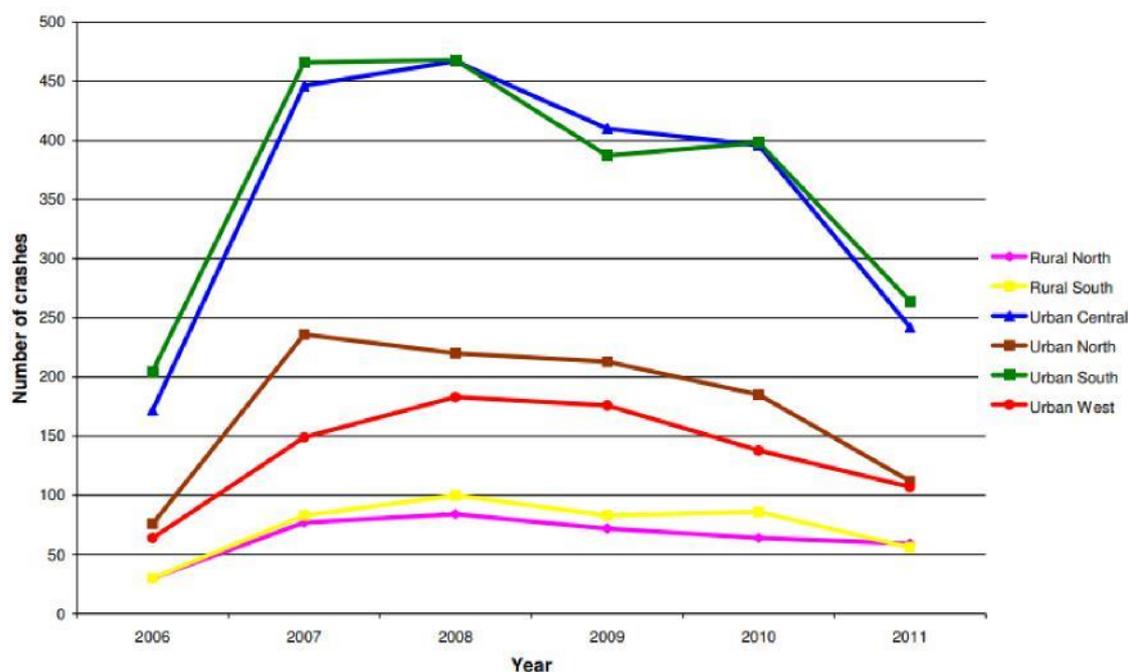
#### 4. Is the claim in the advertisement substantiated by a **meaningful comparison**?

The advertiser has substantiated their claim with Figure 17 (page 29) of the report “ARPHS Needs Assessment Report 2012”.

The figure is reproduced here:

**a) Alcohol and drug-related crashes in Auckland Council zones (2006-2011)**

Figure 17. Alcohol and drug related crashes in the Auckland region, 2006-2011.



From the figure above, it is clear that the comparison being made is based on the number of crashes in each year (i.e. crashes per year). No account has been taken for the relative size of the NZTA urban zone areas.

The opinion of Paul Graham (NZTA Principal Scientist) is relevant here. From his submission:

*“... a smaller number of alcohol-related crashes occur in West Auckland than elsewhere each year, but that West Auckland has the highest percentage of crashes which are alcohol-related.  
 The data do not justify the claim.”*

The comparison of the crash numbers presented in Figure 17 is not reasonable, or in any way justifiable, in the context of making a judgment of which zone has better / worse crash incidence. This evidence does not enable a **meaningful comparison** and therefore does not substantiate the claim.

**Summary**

The Complaints Board’s decision (September 11) hinged on their assessment of the most likely consumer interpretation of the term ‘incidence’.

I argue (and present new evidence to support) that the average consumer would not think twice about the exact meaning of the term ‘incidence’ and their take-out would simply be that West Auckland’s incidence is **better** than other zones. In short form, my arguments are:

- That the advertisement implies that West Auckland’s crash incidence is **not only lower, but also better** than Auckland’s other urban areas

- That a **lower number** of something undesirable **is not always better** (where the comparison made is not meaningful)
- That because there is an implied benefit, the average consumer will assume a **meaningful comparison** has been conducted
- That the **benefit** is presented as a fact (“According to NZTA/ARPHS...”) and the average consumer would not interpret it to be an opinion of the Advertiser
- That there are a **large number of specific definitions of incidence** that could have been used
- That the average consumer **is not familiar with crash statistic data analysis** and does not have ready access to such data
  - Therefore the average consumer would not think twice about which specific definition of incidence has been used.
- That the average consumer **is not familiar with NZTA urban zone areas** and does not have ready access to lists or definitions of these zones
  - Therefore it is unlikely the average consumer would consider the relative scale/size of the zones when interpreting the advertisement
- That the average consumer holds a **level of goodwill and trust toward the Advertiser**, which is reinforced by the attribution of the claim to a trustworthy public agency (ARPHS / NZTA).
  - Therefore, the average consumer is more likely to trust that the Advertiser’s claim is based on a **meaningful comparison**
- That as a result of their lack of knowledge /experience, combined with the credibility of The Trusts / NZTA / ARPHS, the average consumer would not think twice about the exact definitions of the statistics underpinning the claim, but instead assume that a **meaningful comparison** has been conducted.
- That the data used to substantiate the claim that “West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas” **does not enable a meaningful comparison between zones**
  - Therefore, the Advertiser has misled the average consumer, by inferring that alcohol related crash incidence in West Auckland is better than Auckland’s other urban areas through an abuse of trust and exploitation of their lack of experience / knowledge.

## APPEAL RESPONSE FROM ADVERTISER, THE TRUSTS

### May it please the Authority Appeals Board

#### The Complaint

1. N Smale, a member of an entity named West Auckland Trusts Action Group (**WALTAG**) lodged a complaint with the Advertising Standards Authority (**ASA**) against the following statement:

*“Is it working? It sure is! According to the Auckland Regional Public Health Service, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas.”*

2. The statement appeared on the Trusts website, in a printed publication called Our West and in a pamphlet. The pamphlet also specified that the “NZTA” data also supported the above statement.

3. As noted in Counsel's letter of 20 August 2018 on behalf of the Trusts, the statement complained of was taken from a report by the Auckland Regional Public Health, dated February 2012. Counsel cited the page reference relating to the statement.
4. The allegation from N Smale was (and continues to be) that:
  - a. By making these statements the Trusts misled the public;
  - b. That the statements were in breach of the Advertising Code of Ethics, in particular:

Basic Principle 3: No advertisement should be misleading or deceptive or likely to mislead or deceive the consumer;

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).

5. In respect of the complaint, the Complaints Board determined the relevant codes to be the following parts of the Advertising 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.

6. Following the exchange with the Trusts the Complaints Board sought input into the information from the NZ Transport Agency (NZTA). Mr Paul Graham, Principal Scientist, NZTA, dated 30 August 2018 states that "in 2017 there were fewer alcohol-related crashes in West Auckland than in other urban zones".
7. Despite this, the Trusts determined that until new information was received, the statements complained of would be removed from digital and print media. That occurred on 30 August 2018. It is to be noted that the NZTA, NZ Police, the District Licensing Inspector, the Medical officer of Health, (who is part of the Auckland Regional Public Health), and the wider public had not queried the statement and reports which the Trusts had relied on to formulate the view that was put on its website

and print media: West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas. It is unusual for such a matter to go unchallenged by these agencies, if alternative data exists to disprove the basis of the statement.

8. On 11 September 2018 the Advertising Standards Authority Complaints Board (**the Complaints Board**) made a decision not to uphold a complaint lodged by N Smale against the Waitakere and Portage Licensing Trusts (**the Trusts**)
9. The Complaints Board's determination was that the statement was advertising but that it was not misleading and that it was not in breach of Basic Principle 4, Rule 2 or Rule 11 of the Advertising Code of Ethics. It is noted that the decision of the Complaints Board was not unanimous, the majority and minority differed in their views. The minority's view was that the claim was not supported by evidence and therefore the statement is misleading.
10. Through Counsel, the Trusts had responded to the Complaints Board on three occasions setting out its responses. Those letters are with the ASA Secretariat and will not be reproduced.<sup>1</sup> The Trusts continue to rely on those submissions. These submissions are in addition to those letters.

### The Appeal

11. The appeal was lodged by Mr Smale and served through the ASA Secretariat on October 2018.
12. The ASA Appeal Board (**the Appeal Board**) decision allowing the appeal is dated 28 September 2018 (Appeal Board decision). The reason for the decision allowing the appeal is that the Chairperson of the Appeal Board determined that under the Rules of the Advertising Standards Authority Incorporated, Second Schedule, Rules of the ASA – July 2016 (**ASA Rules**), which sets the jurisdiction of the Appeal Board, the appeal could be allowed.
13. Clause 6.4 provides the Appeal Board with a discretion whether to grant the appeal. Clause 6.4 specifies five grounds on which an appeal may be permitted.
14. The ground on which the appeal has been permitted in this instance is 6.4(c)<sup>2</sup>

“Evidence provided to the Complaints Board has been misinterpreted to the extent that it has affected the decision.”
15. The basis for the acceptance of the appeal as provided by the Chairperson is provided on page 2 of the Appeal Board decision permitted the appeal as follows:

*“After reviewing all the relevant correspondence, the Chairperson held that on balance the appeal application had met the threshold to establish grounds for appeal under ground (iv), that the abstracts provided by the advertiser were insufficient to substantiate the claims made and Ground (v), it was in the interests of natural justice that the matter be reheard.”*
16. It is noted that the grounds which the above paragraph refers to are not numbered (iv) and (v) but are numbered 6.4(a) to (e) in the ASA Rules.<sup>3</sup> For completeness the full list of grounds is set out as follows

## Appeal of an ASCB Decision

- 6.4. The appeal application may be accepted on any of the following grounds:
- a) The proper procedures have not been followed.
  - b) There is new evidence of sufficient substance to affect the decision.
  - c) Evidence provided to the ASCB has been misinterpreted to the extent that it has affected the decision.
  - d) The decision is against the weight of evidence.
  - e) It is in the interests of natural justice that the matter be reheard.”
17. Despite not being specified in the decision of the Chairperson of the Appeal Board, the Trusts understand reference to ground (iv) to be ground 6.4(d) and ground (v) to be 6.4(e)
18. There is a discrepancy between the summary of the Chairperson’s decision which states that the appeal has been accepted under ground 6.4(c) (which is referred to as Ground (iii)) and the supporting reason for the decision which is that the appeal has been accepted on the basis of satisfying grounds 6.4(d) and (6.4(e).
19. It is noted that no specific reasons have been provided in the appeal decision as to how the appeal lodged, shows on the balance of probabilities, that the information filed and relied upon by the Trusts fails for insufficiency or what the threshold is which the appeal filed was able to meet.
20. Given this discrepancy as to the grounds on which the appeal has been allowed, and the methodology used by the Chairperson of the Appeals Board to determine that the requisite threshold had been met to allow the appeal under each of the grounds 6.4(c), (d) and (e), the Trusts have addressed each of these matters in this submission.
21. It is to be noted that once the appeal is accepted, the grounds for the reconsideration of the appeal remain those established by the Complaints Board. In this instance they are: Basic Principle 4, Rule 2 or Rule 11 of the Advertising Code of Ethics.
22. At all points it is to be noted that:
- a. Despite the definition of ‘advertising’ which the ASA have adopted, the Trusts maintain that the statement in question as part of this complaint and appeal do not qualify as ‘advertisement’ as the statement is not intended to influence the viewer to one view or another and does not direct the viewer to the Trusts to its business. This is discussed further in this submission with reference to a decision of the Court of Appeal.

- b. The information in existence as at the time the statement was made was based on information the Trusts had obtained from a 2012 report which has been provided to the ASA. The basis of the statement has not been refuted by the NZ Police, the Auckland Regional Public Health, or the NZTA. Mr Graham's statement to the ASA contained in the email of 30 August 2018 states "in 2017 there were fewer alcohol-related crashes in West Auckland than in other urban zones". The ASA has not approached the other agencies for comment on a report the ARPH authored. The complainant, Mr Smale, has focused only on one agency, NZTA. That agency did not author the primary report on which the statement was based.
  - c. It would be prejudicial to the Trusts for a retrospective finding to be made about a statement which was true until 2017 but no longer true from August 2018. A retrospective finding would also be against the rules of natural justice as the Trusts have removed the offending statement until new information relating to this matter is resolved. In absolute terms, relief would be futile in any case.
23. In support of this reply to the appeal, the Trusts rely on the affidavit of Mr Simon Wickham, the Chief Executive for the West Auckland Trust Services Limited (WATS). WATS is a company established and operated by the Waitakere and Portage Licensing Trusts (the Trusts). Mr Wickham reports to each trust board and was authorised to give the affidavit in support of the Trusts position.

### **The Operation of the Trusts**

24. WATS is a not-for-profit company which provides operational support for the businesses of the Trusts. WATS provides 'back-of-house' support, whilst all strategic and financial decisions relating to the conduct of the Trusts businesses is undertaken by each trust board
25. The board of each trust is made up of elected members who are elected at each local authority triennial elections. For the Portage Licensing Trust there are ten (10) elected members. For the Waitakere Licensing Trust there are seven (7) elected members.
26. The Trusts operate off-licence premises under section 300 of the Sale and Supply of Alcohol Act 2012 (**the Act**). These sales include all non-cellar door sale of alcohol for consumption off the premises, known as off-licenses. The Trusts also own a number of on-license venues, but this is in a competitive market like other parts of Auckland, with the exception of tavern type licences which only the Trusts can operate in areas of the west which are within the licensing trust district.
27. The Trusts communicate their activities through print format, known as Our West; and online, through Facebook, the website [thetrusts.co.nz](http://thetrusts.co.nz), and electronic direct marketing by way of a newsletter.

### **Grounds of Appeal**

- (1) 6.4(c): Evidence provided to the ASCB has been misinterpreted to the extent that it has affected the decision.**
28. As set out in the affidavit of Mr Wickham it was the Trusts understanding from reading the Auckland Regional Public Health Report (**ARPH Report**<sup>4</sup>) the statements

contained in that report regarding the number of incidents of alcohol related crashes was lower than elsewhere in Auckland.

29. The ARPH Report stated as of February 2012 – the date of the report that:
- a. Pages 27 – 33 is focused on alcohol related harm in the West Auckland area, compared to other areas of Auckland. It refers to the area covered by the Henderson-Massey local board, which is commonly known as the ‘urban area of the west’. This is the terminology of the report, not of the Trusts
  - b. Page 28, shows that 1:5 crashes attended to by Police involve alcohol.
  - c. Page 29, Figure 17, shows, in the red line the urban west number of crashes vis-à-vis other rural and urban areas. The other lower areas are rural north and rural south. The statement being complained of is based on the information conveyed in Figure 17. This figure supports the statements made by the Trusts that the lowest number of alcohol related crashes occur in the urban west.
  - d. Page 29, Figure 18, shows the lowest number of fatalities as being in the urban west. The Trusts have relied on this information in the statements they have made. This figure supports the statements made by the Trusts.
  - e. Page 30, Figure 19, shows the lowest number of weekend versus weekday crashes in the urban west, out of all other urban areas. The Trusts have relied on this information in the statements they have made. This figure supports the statements made by the Trusts.
  - f. Lastly, page 32, shows at Figure 22 the number of drink driving prosecutions. It shows that the Waitakere area has the lowest between 2000-2010. This figure supports the statements made by the Trusts.
30. With regard to Annexure 2 of Mr Wickham’s affidavit: Local Alcohol Policy Research Report, Auckland Council, 2012, the Trusts took away the following information:
- a. At section 5.3.4 – Liquor Ban Breaches, page 41, the report states that by geographic area, as shown on Table 5.3.2, Waitemata consistently records the lowest number of offences. The Waitemata Police area includes the West (urban, some rural, and a small area of the north shore). The graph clearly shows the ‘West’ parts of the Waitemata are in the lowest part of the ‘urban’ area for offences, the lowest being ‘Rodney.’
  - b. Table 5.6.8 (page 66) differentiates the types of crashed in the ‘urban west’ by local road and state highway. This appears to be what Mr Smale relies on, however, it is not clear as he has not identified the source of this complaint and how it relates to this Auckland Council report.
31. Given the information that was provided to support the basis of the statement, on the balance of probabilities, it is difficult to see that a reasonable person may be misled and consider that the Trusts misrepresented facts in existence at the time the statement was made.

**(2) 6.4(d): The decision is against the weight of evidence**

32. Given the raw and interpretive data relied upon by the Trusts and which were before the Complaints Board, despite the understanding and definition of the term 'incidence', the decision of the Complaints Board was reasonable and not against the weight of evidence before the Complaints Board.
33. The test the Complaints Board applied, and the Appeal Board is required to apply, is whether on the balance of probabilities the statement could be interpreted as being misleading or deceptive under Rule 2 of the Code of Ethics, and whether a reasonable person could see that the statement was a factual one premised on information provided by reputable third parties – i.e Rule 4 of the Code of Ethics was complied with.
34. The Trusts do not consider that the statements, which are now historic and no longer in circulation, were misleading to the public, or the public in the west. It was clear to anyone reading the statement that it was based on information provided by third parties, which were named.
35. The statement summarised a legitimate statistic and statement from a trusted source, the ARPH. The Trusts refute that it was ever its intention to mislead the public by seeking to assert that because of the existence of the Trusts there was a lower level of alcohol related incidents.
36. As shown below, the statement that was specific to the Trusts and its marketing role has not even been considered. That is a separate statement which also appears and is attributed to a specific source similar to the source of the driver incidents.
37. The full statement from the complaint as it appeared at the time is as follows:



38. Based on the two 2012 reports appended to the affidavit of Mr Wickham, the Trusts formed the view that there was a difference between the urban west and the remainder of urban Auckland. The graph complained of on page 29, Figure 17 of Annexure 1 to Mr Wickham's affidavit clearly shows the lower number of alcohol crashes in urban areas, with the urban west being the lowest. This is from ARPH Report; this is what the Trusts repeated.
39. Repeating a statement regarding lower incidents of alcohol crashes was not misleading or irresponsible. It was a fact which was derived from a report which had very high credibility. Its author is the head of Alcohol Healthwatch. The report was published by the combined ARPHS. The assertions of misleading information are not

just an attack on the Trusts, but a criticism of the ARPHS, the Police, the Auckland Council and NZTA.

40. The Trusts were of the genuine belief that repeating the statement from the ARPH Report was of benefit to the community. These matters are discussed in at least quarterly meetings with Police, Auckland Council, and ARPH. If N Smale's view is correct, then these agencies would have raised the matter with the Trusts and the statement would have been amended, removed or altered.
41. The Trusts submit that the weight of the evidence is in fact against the complaint and the unjustified assertions contained in the complaint. It would be unjust and without an evidential foundation for the Complaints Board decision to be overturned on appeal.

**(3)6.4(e): It is in the interests of natural justice that the matter be reheard**

42. The complaint has been fully ventilated through the complaint process and the appeal process.
43. In the context of a re-hearing, the Appeal Board must consider all information a new. But it is limited to the evidence it received and it must consider the fact, the evidence and the law as it existed as at the time the Trusts made the statement now complained of. The Appeal Board must make its decision bearing in mind the information that existed at the time the statement was made – the relevant date is 2012.
44. The fact that the information or the basis for third party reports relied on by the Trusts has now become outdated or redundant, simply means the only available action is to remove the statement, which the Trusts did so as soon as the NZTA information was provided from Mr Graham. This does not warrant a finding that Basic Principle 4, Rule 2 or Rule 11 have been breached.
45. If the statement is no longer true, then between these agencies and the Trusts there is genuine concern.
46. As a community organisation, which serves some of the more economically deprived areas of Auckland, the Trusts have a vested interest in the truth of the message now under appeal. Despite N Smale's assertions and the technical definition of advertisement, the statement was to disseminate public good message.
47. Materially there was nothing to be gained by the Trusts in repeating the statement. In fact, it was detrimental as it could be interpreted by the public as suggesting a lower rate of consumption of alcoholic beverages as being better because it would result in less alcohol related crashes.

**The legal test as to the powers to be exercised by the Appeal Board in an appeal**

48. In *Electoral Commission v Cameron* [1997] 2 NZLR 421, the Court of Appeal provides some useful guidance as to the scope of the jurisdiction of the ASA, its accountability and the exercise of its jurisdiction.
49. In that case the Chair of the Complaints Board accepted a complaint for adjudication.<sup>5</sup> He found two advertisements were in breach of Rule of the 2 Advertising Code of Ethics regarding truthful presentation<sup>6</sup>.

50. In its decision, the Complaints Board was of the view that while the statements made by the Electoral Commission may be correct as statements of general principle, they made no reference to exceptions and qualifications to that general principle. The Complaints Board held that without making public aware there are exceptions and qualifications to general principle, statements appeared unequivocal, and did not encourage voters to seek further information.<sup>7</sup> This is the same ground as that raised by Mr Smale in his pursuit of the statement being misleading.
51. In considering the issue, the Court of Appeal held that the ASA's jurisdiction in this specific case, in particular its determination of the term "advertisement" under the Codes is "to be taken in its broadest sense to embrace any form of advertising to promote the interest of any person, product or service"; whereby the publication in this case was communicating educational information to the public about the voting system MMP, the Court held that the advertisements were not promoting a person, product or service, and so did not fall into that definition. Therefore for the ASA to make determination on the Electoral Commission's functions would be beyond its jurisdiction.<sup>8</sup>
52. It is submitted that in this instance the analysis provided by the Court of Appeal is most helpful. The Trusts cannot be considered to have been 'advertising' in making the statement subject to the complaint: the 'advertisement' was not promoting a person, product or service, and so did not fall into the definition of advertisement. If the statement is not an advertisement, then there is no jurisdiction to reconsider the appeal.

## Conclusion

53. The Trusts do not consider that they intentionally or inadvertently made a statement in print and in a digital format which constitutes 'advertising' and which was irresponsible or unethical or misleading.
54. So far as the Trusts were aware the statement was truthful and was not deceptive. The source of the information and its repetition by the Trusts in print and digital media was clear.
55. N Smale's desire to paint a picture of deception and misconduct is simply frivolous and lacking evidential foundation. The intention of the complaint and the appeal process is to draw attention to other activities of the organisation he is involved with – this is evidenced by the disrespectful way in which the decision of the Complaints Board has been cited on the website <https://trustsaction.org.nz/2018/09/28/a-load-of-hogwash-but-not-misleading/> which is attached as Annexure 3 to Mr Wickham's affidavit.
56. It is in fact the Trusts and the wider public who are being misled by the endeavours of N Smale – to a large extent his statements in the above article are deceptive, misleading and they are being used to support allegations which are false. His statements are considered to be in breach of Basic Principles and Rules of the Code of Ethics in its entirety.

<sup>1</sup> First letter 15 August 2018, Second letter 20 August 2018, third letter 6 September 2018.

<sup>2</sup> The Appeal Board decision, under ruling does not specify "6.4(c)", but it states "6(c)"

<sup>3</sup> Rules of the Advertising Standards Authority Incorporated, Second Schedule, Rules of the ASA- July 2016, Clause 6,4, page 18

<sup>4</sup> Annexure 1 to Mr Wickhams affidavit, Pages 27-33 of that Annexure

<sup>5</sup>Electoral Commission v Cameron [1997] 2 NZLR 421 at 427

<sup>6</sup>Lbid at 427

<sup>7</sup>At 427

<sup>8</sup>At 431

## **AFFIDAVIT OF SIMON WICKHAM, SUBMITTED BY ADVERTISER**

**Simon Wickham**, of Auckland, Chief Executive, swear:

### **Introduction**

1. My name is Simon Wickham and I am the Chief Executive for the West Auckland Trust Services Limited (WATS). WATS is a company established and operated by the Waitakere and Portage Licensing Trusts (the Trusts). I report to each trust board.
2. WATS is a not-for-profit company which provides operational support for the businesses of the Trusts. WATS provides 'tack-of-house' support, whilst all strategic and financial decisions relating to the conduct of the Trusts businesses is undertaken by each trust board.
3. The board of each trust is made up of elected members who are elected at each local authority triennial elections. For the Portage Licensing Trust there are ten (10) elected members. For the Waitakere Licensing Trust there are seven (7) elected members.
4. The Trusts operate off-licence premises under section 300 of the Sale and Supply of Alcohol Act 2012 (the Act). These sales include all non-cellar door sale of alcohol for consumption off the premises, known as off-licenses. The Trusts also own a number of on-license venues, but this is in a competitive market like other parts of Auckland, with the exception of tavern type licences which only the Trusts can operate in areas of the west which are within the licensing trust district.
5. The Trusts communicate their activities through print format, known as Our West; and online, through Facebook, the website [thetrusts.co.nz](http://thetrusts.co.nz), and electronic direct marketing by way of a newsletter.

### **Scope of affidavit**

6. This affidavit is in response to an appeal from N Smale to the Advertising Standards Authority Appeals Board (ASAB). The appeal follows on from a complaint to the Advertising Standards Authority Complaints Board which determined that the complaint against the Trusts could not be upheld (the complaint decision). I have read the complaint decision.
7. Following the complaint by N Smale and the response which the ASA received from the NZ Transport Agency (NZTA) the Trusts accepted that the information which it had placed on the website, in Our West and in the pamphlet were outdated, as they related to a study commissioned and published by the Auckland Regional Public Health Service (ARPHS) for the period ending in February 2012. This resulted in the Trusts removing the statements from its website and not repeating them in print media. The Trusts have enquired about an updated report from the ARPHS.
8. The Trusts reply to the NZTA response was sent to the ASA through the Trusts lawyer.

9. I have been authorised by the Trusts to give this affidavit as part of the response to the appeal from N Smale.

### **Response to N Smale's Appeal**

10. I have read the decision of the ASAB allowing the appeal against Basic Principle 4 and Rule 2 and Rule 11 of the Code of Ethics regarding due care and social responsibility on the part of the Trusts as advertiser.
11. As I understand it, N Smale's appeal is premised on the historic use of statements from the 2012 Auckland Regional Public Health report (**ARPH Report**). N Smale's concern is that the public were misled or deceived through the repetition of statements quoted from the ARPH Report.
12. I note that N Smale and the ASA did not receive responses from Police, ARPH or the Auckland Council as to the issues raised by N Smale. NZTA are only part of the group of organisations which provide raw data on incidents of alcohol related statistics.
13. One of the issues in Auckland is the separation of rural and urban and how each agency makes this determination and for what purpose. The geography of the west and the locations in the west which are subject to the monopoly provisions of the Act, which excludes some parts of the west, particularly in the north-west, make this rural/urban divide somewhat difficult from a statistical point of view.
14. As identified in the advertisements complained of, as it appeared on the Trusts website, the statement provided the source for the quote. The Trusts website advertisement, [www.thetrusts.co.nz](http://www.thetrusts.co.nz), said:

"Is it working? It sure is! According to the Auckland Regional Public Health Service, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas."
15. The response from Paul Graham, Principal Scientist, NZTA, dated 30 August 2018 states that "in 2017 there were fewer alcohol-related crashes in West Auckland than in other urban zones". The response then goes on to say that the west Auckland area has the lowest population out of the four urban zones.
16. In the latter part of the email Mr Graham goes on say that "the more recent data in Appendix A [provided by Mr Smale] shows that a smaller number of alcohol-related crashes occur in West Auckland than elsewhere each year, but that West Auckland has the highest percentage of crashes which are alcohol-related." This statement contains an internal inconsistency.
17. It was my understanding from reading the ARPH Report that the statement contained in that report regarding the number of incidents of alcohol related crashes was lower than elsewhere in Auckland. That is what the ARPH Report stated as of February 2012 - the date of the report. That report was Attachment 1 to the to the Complaints board. That is why the statement from the report was put on the website, in Our West and in the pamphlet. For completeness I produce as Annexure "1" Needs Assessment Community Action on Alcohol Policy February 2012.
18. It is noted that the Auckland Council report provided to the ASA as Attachment 2 to the legal submissions specified that the rural west is larger geographically than other rural areas in Auckland. For completeness I produce as Annexure "2" Auckland Council

Local Alcohol Policy Research Report 2012. The geographical spread of the west Auckland population skews some of this data and statistical analysis.

19. Without further clarity from Mr Graham, the Police, Auckland Regional Public Health and the Auckland Council, it is difficult to conclusively compare all data. As such, in my view the NZTA response does not clarify the situation but creates further confusion.
20. I do not consider that the statements, which are now historic and no longer in circulation, were misleading to the public, or the public in the west. I consider that they repeated a legitimate statistic and statement from a trusted source, the Regional Public Health. I refute that it was ever our intention to mislead the public. In my view, the Trusts formed the view that the difference between the urban west and the remainder of urban Auckland was the lower number of alcohol outlets, which resulted in a potential for this lower rate of incidents of alcohol crashes. But that is not what the statement said; it simply repeated what was in the ARPH Report:

*"Is it working? It sure is! According to the Auckland Regional Public Health Service, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas."*

21. I consider that as part of the social responsibility ethic espoused by the Trusts and required by the Code of Ethics, particularly Rules 2 and 11, and Basic Principle 4, repeating a statement regarding lower incidents of alcohol crashes was not misleading or irresponsible. It was a fact which was derived from a report which had very high credibility. Its author is the head of Alcohol Healthwatch. The report was published by the combined ARPHS. The assertions of misleading information are not just an attack on the Trusts, but a criticism of the ARPHS, the Police, the Auckland Council and NZTA. If the complaint is upheld, does it render the studies and the work of these agencies as misleading? I would not think so.
22. However, that is what N Smale is now alleging. I enclose as Annexure "3" a post "A load of hogwash but not misleading" from the organisation that he runs called West Auckland Licensing Trust Action Group disregarding the ASA complaint process and diminishing in my view the works of the ARPH and the independent assessment by the ASA Complaints Board. His blog does not contain the full decision and in my opinion is itself misleading under the Code of Ethics, Basic Principle 4, Rule 2 and Rule 11
23. The Trusts were of the genuine belief that reporting the statement from the ARPH report was of benefit to the community. These matters are discussed in at least quarterly meetings with Police, Auckland Council, and ARPH. That is why the Trusts want the updated information.
24. If the statement is no longer true, then between these agencies and the Trusts there is genuine concern. Work is being undertaken to better communicate the message that alcohol and driving are bad companions, aside from the fact that alcohol fuelled driving is illegal.
25. As a community organisation, which serves some of the more economically deprived areas of Auckland, the Trusts have a vested interest in the truth of the message now under appeal. Despite N Smale's assertions and the technical definition of

advertisement, the statement was for the public good, part of a community health message which the Trusts use their position to promote.

26. Materially there was nothing to be gained by the Trusts in repeating the statement. In fact, it was detrimental as it could be interpreted by the public as marketing a lower rate of consumption of alcoholic beverages as being a positive outcome despite the fact the Trusts derive income from the sale of alcoholic beverages.
27. As a result, I do not consider that the Trusts intentionally or inadvertently made a statement in print and in a digital format which was irresponsible or unethical or misleading. So far as the Trusts were aware the statement was truthful and was not deceptive. The source of the information and its repetition by the Trusts in print and digital media was clear.
28. I do not consider that the Trusts purposefully or carelessly failed to comply with Rule 2 or Rule 11 of the Code of Ethics or Basic Principle 4.

The following were attached to the Affidavit:

Annexure "1" Needs Assessment Community Action on Alcohol Policy February 2012.

Annexure "2" Auckland Council Local Alcohol Policy Research Report 2012.

Annexure "3" a post "A load of hogwash but not misleading"

## **SUMMARY OF COMPLAINTS BOARD RULING**

The print advertisement in the 'Our West' mailer publication said: "According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas"

The Trusts website advertisement, [www.thetrusts.co.nz](http://www.thetrusts.co.nz), said: "Is it working? It sure is! According to the Auckland Regional Public Health Service, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas."

The pamphlet advertisement said: "It's working! According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in the Auckland Council urban zone areas."

The Complainant said it was misleading for the Advertiser to claim the lowest incidence of alcohol related crashes in urban Auckland as the use of absolute numbers is not a reasonable basis for comparison between geographic areas of different sizes and populations. The Complainant supplied recent NZTA data which showed that percentage-wise, West Auckland was not the lowest.

The Advertiser said the claim made in its advertising was sourced from NZTA data and factually correct in that West Auckland had the lowest number of crashes. The Advertiser provided two reports substantiating the claim.

The Complaints Board noted the use of the word 'incidence' and discussed it's meaning. The majority of the Complaints Board said the likely consumer interpretation of 'incidence' was that it referred to the number of crashes. It said the use of the data to support a specific position was permissible under advocacy advertising and this saved the advertisement from being misleading. The advertisement was not in breach of Basic Principle 4 or Rules 2 and 11 of the Code of Ethics.

A minority of the Complaints Board disagreed and said the advertisement was misleading as the use of the term 'incidence' meant the rate of alcohol related crashes as a percentage which was not supported by the data. The minority view was that advocacy did not save the advertisement from being misleading.

In accordance with the majority, the Complaints Board ruled the complaint was Not Upheld.