

<b>COMPLAINT NUMBER</b>	18/428
<b>COMPLAINANT</b>	J Williams and 2 Others
<b>ADVERTISER</b>	Alt New Zealand Ltd
<b>ADVERTISEMENT</b>	Alt New Zealand Ltd, Television
<b>DATE OF MEETING</b>	12 February 2019
<b>OUTCOME</b>	Upheld

## SUMMARY

There were four “Get Free” television advertisements for Alt New Zealand, each with a theme: “Get Fit”, “Get Old”, “Get Young” and “Get Rich”. The “Get Free. Get Fit” advertisement showed a fit-looking woman leaping through a line drawing in the shape of an alt e-cigarette device. The text says: “Get Free, Get Fit. Stop smoking and your lung capacity can increase by up to 30%.” The “Get Free. Get Rich” advertisement showed a man with a handful of \$100 bills feeding them through a line drawing in the shape of an alt e-cigarette device. The text says: “Stop smoking and you could save \$7000 Dollars a Year”. The “Get Free. Get Old” advertisement showed a close-up of a man’s eye as he is looking through a line drawing in the shape of an alt e-cigarette device. As he does so the camera pans backwards to reveal the man has white hair and a white beard. The text says: “Stop smoking and you could add 10 years to your life expectancy.” The “Get Free. Get Young” advertisement shows an image of a smiling woman looking through a line drawing which is the shape of an alt e-cigarette device. As she does so she gives a wink. The text says: “Stop smoking before you’re 25 and your lungs can regenerate.”

There were three complaints about these advertisements. The Complainants said advertisements for vaping should come under the same rules as advertisements for tobacco, and it is not proven that vaping is safe or healthy.

The Advertiser said it is presently legal to advertise electronic cigarettes in New Zealand. The advertisements promote the alt. as an alternative to smoking, but do not make any specific claims or statements regarding the financial or health benefits of using the alt. as opposed to smoking.

A majority of the Complaints Board said all four advertisements were making therapeutic claims which had not been adequately substantiated.

A minority of the Complaints Board said none of the advertisements were making any therapeutic claims.

The Complaints Board said taking into account context, medium, audience and product, the advertisement had breached Principle 1, Principle 2 and Rule 2(a) of the Health and Therapeutic Advertising Code.

Therefore, in accordance with the majority, the Complaints Board ruled the complaints were Upheld.

## Advertisements to be removed.

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

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### COMPLAINTS BOARD DECISION

The Chair directed the Complaints Board to consider the complaint with reference to Principles 1 and 2 and Rule 2 (a) of the Therapeutic and Health Advertising Code.

Principle 1 required the Complaints Board to consider whether the advertisement observed a high standard of social responsibility, particularly as consumers often rely on such products, devices and services for their health and wellbeing.

Principle 2 required the Complaints Board to consider whether the advertisement was truthful, balanced and not misleading or likely to mislead, deceive or confuse consumers, abuse their trust, exploit their lack of knowledge or without justifiable reason, play on fear, whether by implication, omission, ambiguity, exaggerated or unrealistic claim or hyperbole.

Rule 2 (a) required the Complaints Board to consider whether the advertisement was accurate. Statements and claims should be valid and able to be substantiated. Substantiation should exist prior to a claim being made. For medicines and medical devices, any therapeutic claims must be consistent with the approved indications (for medicines) or the listed intended purpose (for medical devices).

The Therapeutic and Health Advertising Code definition of a Therapeutic Purpose is:

- (a) preventing, diagnosing, monitoring, alleviating, treating, curing, or compensating for, a disease, ailment, defect, or injury; or
- (b) influencing, inhibiting, or modifying a physiological process; or
- (c) testing the susceptibility of persons to a disease or ailment; or
- (d) influencing, controlling, or preventing conception; or
- (e) testing for pregnancy; or
- (f) investigating, replacing, or modifying parts of the human anatomy.

Only medicines with consent to distribute in New Zealand and medical devices can claim to have a therapeutic purpose in advertisements.

The Therapeutic and Health Advertising Code states that a product can be a medicine in three ways. That is; it is, or contains, a scheduled ingredient or, a therapeutic claim is made on the label of in advertisements or, it is a product with consent to distribute.

The minimum substantiation expected to support a therapeutic claim made about a medicine in an advertisement would be the product Data Sheet, Consumer Medicine Information (CMI) and / or the approved label. This may be accompanied by supporting research.

The Therapeutic and Health Advertising Code states that a product can appear to be a medical device by virtue of the way it works or the claims that are made on the label or in advertisements.

The minimum substantiation expected to support a therapeutic claim made about a medical device in an advertisement would be the Web Assisted Notification Database (WAND) listing

which includes the listed 'intended purpose' for the product. This may be accompanied by supporting research.

### **The Complaints Board ruled the complaints were Upheld.**

#### **The Complaint**

There were three complaints about these advertisements. The first Complainant, J Williams, was concerned the premise of the advertisement was vaping is healthier or cheaper than smoking. J Williams said advertisements for vaping should come under the same rules as advertisements for tobacco, and it is not proven that vaping is safe or healthy. A Issa said they didn't think these advertisements should be able to claim benefits and they should be removed. P Wilkinson Baker said they were not aware that alternative products to smoking were allowed to be advertised.

#### **The Advertiser's response**

The Advertiser provided two responses. The first response was about the Advertising Standards Code, the second response was about the Therapeutic and Health Advertising Code.

In the first response the Advertiser said the alt. ads are intended to promote the alt. product, display a statement highlighting the harm of smoking and advertise the alt. as an alternative to persons intending to switch from smoking tobacco cigarettes. The Advertiser said it is presently legal to advertise electronic cigarettes in New Zealand. The ads promote the alt. as an alternative to smoking, but do not make any specific claim/statement regarding the financial or health benefits of using the alt. as opposed to smoking.

In the second response the Advertiser said:

- alt. is being advertised as an alternative to smoking
- the explicit messaging is, if an individual stops smoking, their health is likely to improve
- It is common knowledge that stopping smoking saves you money
- The alt does not constitute a medicine or medical device and therefore Rule 2(a) is not applicable
- There is substantial evidence smoking alternatives are much less harmful than smoking
- Health and financial messaging could be implied in most vaping advertisements and this messaging should be encouraged

#### **The Media's response**

The Media, the Commercial Approvals Bureau, said in the absence of a clearly identified breach, they support the Advertiser's promotion of their product, to adult audiences.

#### **Complaints Board Discussion**

##### *Consumer Takeout*

The Complaints Board considered the consumer takeout of the advertisements.

A majority of the Complaints Board said the general consumer takeout of the advertisements was: Smoking is bad for you and here is a product that can help you stop smoking. If you stop smoking and start vaping, there are certain health and financial benefits.

A minority of the Complaints Board disagreed and said the general consumer takeout of the advertisements was simply: Quit smoking and you will receive the resulting health and financial benefits.

*Are the advertisements making any therapeutic claims?*

The Complaints Board then considered whether the advertisements were making any therapeutic claims.

The Complaints Board noted that under the Therapeutic and Health Advertising Code therapeutic claims can only be made if a product fits the definition of a “medicine” or a “medical device” as defined under the Medicines Act 1981.

A majority of the Complaints Board said the advertisements were making therapeutic claims and the phrase “Get Free”, along with the accompanying imagery, refers to giving up smoking (which for some people is an addiction) with the help of Alt. This implies Alt is a smoking cessation product that has a therapeutic benefit of alleviating smoking addiction.

A minority of the Complaints Board disagreed and said the advertisements were not making any therapeutic claims.

*What therapeutic or health benefit claims are being made, and have they been substantiated?*

The majority of the Complaints Board, which said the advertisements were making therapeutic claims, then considered each of the four advertisements in turn, and posed the following questions:

1. What is the consumer takeout?
2. Does the consumer takeout fit the definition of an actual or implied therapeutic claim, a health benefit claim or another type of claim?
3. If the advertisement is making any of the above claims, has the advertiser provided adequate substantiation to support it?

**Ad 1****“Get Free, Get Fit. Stop smoking and your lung capacity can increase by up to 30%”**

A majority of the Complaints Board agreed:

- The consumer takeout was: Smoking is bad for you and here is a product that can help you stop smoking. If you stop smoking and start vaping your lung capacity could increase by up to 30%.  
In addition to the Board’s view of the ‘Get Free’ part of this advertisement the Board said the rest of the advertisement implied a therapeutic claim that replacing smoking with vaping produces the same results (improved lung capacity) as not replacing smoking with anything.
- The consumer takeout fitted the definition of an actual or implied therapeutic claim.
- The Advertiser did not provide adequate substantiation to support this claim. Neither a medicine data sheet/CMI/label was provided nor was a medical device WAND listing provided.

**Ad 2****“Get Free. Get Old. Stop smoking and you could add 10 years to your life expectancy”**

A majority of the Complaints Board agreed:

- The consumer takeout was: Smoking is bad for you and here is a product that can help you stop smoking. If you stop smoking and start vaping, you could add years to your life.
- The consumer takeout of the ‘Get Free’ part of the advertisement fitted the definition of an actual or implied therapeutic claim.
- The consumer takeout of the ‘Get Old’ part of the advertisement fitted the definition of a health benefit claim.

- The Advertiser did not provide adequate substantiation to support the therapeutic claim being made. Neither a medicine data sheet/CMI/label was provided nor was a medical device WAND listing provided.
- The Advertiser did not provide adequate substantiation to support the health benefit claim that switching from smoking to vaping adds 10 years to life expectancy.

### Ad 3

#### **“Get Free. Get Young. Stop smoking before you’re 25 and your lungs can regenerate”**

The majority of the Complaints Board agreed:

- The consumer takeout was: Smoking is bad for you and here is a product that can help you stop smoking. If you stop smoking and start vaping before you’re 25 your lungs can regenerate.
- In addition to the Board’s view of the ‘Get Free’ part of this advertisement the Board was of the view that the rest of the advertisement implied a therapeutic claim that replacing smoking with vaping produces the same results (lung regeneration) as not replacing smoking with anything. The consumer takeout fitted the definition of an actual or implied therapeutic claim.
- The Advertiser did not provide adequate substantiation to support the claim being made. Neither a medicine data sheet/CMI/label was provided nor was a medical device WAND listing provided.

### Ad 4

#### **“Get Free. Get Rich. Stop smoking and you could save \$7000 Dollars a Year”**

The majority of the Complaints Board agreed:

- The consumer takeout was: Smoking is bad for you and here is a product that can help you stop smoking. If you stop smoking and start vaping, you could save \$7000 a year.
- The consumer takeout in relation to ‘smoking is bad for you and here is a product that can help you stop smoking’ fitted the definition of an actual or implied therapeutic claim.
- The Advertiser did not provide adequate substantiation to support the therapeutic claim being made. Neither a medicine data sheet/CMI/label was provided nor was a medical device WAND listing provided.
- The Advertiser did provide adequate substantiation to support the claim that you could potentially save money by switching from smoking to vaping, depending on the quantities consumed.

### Summary

A majority of the Complaints Board said all four advertisements were making therapeutic claims which had not been adequately substantiated.

A minority of the Complaints Board said none of the advertisements were making therapeutic claims.

The Complaints Board said taking into account context, medium, audience and product, the advertisement had breached Principle 1, Principle 2 and Rule 2(a) of the Health and Therapeutic Advertising Code.

Therefore, in accordance with the majority, the Complaints Board ruled the complaints were Upheld. The advertisements are to be removed.

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## DESCRIPTION OF ADVERTISEMENT

There were four television advertisements for Alt New Zealand, each with a theme: "Get Fit", "Get Old", "Get Young" and "Get Rich".

The "Get Free. Get Fit" advertisement showed a fit-looking woman leaping through a line drawing which is the shape of an alt e-cigarette device. The text says: "Get Free, Get Fit. Stop smoking and your lung capacity can increase by up to 30%".

The "Get Free. Get Rich" advertisement showed a man with a handful of \$100 bills feeding them through a line drawing which is the shape of an alt e-cigarette device. The text says: "Get Free. Get Rich. Stop smoking and you could save \$7000 Dollars a Year".

The "Get Free. Get Old" advertisement showed a close-up of a man's eye as he is looking through a line drawing which is the shape of an alt e-cigarette device. As he does so the camera pans backwards to reveal the man has white hair and a white beard. The text says: "Get Free. Get Old. Stop smoking and you could add 10 years to your life expectancy".

The "Get Free. Get Young" advertisement shows an image of a smiling woman looking through a line drawing which is the shape of an alt e-cigarette device. As she does so she gives a wink. The text says: "Get Free. Get Young. Stop smoking before you're 25 and your lungs can regenerate".

### COMPLAINT FROM J WILLIAMS

Advertising for a product or brand called "alt"

Promises money to be made from quitting smoking.

Alt appears to be a vaping product - nicotine replacement therapy, or nicotine product. Doesn't specify. Entire premise is that it's healthier or cheaper than smoking. Ought to be ruled under the same rules for advertising as tobacco, as effectively same product. If one cannot advertise tobacco products on television I fail to see why vaping products are allowed.

Other adverts from same company call it safe or healthy. This is not proven.

### COMPLAINT FROM A ISSA

I would like to make a complaint in relation to an advertisement. The advertisement is for the "getalt.com" company that is advertising electronic cigarettes during the evenings. It is fair to consider electronic cigarettes the same as regular cigarettes therefore I do not think it is appropriate to advertise for them and furthermore claim benefits for electronic cigarettes as is the case with these advertisements. I would like these advertisements to be removed.

### COMPLAINT FROM P WILKINSON-BAKER

I have this evening seen broadcast a commercial for a product called ALT. Their website is www.getalt.com. The product is an alternative to smoking. A type of vapor stick. I was not aware that smoking tobacco or alternative products to smoking were allowed to advertise on television on radio or in the press. Their website goes on to explain the virtue of their product over a more common vapor sticks yet I can see no alternative. They also state that they are in favour of a smoke-free NZ (aren't we all) but what they would prefer is a vapor smoking NZ instead.

## CODES OF PRACTICE

### ADVERTISING STANDARDS CODE

**Principle 1: Social Responsibility:** Advertisements must be prepared and placed with a due sense of social responsibility to consumers and to society.

**Principle 2: Truthful Presentation:** Advertisements must be truthful, balanced and not misleading.

**Rule 2(b): Truthful Presentation:** Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission false representation or otherwise. Obvious hyperbole identifiable as such is not considered to be misleading.

## **THERAPEUTIC AND HEALTH ADVERTISING CODE**

**Principle 1:** Therapeutic and Health advertisements shall observe a high standard of social responsibility particularly as consumers often rely on such products, devices and services for their health and wellbeing.

**Principle 2:** Advertisements shall be truthful, balanced and not misleading. Advertisements shall not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust, exploit their lack of knowledge or without justifiable reason, play on fear. This includes by implication, omission, ambiguity, exaggerated or unrealistic claim or hyperbole.

**Rule 2(a):** Advertisements shall be accurate. Statements and claims shall be valid and shall be able to be substantiated. Substantiation should exist prior to a claim being made. For medicines and medical devices, therapeutic claims must be consistent with the approved indication(s) (for medicines) or the listed intended purpose (for medical devices).

## **INITIAL RESPONSE FROM ADVERTISER, ALT WITH REFERENCE TO THE ADVERTISING STANDARDS CODE**

Please see below a response to the three online complaints received by the ASA, regarding the four alt. television commercials. Please see attached to the email broadcast quality versions of the ads, as requested.

alt. is committed to advertising with industry best practice and in keeping with the ASA guidelines. We engaged industry professionals to guide alt. during the creation, production and broadcasting of the alt. ads, to ensure durable compliance. We look forward to hearing from you, please contact us if you require any clarification or have any queries.

### **ASA Response Form**

Contact Person	Benjamin Pryor
Creative Agency	In-house Creative Team
Media Agency	OPEN Communications
Description of the Ads	The alt. ads are intended to promote the alt. product, display a statement highlighting the harm of smoking and to advertise the

	<p>alt. as an alternative to persons intending to switch from smoking tobacco cigarettes.</p> <p>The alt. ads have been specifically created to not glamorise smoking and state that the product is only available to persons 18+. In all four ads we used adults over 25 years of age, to reinforce that the product is for persons over 18+.</p>
Ads medium	TV
Ad run period	18 November 2018 – 26 January 2019
Target audience	<p>Existing smokers who are 18+</p> <p>All ads contain 18+ imagery, denoting that the product is for consumption by adults 18+.</p> <p>The adverts immediately refer to smoking to align the advert to existing smokers.</p> <p>The ads are purposefully only shown on free to air TV channels after 8:30pm, which reduces the likelihood that children will see the ad.</p>
Advertising electronic cigarettes	<p>All three of the complainants questioned the legality of advertising the alt. on television.</p> <p>As established in the Cosmic, out of Home – Bus 18/044 Complaint decision, it is presently legal to advertise electronic cigarettes in New Zealand.</p> <p>We engaged experienced marketing, advertising, media and regulatory agencies to assist alt. in developing ads that target adults, do not glamorise electronic cigarettes and promote the alt. as an alternative to persons looking for an alternative to cigarette smoking.</p>
alt. as an “alternative”	<p>We view the alt. as providing a choice for all tobacco cigarette smokers looking to change to an alternative. The Ministry of Health believe that vaping products can make a contribution to the SmokeFree 2025 goal, and improve public health as set out in the Cabinet Paper –</p> <p><a href="https://www.health.govt.nz/system/files/documents/pages/supporting-smokers-switch-to-significantly-less-harmful-alternatives-21nov2018-redacted.pdf">https://www.health.govt.nz/system/files/documents/pages/supporting-smokers-switch-to-significantly-less-harmful-alternatives-21nov2018-redacted.pdf</a></p> <p>The four alt. ads do not advertise nicotine, or stipulate that the alt. is available with nicotine. The alt. is available with or without nicotine.</p> <p>Further, we would like to highlight the distinction between</p>

	<p>nicotine and tobacco. Nicotine alone has not been shown to be carcinogenic. It is the result of combusting tobacco that results in carcinogens in the smoke produced by a cigarette.</p> <p>The four aims of the Government's smoke free legislation are (<a href="https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/smokefree-environments-legislation">https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/smokefree-environments-legislation</a>):</p> <ol style="list-style-type: none"> <li>1. Protecting workers and the general public from second-hand smoke. <ul style="list-style-type: none"> <li>• The alt. product does not produce smoke, it produces vapour</li> </ul> </li> <li>2. Reduce harm caused to individuals by their smoking <ul style="list-style-type: none"> <li>• Vaping is known to be 95% less harmful than smoking, therefore promotion of the alt. product is in line with Government intention (<a href="https://www.nhs.uk/news/heart-and-lungs/e-cigarettes-95-less-harmful-than-smoking-says-report/">https://www.nhs.uk/news/heart-and-lungs/e-cigarettes-95-less-harmful-than-smoking-says-report/</a>)</li> </ul> </li> <li>3. Restrict minors access to smoking and prevent negative influences on young people. <ul style="list-style-type: none"> <li>• The alt. advertisement is clearly targeted to existing smokers who are over the age of 18. It does the opposite of glamorising smoking by listing well-known negative health effects associated with smoking.</li> </ul> </li> <li>4. Promote a smokefree lifestyle as the norm <ul style="list-style-type: none"> <li>• We believe that providing an alternative to traditional tobacco and highlighting the negative health effects associated with smoking contribute to this goal set out by the Government.</li> </ul> </li> </ol>
<p>"benefits" as noted by the Complainants</p>	<p>Two of the complaints questioned the "benefits", or the statements regarding the harm of smoking displayed in the ads.</p> <p>We refute that the alt. ads "entire premise" is that the alt. is healthier or cheaper than smoking. The ads promote the alt. as an alternative to smoking, but does not make any specific claim/statement regarding the financial or health benefits of using the alt. as opposed to smoking.</p> <p>The Ministry of Health, as noted in the Cabinet Paper sees electronic cigarettes as an effective tool to assist in the SmokeFree New Zealand goal. Countries, such as the United Kingdom have a advanced electronic cigarette regulatory environment, that has been based on medical and academic</p>

	<p>studies (refer below).</p> <p>The ads do make a statement regarding smoking, but we believe this does not assert that the alt. is “healthier or cheaper” than smoking.</p> <p>The linked abstract from a medical study notes the harm of tobacco cigarettes, which have been referred to in the ads:</p> <p><a href="https://www.nejm.org/doi/pdf/10.1056/NEJMsa1211128">https://www.nejm.org/doi/pdf/10.1056/NEJMsa1211128</a></p> <p>Quitline, one of the Government’s tele-health services provides a statement regarding the financial benefits of quitting smoking cigarettes:</p> <p><a href="https://quit.org.nz/reasons-to-quit/money-benefits">https://quit.org.nz/reasons-to-quit/money-benefits</a></p>
Comments	<p>Our mission is to work toward a New Zealand that is free from cigarettes and tobacco. We are not a tobacco company and we have no interest in selling or promoting cigarettes. We have designed an alternative product to give existing smokers a choice to no longer smoke. This is in line with the Government’s Smoke Free Goal of 2025 and we firmly believe attaining this goal would be a great step forward for New Zealand.</p>

## SECOND RESPONSE FROM ALT INCLUDING REFERENCE TO THE THERAPEUTIC AND HEALTH ADVERTISING CODE

We refer to your letter dated 23 January 2019, and thank the ASA Complaints Board for the opportunity to discuss whether the advertisements make any therapeutic claims.

### 1. Technical Analysis

#### Explicit or Implied claims

To address your query in regarding the explicit or implied claims of our advertisements we highlight the general theme of the three advertisements that pertain to the harmful effects of smoking:

1. Show an individual with the alt. logo;
2. Make a statement highlighting the harm of smoking; and
3. Advertise alt. as an alternative to smoking.

#### *Explicit Claims*

The explicit messaging is clearly stating that if an individual “*Stop[s] smoking*” their health is likely to improve. It is clear from years of research that smoking causes adverse health effects. It has also been proven, in numerous studies, that stopping smoking can alleviate these negative health impacts to varying degrees. Further, it is common knowledge that stopping smoking saves you money and shown in numerous studies.

#### *Implied Claims*

We note there is no definition provided for the word “*implied*” in the Therapeutic and Health Advertising Code (THAC). As such, it is difficult for us to determine the scope of what could be considered a reasonably implied claim.

Despite the strict wording of the advertisement statements containing “Stop smoking...”, we will address the possibility that a viewer, observing the advert in absence of any other context (addressed below in Contextual Factors), could draw a nexus between the claims and the device itself:

‘Ceasing smoking and starting vaping can reduce the harm caused by smoking.’

If this is the implied message taken from the advertisement by a viewer – does this constitute a Therapeutic Claim as per the THAC?

## 2. Therapeutic Claims

In order for a therapeutic claim to be assessed it must be determined whether the alt. product and advertisement statements fall under the definitions set out in the THAC.

The THAC covers all words and visual depictions in all advertising for therapeutic products – defined as medicines and medical devices.

Per Section the Medicines Act 1981, a medicine is defined as “*any substance or article or active ingredient that is manufactured, imported, sold, or supplied wholly or principally for administering to one or more human beings for a therapeutic purpose*”.

Firstly, we would like to draw the Complaints Board’s attention to the words “*wholly or principally*”. Considering we are analysing an *implied* message from the advert, this suggests that the message being assessed was not “*wholly or principally*” the subject of the advertisement – we opine that failing to meet this criterion would mean the alt. product falls outside the definition of a medicine.

Secondly, the principal purpose of the product must be therapeutic.

The meaning of ‘*Therapeutic Purpose*’ is defined in Section 4 of the Medicines Act 1981. We contend that the definitions at Section 4(b) – (f) are not relevant for the purposes of this assessment as they relate to physiological processes, testing persons susceptibility, conception, pregnancy and altering parts of human anatomy. The pertinent definition of ‘*Therapeutic Purpose*’ with regard to the advertisements is:

*preventing, diagnosing, monitoring, alleviating, treating, curing, or compensating for, a disease, ailment, defect, or injury;*<sup>1</sup>

For the above definition of Therapeutic Purpose to be satisfied, we believe it must be proven that:

1. Smoking is considered a “*disease, ailment, defect or injury*”; and
2. The advertisement must portray (explicit or implied) that vaping the alt. is “*preventing, diagnosing, monitoring, alleviating, treating, curing, or compensating*” smoking.
- 3.

### Accordingly, is smoking a disease?

The act of smoking itself is clearly not a disease. Although, whilst not mentioned in the advertisements **smoking addiction** may be considered a disease.

Academic papers identify two different schools of thought regarding this question, these being:

1. Tobacco addiction (smoking) equates to other addictive diseases; and

<sup>1</sup>[http://www.legislation.govt.nz/act/public/1981/0118/latest/DLM55001.html?search=sw\\_096be8ed81818823\\_therapeutic+purpo se\\_25\\_se&p=1](http://www.legislation.govt.nz/act/public/1981/0118/latest/DLM55001.html?search=sw_096be8ed81818823_therapeutic+purpo se_25_se&p=1)

2. Simply a lifestyle choice with the lack of consistent commitment to quit primarily driven by habit.

There is a fine line separating habit and addiction. The American Society of Addiction Medicine defines addiction as “*a primary, chronic disease of brain reward, motivation, memory and related circuitry...Addiction is characterized by impairment in behavioural control, craving, inability to consistently abstain, and diminished relationships.*”

As some researchers have noted, it is difficult to determine by this definition how spending money on cigarettes each week demonstrates clinical addiction yet spending money on coffee (also containing an addictive drug) a week is ok. Splashing out regularly for an exorbitantly priced coffee may also evince an impairment in behaviour control.

To class smoking as a disease, based on the understanding that it ‘equates’ to other addictive diseases or that it is a disease solely because an individual cannot abstain despite the prevalent education regarding the harm of smoking is flawed. We contend that smoking cannot be classified as a disease. Further applying the ejusdem generis rule, we also do not consider smoking can be considered an “*ailment, defect or injury*”.

**If it was determined that smoking addiction was considered to be addressed in the advertisement and it was defined as a disease, is the alt. product being advertised as a cure?**

The text of the advert explicitly states the alt as “the definitive alternative to smoking”. The definition of alternative is “*available as another possibility or choice*”<sup>2</sup>. We cannot envisage how this statement could be construed as anything other than the alt. being available as an option for cigarette smokers to use instead of cigarettes - should they choose.

Therefore, we opine that any implied claim should not be considered under the THAC as the product being advertised is not a medicine or medical device marketed/advertised for a therapeutic purpose.

### **3. Rule 2(a) THAC**

As noted above, our understanding is that the alt. does not constitute a Medicine, or Medical Device, and therefore Rule 2(a) is not applicable with regard to therapeutic claims in respect of the advertisements. For the avoidance of doubt, the other elements of Rule 2(a) are still valid, and the advertisements must be accurate and statements/claims substantiated.

### **Tobacco vs Vaping**

Known carcinogens and irritants leading to negative health effects are produced through the burning of tobacco. As vaping does not involve burning tobacco, the many toxins associated with the combustion of tobacco are not produced.

Nicotine is found in tobacco leaf - it is also found in tomatoes and eggplants. Although our advertisement is silent on nicotine, it is important to note nicotine itself has not been shown to be carcinogenic.

*Is vaping less harmful to your health than smoking?*

Public Health England has determined vaping to be 95% less harmful than smoking.<sup>3</sup>

With regard to lung function, there are emerging studies showing the effects of smoking compared to vaping.

In bullfrog models, a benchmark for human respiratory research, smoking caused dramatic inhibition of respiratory function. Cigarette smoke substantially effects the cilia in lung tissue. This dramatic inhibition was not seen when the bullfrog was exposed to e-cigarette vapour.<sup>4</sup>

<sup>2</sup> <https://en.oxforddictionaries.com/definition/alternative>

<sup>3</sup> <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review>

<sup>4</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5732188/>

A 3.5 year human study in never-smoking/daily e-cigarette users found no indications of negative respiratory harm. This group was compared to a control group of never-smoking/non e-cigarette users and even the heaviest e-cigarette user failed to exhibit any evidence of emerging lung injury as reflected in physiologic, clinical and inflammatory measures. Further, no changes were noted in blood pressure or heart rate.<sup>5</sup>

Lung cancer is the most common cause of death from cancer amongst men and women in New Zealand. With at least 69 of the over 5000 chemicals in cigarette smoke known carcinogens, it is not a stretch to conclude cigarette smoking is a likely contributor to these deaths.

We believe it is important for harm reduced smoking alternatives to be advertised to existing New Zealand smokers over the age of 18. Smokers need to be aware that these products exist and that there is substantial evidence they are much less harmful than smoking.

#### **4. TAPS**

Prior to the advertisements being screened, we were advised that TVCAB did not believe the advertisements required TAPS approval and we informally contacted a TAPS advisor who also stated that, in their opinion and based on the nature of the product, the advertisements did not need to be sent to TAPS for approval.

#### **5. Contextual Factors**

Health pressure group ASH, Quitline New Zealand, the Ministry of Health are all openly acknowledging the health and economic benefits of smokers transitioning to vaping, as did the Associate Minister's cabinet paper late last year.

Due to the significant publicity of this messaging we believe that health and financial messaging could be implied in most vaping advertisements. We submit that, considering the contribution this could have to a smoke free New Zealand, this messaging should be encouraged, not suppressed.

Again, we thank the Board for the opportunity to respond on the above matters. Please let us know if we can provide any further clarification.

#### **RESPONSE FROM MEDIA, COMMERCIAL APPROVALS BUREAU**

We have been asked to respond to this complaint under the following codes:

Advertising Standards Code - Principle 1, Principle 2, Rule 2(b).

CAB approved this ALT commercial on 24/10/18 with an 'AO' adults only classification.

The adults only classification means this commercial can only be played during programming that is specifically designed for an adult viewing audience.

Complainants viewed the commercial on TV1 at 8:45pm and TV2 at 9:30pm, and both times fall clearly within the boundaries of 'AO' programming.

One complaint details the contents of the advertiser's website – but that content is not present in the television commercial at hand.

Another complainant writes:

Alt appears to be a vaping product - nicotine replacement therapy, or nicotine product. Doesn't specify.

The commercial does not mention nicotine as either a product or treatment.

The material basis of both complaints seems thin – two viewers were surprised to see an advertisement for ALT products, but are unable to substantiate a breach of the applied codes.

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<sup>5</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5693960/>

Presented as a precedent decision, 18/044 (attached) establishes that devices like ALT's are a legal product, and advertisers have a secured right to promote them responsibly. In the absence of a clearly identified breach, we confidently support the advertiser's promotion of their product with a demonstrable care for social responsibility through the 'AO' classification and restriction to adult audiences.

**APPEAL INFORMATION**

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website [www.asa.co.nz](http://www.asa.co.nz). Appeals must be made in writing via email or letter within 14 days of receipt of this decision.