

COMPLAINT NUMBER	19/206
APPEAL NUMBER	19/007
APPLICANT	5G Free New Zealand
ADVERTISER	5G Free New Zealand
ADVERTISEMENT	5G Free New Zealand Flyer
DATE	15 October 2019
OUTCOME	Allowed Not Upheld

SUMMARY

The Complaints Board ruled on 9 July 2019 the complaint made by P Gainsford about a flyer for 5G Free New Zealand was Upheld in part.

The Advertiser appealed the Decision. The appeal application was considered by the Chairperson of the Appeal Board. She noted the Applicant's comment that in advocacy advertising the Advertiser should only have to show it has bona fide scientific research or credible expert opinion and should not have to prove its opinion beyond reasonable doubt. She also noted the Advertiser had provided additional information in support of its opinions about 5G technology, including copies of full studies.

The Chairperson of the Appeal Board accepted the appeal under Ground (e) 'It is in the interests of natural justice that the matter be reheard' and referred the complaint back to the Complaints Board for a rehearing.

The Complaints Board considered the appeal application and all the relevant documents. The Complaints Board noted the advertisement fitted the definition of an advocacy advertisement and therefore a "more liberal interpretation of the Codes" should apply. The Complaints Board noted it was not its role to "determine which of competing academic studies or other evidence is correct" only "to determine whether there has been a breach of the ASA Codes taking into account the Advocacy Principles".

The Complaints Board agreed the Advertiser had provided sufficient substantiation in its appeal application to support each of the four statements, in the context of advocacy advertising, and therefore the advertisement was not misleading.

The Complaints Board ruled the advertisement was not in breach of Principle 2, Rule 2(b) or Rule 2(e) of the Advertising Standards Code.

The Appeal was Allowed and the Complaint was Not Upheld.

Decision: Complaint **Not Upheld**, Appeal **Allowed**

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

COMPLAINTS BOARD APPEAL DECISION

The Complaints Board ruled on 9 July 2019 the complaint made by P Gainsford about a flyer for 5G Free NZ was Upheld in part.

When it considered the complaint in July, the Complaints Board agreed the advertisement was misleading because the Advertiser had not provided sufficient substantiation to support four of the six statements in the flyer: Statement 2 'The radiation from small cells is not small', Statement 3 'Wireless antennas emit microwaves - non-ionising radiofrequency radiation – and essentially function as cell towers', Statement 4 '5G poses a threat to our wildlife, particularly bees, butterflies and other pollinators, and threatens biodiversity' and Statement 5 'Independent science shows the type of radiation emitted by 5G and wireless technologies is capable of harming our health'.

The Advertiser appealed the Decision. The appeal application was considered by the Chairperson of the Appeal Board. She noted the Applicant's comment that in advocacy advertising the Advertiser should only have to show it has bona fide scientific research or credible expert opinion and should not have to prove its opinion beyond reasonable doubt. She also noted the Advertiser had provided additional information in support of its opinions about 5G technology, including copies of full studies.

The Chairperson of the Appeal Board accepted the appeal under Ground (e) 'It is in the interests of natural justice that the matter be reheard' and referred the complaint back to the Complaints Board for a rehearing.

The Complaints Board carefully considered all the information before it: the Complaint, the flyer advertisement, the Advertiser's response, the original Complaints Board Decision and the Advertiser's appeal application and the studies provided.

The Acting Chair directed the Complaints Board to reconsider the advertisement with reference to Principle 2, Rule 2(b) and Rule 2(e) of the Advertising Standards Code:

Principle 2: 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.

Rule 2(e): Advocacy Advertising: Advocacy advertising must clearly state the identity and position of the advertiser. Opinion in support of the advertiser's position must be clearly distinguishable from factual information. Factual information must be able to be substantiated.

The Complainant's response to the Appeal

The Complaints Board noted the Complainant did not provide a response to the Advertiser's appeal application.

Complaints Board Consideration of the Appeal

Consumer Takeout

The Complaints Board agreed the likely consumer takeout of the advertisement was a warning about wireless technology, especially 5G, from 5G Free NZ because it could be harmful to

human health and the environment, and a significant number of scientists are concerned about it.

Was the advertisement misleading?

The Complaints Board considered whether the advertisement was likely to mislead the consumer and whether it made any claims which were unsubstantiated.

The Complaints Board noted the advertisement fitted the definition of an advocacy advertisement and therefore a “more liberal interpretation of the Codes” should apply. The Complaints Board noted it was not its role to “determine which of competing academic studies or other evidence is correct” only “to determine whether there has been a breach of the ASA Codes taking into account the Advocacy Principles”.

The Advocacy Principles developed by the Complaints Board in previous decisions considered under Rule 11 of the Code of Ethics remain relevant. They state:

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

The Complaints Board noted the Advertiser had provided additional information in support of its opinions about 5G technology, including copies of relevant scientific evidence/studies.

The Complaints Board referred to the guidance note which was sent to the Advertiser, “How to Respond to a Complaint Regarding Misleading Claims”, which says:

“When substantiating an absolute claim, the Complaints Board expects the Advertiser to have at the least, the advertised level of substantiation (e.g. “tests prove” or “studies shove). If scientific claims are made, the Complaints Board requires that scientific tests have actually been undertaken to support the claim... A full copy of the relevant scientific evidence/study should be provided and taken into account by the Complaints Board and not just the extract which supports the claim — it is the totality of good scientific evidence available that is important. While the Complaints Board is not an arbiter of scientific fact it will make an assessment as to whether the evidence applies and supports the advertised claim.”

The Complaints Board noted that it retained flexibility to assess the merits of any substantiation provided on a case by case basis, but was comfortable the guidance note provided to the Advertiser provided reasonable guidance on the level of substantiation generally required for scientific claims.

The Complaints Board noted Statements 1 and 6 in the flyer had not been upheld and it did not re-consider these statements.

The Complaints Board considered Statements 2-5 in turn, in light of the additional supporting information provided by the Advertiser.

The Complaints Board agreed the Advertiser had provided sufficient substantiation to support each of the four statements, in the context of advocacy advertising, and therefore the advertisement was not misleading.

The Appeal was Allowed and the Complaint was Not Upheld.

Decision: Complaint **Not Upheld**, Appeal **Allowed**

APPENDICES

1. Description of Advertisement
 2. Summary of the Original Complaints Board Decision
 3. Appeal Application from the Advertiser
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Appendix 1

DESCRIPTION OF ADVERTISEMENT

The flyer for 5G Free NZ, which was distributed to households in a Wellington suburb, said: “over 200 scientists and physicians worldwide who have researched the biological and health effects of radio-frequency radiation have signed the 5G appeal, calling for a moratorium on the use of 5G technology”... “the radiation from small cells is not small”... “Independent science shows the type of radiation emitted by 5G and wireless technologies is capable of harming our health” ... “exposures to wireless radiation can increase cancer risk, alter brain development and damage sperm” The flyer also said “5G poses a threat to our wildlife” and “wireless radiation consumes mega amounts more energy than do wired options of communication.”

Appendix 2

SUMMARY OF THE ORIGINAL COMPLAINTS BOARD DECISION

Consumer Takeout

The Complaints Board agreed the consumer takeout of the flyer advertisement was a warning about wireless technology, especially 5G, because it could be harmful to human health and the environment, and a significant number of scientists are concerned about it.

Is it advocacy advertising?

The Complaints Board agreed the flyer was advocacy advertising and the identity and position of the Advertiser were sufficiently clear.

The Complaints Board referred to the ASA guidelines on “How to Respond to a Complaint Regarding Misleading Claims” which say: “If scientific claims are made... a full copy of the relevant scientific evidence/study should be provided and taken into account by the Complaints Board and not just the extract which supports the claim... While the Complaints Board is not an arbiter of scientific fact it will make an assessment as to whether the evidence applies and supports the advertised claim.”

Was the advertisement misleading?

The Complaints Board agreed the advertisement was misleading because the Advertiser had not provided sufficient substantiation to support four of the six statements in the flyer: Statement 2 ‘The radiation from small cells is not small’, Statement 3 ‘Wireless antennas emit microwaves - non-ionising radiofrequency radiation – and essentially function as cell towers’, Statement 4 ‘5G poses a threat to our wildlife, particularly bees, butterflies and other pollinators, and threatens biodiversity’ and Statement 5 ‘Independent science shows the type of radiation emitted by 5G and wireless technologies is capable of harming our health’.

The Complaints Board ruled to uphold the complaint, in part.

Appendix 3

APPEAL APPLICATION FROM 5G FREE NEW ZEALAND

Grounds of appeal

- a. The proper procedures have not been followed.
- b. Evidence provided to the Complaints Board has been misinterpreted to the extent it has affected the decision.
- c. The decision is against the weight of evidence.
- d. It is in the interests of natural justice that the matter be reheard.

1. Failure to follow its own rules/procedure

The Complaints Board referred to the ASA guidelines on “How to Respond to a Complaint Regarding Misleading Claims” which says: “If scientific claims are made... a full copy of the relevant scientific evidence/study should be provided and taken into account by the Complaints Board and not just the extract which supports the claim... While the Complaints Board is not an arbiter of scientific fact it will make an assessment as to whether the evidence applies and supports the advertised claim.” The Secretariat provided a copy of the ASA guidelines to the Advertiser when they were asked to respond to the complaint.

The onus on the advertiser is only to be able to show bona fide scientific research or credible expert opinion in support of claims made, even though there are dissenting views. The advertiser is not required to establish proof beyond reasonable doubt.

The ASCB appears to be heading toward the latter requirement, in conflict with past rulings. The information provided I meets, and indeed exceeds, that threshold.

The guidelines are quoted as:

“and not just the extract which supports the claim... While the Complaints Board is not an arbiter of scientific fact it will make an assessment as to whether the evidence applies and supports the advertised claim.”

Firstly, the phrase “*extract* that supports the claim” is not the scientific *abstract*. A scientific abstract, by definition, is not an extract – it is a synopsis. These are completely different things. The ASCB has therefore applied the wrong test according to its own guidelines.

The Merriam Webster dictionary confirms this:

Abstract: [noun](#)

1 : a [summary](#) of points (as of a writing) usually presented in [skeletal](#) form also : something that summarizes or [concentrates](#) the [essentials](#) of a larger thing or several things

Extract: [noun](#)

1 : a selection from a writing or discourse : [excerpt](#)

The Guideline reference to “Not just the extract which supports the claim” refers to cherry-picking a specific quote that supports the claim out of a paper that, when considered in total gives a different picture. Again – the scientific abstract is prepared by the study’s author to provide a fair overview of the paper and does not match this test. Moreover, the full paper can often be so technical as to be incomprehensible to the lay person, and the abstract is actually of greater value in understanding the conclusion of the research.

The ASCB has then gone on to fail to apply its guideline that “While the Complaints Board is not an arbiter of scientific fact *it will make an assessment as to whether the evidence applies and supports the advertised claim.* (emphasis added). It has made no assessment of any kind. In failing to follow this part of the guideline it has also breached its own procedures.

2. Breach of administrative law – the ASCB has fettered its own discretion.

Since there is a rule that a public authority is not entitled to fetter its discretion, it is obliged to keep open the possibility of not applying that policy in any particular case if the specific circumstances of that case warrant the disapplication of the policy in relation to it.’ *British Oxygen Co Ltd v Board of Trade*: HL 15 Jul 1970.

Accordingly, a fixed policy never to consider an abstract and automatically uphold a complaint because only abstracts have been provided (although full papers were in fact referenced in our response) is *ultra vires* under current administrative law.

2A. Breach of administrative law – failing to consider relevant matters and acting in bad faith

The analysis below identifies that in relation to two of the upheld complaints the advertiser provided links to full scientific papers, not just abstracts. Once again the ASCB is acting *ultra vires* in failing to consider relevant matters as well as failing to follow its own rules.

Further, the number of times the ASCB makes this false claim is beyond the possibility of making a single legitimate mistake. The ASCB appears to have taken a fixed position without checking the individual links. No other explanation is tenable. Thus the ASCB has acted in bad faith – a further breach of administrative law.

3. Reference to decision 19/025

The ASCB quotes this as a precedent decision. It appears not to have been appealed, although there are strong grounds for appeal in our view.

Complaint 19/025 was about a commercial advertisement that the ASCB considered made claims of diagnosis and treatment/prevention of possible harm from EMF radiation. The various decisions fail to separate the science about possible health risks and the medical-related claims (or perhaps inferences would be a better term), and the decisions appear primarily focussed on the medical aspects of the claims made.

As such, this case is distinguished from the present complaint, as no medical claims are made, and our material is an advocacy, rather than commercial, advertisement. The Rules are not identical for advocacy and commercial advertisements (although there are commonalities).

Specifically, the 19/025 decision centred on Rules 1(b) and 2(a), whereas the current decision centres on Rules 2(b) and 2(e). 19/025 therefore cannot be a precedent.

The 19/025 decision also focusses on “opinions”, and that there was insufficient substantiation of the claims made (again, tied to medical aspects of the advertisement).

In advocacy advertising we are always dealing with opinions.

Those who maintain that 5G is safe are entitled to their opinion, but the test under the Code is not whether an opinion has been expressed, or whose opinion is right. The test is whether there is reasonable and reliable evidence for that opinion, even if there is also evidence for an opposing or differing opinion.

In this matter there is no evidence that EMF radiation is safe at current levels of exposure – the fact is that no adequate research has ever been done to establish this.

4. The standing of The International EMF Scientist Appeal

This organisation comprises scientists who have published research in the EMF field in internationally recognised peer reviewed journals. As such it meets the ASA's extended interpretation of *Cameron v The Electoral Commission*. Accordingly, the ASCB cannot replace any of the organisation's statements with its own opinion on any matter of scientific fact relating to EMF radiation and its impact on humans.

We now address the individual rulings.

Statement 1.

This complaint was not upheld, and rightly so. The International EMF Scientist Appeal proves that absolutely. We do not appeal this decision and have nothing further to add.

Statement 2

'The radiation from small cells is not small.'

"A majority of the Complaints Board said the Advertiser had not provided sufficient substantiation to support this scientific claim and this aspect of the complaint was Upheld. The majority said the Advertiser had only provided an abstract in support of this claim, and not the full scientific study.

"A minority disagreed. The minority said this statement is a low-level claim and as such it does not require further substantiation."

In our response we provided the following abstract:

https://journals.lww.com/health-physics/Abstract/2018/12000/Systematic_Derivation_of_Safety_Limits_for.17.aspx
We consider that the abstract should have been sufficient but we have now supplied the full study.

Please note that the study supplied (Neufeld and Kuster) reports on an experiment that concluded that there was a risk of "permanent tissue damage" from exposure to non ionising radiation of 10 GHz or higher (such as is planned to be used in 5G systems). The authors caution that the relevant ICNIRP guidelines do not provide sufficient protection. (New Zealand's standards are ultimately based on the recommendations promulgated by ICNIRP so this paper is very relevant to New Zealand.)

Statement 3

'Wireless antennas emit microwaves - non-ionising radiofrequency radiation – and essentially function as cell towers.'

"The Complaints Board agreed this aspect of the complaint was Upheld. The Complaints Board said this scientific claim implies that non-ionising radiation is harmful. The Advertiser had not however provided sufficient substantiation to support this implication. The Complaints Board said the Advertiser had only provided an abstract in support of this claim, and not the full scientific study."

First, the statement 'Wireless antennas emit microwaves – non-ionising radiofrequency radiation – and essentially function as cell towers' is a simple statement of fact that makes no claims as to the harmfulness of non-ionising radiation.

This being said there might have been an implication that this form of radiation can be harmful, in the context of the advertisement.

Regarding the alleged implication, the following link was provided in the response:

<https://www.sciencedirect.com/science/article/pii/S2542519618302213?via%3Dihub>

This links to the full paper; not the abstract. The paper is from *The Lancet Planetary Health* one of the most prestigious scientific publications in the world.

Statement 4

'5G poses a threat to our wildlife, particularly bees, butterflies and other pollinators, and threatens biodiversity.'

"The Complaints Board agreed the Advertiser had not provided sufficient substantiation to support this scientific claim and this aspect of the complaint was Upheld. The Complaints Board said the Advertiser had only provided abstracts in support of this claim, and not the full scientific studies."

We supplied four references, including the following:

Cucurachi, C., et al. "[A review of the ecological effects of radiofrequency electromagnetic fields \(RF-EMF\).](https://www.sciencedirect.com/science/article/pii/S0160412012002334)" *Environment International*, vol. 51, 2013, pp. 116–40.
<https://www.sciencedirect.com/science/article/pii/S0160412012002334>
<https://www.nature.com/articles/s41598-018-22271-3>

Manville, Albert M. "[A BRIEFING MEMORANDUM: What We Know, Can Infer, and Don't Yet Know about Impacts from Thermal and Non-thermal Non-ionizing Radiation to Birds and Other Wildlife.](#)" *Wildlife and Habitat Conservation Solutions*, 2014

All of these link to the full papers; not the abstracts.

Statement 5

'Independent science shows the type of radiation emitted by 5G and wireless technologies is capable of harming our health.'

"The Complaints Board agreed the Advertiser had not provided sufficient substantiation to support this scientific claim and this aspect of the complaint was Upheld. The Complaints Board said the Advertiser had only provided abstracts in support of the claim, and not the full scientific studies."

Please note that the evidence supplied for #5 was a mix of abstracts and information/links through which full texts could be accessed. Relevant full texts have been sent with this Appeal document.

Statement 6

This complaint was not upheld. We do not appeal this decision and agree with the ASCB's reasoning as far as it goes.

Should you be interested to read about the energy consumption of wireless networks, the link below provides a wealth of references.

<https://ehtrust.org/science/reports-on-power-consumption-and-increasing-energy-use-of-wireless-systems-and-digital-ecosystem/>