

<b>COMPLAINT NUMBER</b>	19/291
<b>COMPLAINANT</b>	N Smale
<b>ADVERTISER</b>	The Trusts
<b>ADVERTISEMENT</b>	The Trusts, Print, Digital Marketing
<b>DATE OF MEETING</b>	30 October 2019
<b>OUTCOME</b>	Upheld Advertisement to be Removed

### Description of Advertisement

The printed booklet, which is also accessible on-line, is entitled “All about your Trusts and the cover includes images of community activities and The Trusts logo with the words “giving back” underneath. The contents page of the booklet includes the following headings: Welcome; About your West Auckland Trusts; What we do; Helping fuel our communities; Modern hospitality venues; Developing our people; Financials; Engage with us; Where to find out more.

On page 15 of the booklet under the heading “Where we invest our profits” it states: “The graph below shows where our profits go in a typical year. It’s important that we re-invest in our existing stores and venues to keep them modern, put some aside for the future, and look to where we can invest in new parts of our business. We also invest in development programmes for our people. The rest is given back to the West Auckland community through the Million Dollar Mission, Household Distribution, grants, donations and sponsorships. You can find out more about what’s given back each year at [www.thetrusts.co.nz](http://www.thetrusts.co.nz).” The text is accompanied by a graph which shows 47% and the words “giving back now”.

### Summary of the Complaint

The Complainant said the average consumer would believe from this advertisement that The Trusts typically give back about 47% of their profits each year; where in the Complainant’s view the actual figure is approximately 14% and has not exceeded 23% in recent history.

### Issues Raised

- Truthful Presentation

### Summary of the Advertiser’s Response

Counsel for the Advertiser said the guide in its entirety is not advertising material and the part of the information complaint of is not misleading advertising.

Counsel for the Advertiser said the guide is information to communicate the function of the Respondents under the statutory requirements of the Sale and Supply of Alcohol Act 2012.

Counsel for the Advertiser said that “The graph is information as to the way the 2018/19 profits have been distributed - in accordance with the 2018/19 distributions, 47% of profits (profits having been 6% of income), were returned to the community. This is supported by the preceding information in the guide and the 2018/19 financial records, which have now been audited and available, along with the annual report.”

Counsel for the Advertiser said: “In response to the claim that “*the average consumer would interpret the words “a typical year” to mean that the figures presented were representative of recent activity/results*”, this is incorrect. According the principles applied in the Court of Appeal in the *Cavalier Bremworth* case, the average consumer, reading the entire guide would arrive at the conclusion that the recent year is typical of the direction of the respondents going forward based on their investment and giving back strategy. Especially because, the guide expressly states how low the giving back figures were in the past.”

### **Summary of the Complaints Board Decision**

The Complaints Board upheld a complaint about The Trust booklet which states alongside the words “giving back now” that 47% of the profit is given back to the West Auckland community. The Complaints Board said the Advertiser had not provided sufficient substantiation to support the claim and the advertisement was likely to be misleading to consumers. The Board said the advertisement was in breach of Principle 2 and Rule 2(b) of the Advertising Standards Code.

### **Relevant ASA Codes of Practice**

The Chair directed the Complaints Board to consider the complaint with reference to the following code

#### **ADVERTISING STANDARDS CODE**

**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.

### **Relevant precedent decision**

In considering this complaint the Complaints Board referred to precedent Decision 18/216 Appeal 18/013 which was Upheld on Appeal.

The full version of this decision can be found on the ASA website

<https://www.asa.co.nz/decisions/>

**Decision 18/216 Appeal 18/013** concerned a print and digital advertisement for The Trusts in the Our West mailer publication which said the West Auckland region has the lowest incidence of alcohol related crashes in the Auckland Council urban zone areas. This claim was contested by the Complainant.

The Complaints Board was of the view that the word ‘incidence’ was that it referred to the number of crashes in the area and that the Advertiser had provided substantiation for this. However, the Appeal Board took the view that ‘incidence means rate or frequency of an event occurring. The Appeal Board said the use of data that was not adjusted according to the populations of the areas of Auckland being compared, made the advertisement misleading.

### **Preliminary Matters**

The Chair of the Complaints Board confirmed she had ruled on the following issues raised by the Advertiser prior to the Complaints Board meeting:

**Status of the ASA waiver**

The Chair confirmed there is nothing in the ASA waiver that prevents a Complainant raising an issue with the ASA to be tested under its Codes of Practice, despite having raised the same or similar matters with another jurisdiction.

**Competitor vs Consumer complaint**

Whilst noting the Complainant's involvement in a group to establish an alternative framework to the Trusts, the Chair ruled it did not prevent them making a complaint about advertising under the consumer complaints process.

**Right to heard**

The Chair ruled the complaint will be determined without the attendance of parties, as is the ASA's practice for consumer complaints and the parties right to be heard is by written submissions.

**Complaints Board Discussion***Is the Guide an advertisement?*

The Complaints Board began its discussion by considering whether the booklet subject to complaint met the ASA 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.

The Board noted the booklet is available in stores, venues and community locations such as libraries, as well as on-line via The Trusts website. The Complaints Board agreed that reading the guide in its entirety showed that the intent and substance of the document was more than just imparting information. The Complaints Board said the guide promoted awareness of what The Trusts did and included information on how it operated including its alcohol outlets. The Board said there was a clear intention to persuade consumers about the positive aspects of The Trusts and its continued relevance.

The Complaints Board noted Counsel for the Advertiser's response which said the guide is meeting the statutory obligations of a licensing trust which is required under the Sale and Supply of Alcohol Act 2012. However, the Board said the content and presentation of the document was such that it was clear this was not its sole purpose. For example, the Board noted the booklet included an FAQ section which addresses questions about The Trusts and the “Have you tried” section which promoted particular venues.

The Complaints Board noted Counsel for the Advertiser made a distinction between the guide as an investment and giving back strategy and its more traditional avenues to advertise and influence such as the ‘Our West’ publication. The Complaints Board said that although the Our West publication is more obviously advertising, that did not preclude the guide from also having a promotional element to it. The Complaints Board agreed the guide met the ASA definition of an advertisement.

*Is this an advocacy advertisement?*

The Complaints Board discussed whether the guide was an advocacy advertisement. The Board said the promotional focus of the advertisement was on the positive impact The Trusts have in the community and within the context of the entire guide was not advocating any particular philosophical position such as whether the licensing system should still exist.

The Board distinguished this advertisement from precedent Decision 18/216, which was considered under the Advocacy Rule 11 of the Code of Ethics (now replaced by Rule 2(e) of the Advertising Standards Code). The Board said Decision 18/216 concerned the active promotion of The Trusts as an entity by focusing on the wider benefits of the Licencing system such as road safety.

The Complaints Board noted Counsel for the Advertiser stated in its response that the guide was not advocacy. The Complaints Board agreed that the advocacy rule did not apply to the advertisement before it.

#### *Consumer Takeout*

Having unanimously agreed the booklet fell within the Advertising Standards definition of an advertisement, the Complaints Board agreed the likely consumer takeout of the advertisement is that it is a guide detailing the good that The Trusts do for the community, including a breakdown of where its profits are invested.

#### *Is the advertisement misleading?*

The Complaints Board discussed the likely consumer takeout of the pie graph on page 15 of the guide which is headed up “Where we invest our profits” and states that the graph “shows where our profits go in a typical year”. The graph’s distribution shows that 47% relates to “Giving Back Now – Things like the Million Dollar Mission, sponsorships, grants, Special Care Baby Unit and other donations.”

The Complaints Board said there were different ways of interpreting what the “giving back now” was referring to. For some Board members the ‘now’ referred to what was being given back in the 2018-2019 year, and for other Board members, the use of the term ‘a typical year’ meant that 47% was the typical percentage given back to the community over a number of previous years.

Noting the two different ways of interpreting the graph, the Board then turned to the information provided by Counsel for the Advertiser to substantiate the figure of 47%.

The Board first considered the financial data available for the 2018/2019 year. The Board agreed that the numbers provided did not show that 47% of funding had been given back in the 2018/2019 year. The Board noted the audited financial reports from 2018/19 to 2014/15 had also been provided. The Board was not able to identify a year or years where 47% had been given back to the community from the financial information provided.

The Complaints Board noted the explanation provided by Counsel for the Advertiser that the figure was an indication of investment going forward based on its giving back strategy.

The Complaints Board did not consider this would be the likely consumer takeout of the advertisement, based on the language used, which focused on what is being done now rather than what would occur in the future.

The Complaints Board said the advertisement was likely to be misleading, taking into account context, medium, audience and product and was in breach of Principle 2 and Rule 2(b) of the Advertising Standards Code.

#### **Outcome**

The Complaints Board ruled the complaint was **Upheld**

Advertisement to be removed.

### 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.

## APPENDICES

1. Complaint
2. Response from Advertiser

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### Appendix 1

#### COMPLAINT FROM N SMALE

This complaint relates to an information booklet / brochure entitled “All About Your Trusts”. It is available in print through stores, venues and community locations (such as libraries). It is also available online: <https://www.thetrusts.co.nz/wp-content/uploads/The-Trusts-Guide.pdf>. The brochure is designed to promote The Trusts and their current strategies, performance and to advocate for the continuation of their monopoly rights.

On page 15 of the brochure, the following text appears alongside a pie chart:

Where we invest our profits

The graph below shows where our profits go in a typical year. It’s important that we re-invest in our existing stores and venues to keep them modern, put some aside for the future, and look to where we can invest in new parts of our business. We also invest in development programmes for our people. The rest is given back to the West Auckland community through the Million Dollar Mission, Household Distribution, grants, donations and sponsorships. The same breakdown appears without the pie-chart in the Trusts annual report (available here: <https://www.thetrusts.co.nz/annual-report-2019/>) with a footnote stating that these figures relate to their budget for 2019/20.

Although the method of calculation (exactly what is included in profit or each of the categories) isn’t explicit in the brochure, approximate calculations are possible using information in the public domain.

Using “Profit before income tax” as the total profit and Giving Back figures supplied by The Trusts following an official information request (attached), the actual giving back now as a % of profit for recent years has been:

2013/14 = 4.0%

2014/15 = 9.8%

2015/16 = 11.0%

2016/17 = 19.3%

2017/18 = 16.3%

2018/19 = 23.1%

Average (last 6 years) = 13.9%

NB – In the Trusts financial statements (and for tax purposes), ‘Giving Back’ is treated as an expense and therefore ‘profit before income tax and giving back’ is the most appropriate measure of profit. Calculation table attached.

The average consumer would interpret the text ‘typical year’ to mean that the figures presented were representative of recent activity/results. However, regardless of any ambiguity about the exact calculation, it is clear that ‘giving back now = 47%’ is NOT representative of any ‘typical year’ in recent history.

The advertisement is misleading as it falsely represents the proportion of available profits that go to ‘giving back now’. The average consumer would believe from this advertisement that The Trusts typically give back about 47% of their profits each year; where the actual figure is approximately 14% and has not exceeded 23% in recent history.

It is therefore in breach of the Advertising Standards Code: 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

#### FURTHER INFORMATION PROVIDED BY THE COMPLAINANT

The Advertiser requested further information with regards to how the Complainant had reached the 13.9% figure. The Complainant provided the explanation below and Exhibits 1-4 as further information.

Here is the table as provided in the complaint:

		2018/19	2017/18	2016/17	2015/16	2014/15	2013/14		
Profit before income tax	Portage (2)	\$1,163	\$1,460	\$1,860	\$2,108	\$2,330	\$983		
	Waitakere (2)	\$7,181	\$4,330	\$3,162	\$3,939	\$3,491	\$4,167		
	The Trusts	\$8,344	\$5,790	\$5,022	\$6,047	\$5,821	\$5,150		
Giving Back (3)		\$2,500	\$1,131	\$1,201	\$751	\$636	\$213		
Profit (before tax / giving back)		\$10,844	\$6,921	\$6,223	\$6,798	\$6,457	\$5,363		
Giving Back % of profit		23.1%	16.3%	19.3%	11.0%	9.8%	4.0%	<b>AVERAGE</b>	<b>13.9%</b>
	<i>NB 1 - Figures in \$000's</i>								
	<i>NB 2 - Profit figures from annual reports</i>								
	<i>NB 3 - Giving back figures from LGOIMA request (2018/19 from annual report)</i>								

- Figures for “Profit before income tax” for Portage and Waitakere (the first two lines) are taken directly from the annual reports for each of the respective licensing trusts. See exhibits 1 and 2.
- The “Profit before income tax” for The Trusts is simply a summation of the two lines above.
- Giving back figures for 2018/19 are from The Trusts annual report see exhibit 3.
- Giving back figures for earlier years are from figures provided The Trusts in response to a LGOIMA request - see exhibit 4.
- The figures for “Profit (before tax / giving back)” are calculated by adding the “Profit before income tax” and “Giving back”. See note 1 below.

- The Giving back % of profit figure is the ratio of “Giving Back” / “Profit (before tax / giving back)”

<sup>1</sup> The giving back activities of The Trusts are recorded in their Statement of Comprehensive Income as an Operating Expense. Therefore, to arrive at an appropriate profit figure to use as the denominator for calculating the profit available to be given back, the amount included in expenses must be added back in.

Consider the case that The Trusts generated a profit before tax and giving back of \$12 million. If they chose to ‘give back’ \$8 million, that would result in a reported “Profit before income tax” of \$4 million. A calculation using the “Profit (before tax / giving back)” figure gives a sensible ratio of  $8/12 = 66\%$ . Using the “net profit before tax” figure would result in a non-sensical ratio of  $8/4 = 200\%$ .

The point is moot somewhat though, as even if the flawed calculation was the basis for The Trusts claim in their advertising, the % of profit given back has not approached the 47% they have claimed.

## **FURTHER RESPONSE FROM COMPLAINANT REGARDING THE DEFINITION OF AN ADVERTISEMENT**

I don’t feel there is any need for me to make a detailed submission. The guide is unambiguously advertising, including the section which is the subject of my complaint

### **Appendix 2**

## **RESPONSE FROM ADVERTISER, THE TRUSTS**

### **May it please the Authority**

1. Mr Smale has laid a complaint with the Advertising Standards Authority (**the Authority**). The complaint is in relation to information published by the Portage and Waitakere Licensing Trusts (**the Trusts**) in a guide called “All About Your Trusts”.
2. The complainant states that the guide is a form of advertising, and advocating for the Trusts. The complainant specifically states that “*the brochure is designed to promote the Trusts and their current strategies, performance and advocates for the continuation of their monopoly rights*”. The respondent refers to this part of the complaint as Ground 1.
3. The second ground of complaint is the use of an infographic in the form of a pie chart to show how the Trusts spend their income. This is on page 15 of the guide. The complainant takes issue with the use of the words “*the graph below shows where our profits go in a typical year.*” Mr Smale goes on to say that “*the same breakdown appears without the pie-chart in the Trusts annual report with a footnote stating that these figures relate to their budget for 2019/20.*” The respondent refers to this part of the complaint as Ground 2.
4. Mr Smale goes on to say that if you look at historical information in the public record, in particular profits before income tax, and the Giving Back figures supplied by the Trusts following official information requests, the actual giving back “currently”, as a percentage of profit, is lower than that in the brochure.

5. Mr Smale then provides what he refers to as his own “approximation” of the giving back percentages based on the historical data publicly available and provided to him in response to requests under the Local Government Official Information and Meetings Act 1987 (**LGOIMA**). The totality of the information relied on by Mr Smale, being the basis of his approximations was provided on 17 September 2019. It is noted that one of the matters Mr Smale has complained to the Ombudsman about under LGOIMA is his interpretation of how financial information should be presented and that utilised by the Trusts.

6. Mr Smale does not state he is a qualified accountant or auditor; nor does he state that he has had his calculations verified by a qualified accountant or auditor. As such his “approximations” are solely based on his understanding of the information, not an independent qualified person. The veracity of his assertions are therefore questionable.

7. Finally, Mr Smale goes on to state that “*the average consumer would interpret the words “a typical year” to mean that the figures presented were representative of recent activity/results. However, regardless of any ambiguity about the exact calculations, it is clear that Giving Back now = 47% is NOT representative of any “typical year” in recent history.*” Mr Smale alleges that this is misleading advertising because these figures do not correlate with the approximate calculations that he has arrived at. The respondent refers to this part of the complaint as Ground 3.

8. On the basis of these three grounds, Mr Smale alleges that the Trusts “*All About Your Trusts*” is advertising, and it is misleading. His particular focus is the pie chart on page 15 of the guide, so far as it relates to giving back to the community and how the average consumer might read or understand this information. Mr Smale considers that on the basis of his approximate calculations, the Trusts are in breach of Principle 2(b) of the Advertising Standards Code (**the Code**): *Truthful presentation: Advertisements must be truthful, balanced and not misleading* because the pie chart is not truthful and is misleading.

#### **A. The complainant: procedural issues**

9. The respondent submits that as an advertiser Mr Smale cannot lodge the claim before the Authority. He has erred in giving a waiver that he is not a competitor.

10. Mr Smale is himself an advertiser as part of an advocacy and political group known as the West Auckland Licensing Trust Action Group (self labelled as WALTAG). The group has a Facebook page, which Mr Smale administers. On that page a number of people have noted the misrepresentation of the information he advertises on that page about the Trusts. The public Facebook page address is <https://www.facebook.com/LetWestAucklandChoose>.

11. The group’s website and blog address is <https://trustsaction.org.nz/category/petition-blog/>. Mr Smale also administers the website and blog by all appearances. The WALTAG group also have an associated fundraising page, the address for which is <https://givealittle.co.nz/cause/remove-the-monopoly-in-west-auckland>.

12. Mr Smale and WALTAG are not just advocates. They are also electioneering for positions on the Portage and Waitakere Licensing Trusts. Their

election profiles are able to be found here <https://trustsaction.org.nz/candidates/>. The key platform for the group and Mr Smale is that the Trusts are not to be trusted and should be removed. As such the veracity of the complaint must be carefully examined, given that it is part of an electioneering campaign and forms part of a wider agenda seeking for the statutory monopoly position of the licensing trust in the west Auckland area to be removed.

13. To date Mr Smale as an individual and as a representative of WALTAG has complained about the financial reporting of the Trusts to the Auditor- General, (who has refused to investigate on the basis that the Trusts accounts are independently audited by an appointed independent auditor, Grant Thornton), as well the Ombudsman. The Ombudsman has not yet made any rulings that are publicly available. However, the two agencies have noted that the timing of the complaints appear to be aligned with the election cycle. Mr Smale has ignored the directions of the Ombudsman under the Ombudsman Act 1976 and released information not in the public domain and subject of determination by the Ombudsman. He is in contempt of the Ombudsman Act.

14. Mr Smale and WALTAG have also complained about the activities of the Trusts, its strategies and policies to other organisations who have legislative authority. In relation to financial information and communication Mr Smale has taken the same complaint as are before the Authority to other organisations including the Electoral Commission and the Department of Internal Affairs. The allegation have not been substantiated. Neither the Electoral Commission or the Department of Internal Affairs have made a finding that, "*All About Your Trusts*", is advertising. They have also not found the guide to be misleading. Having failed at these junctures, Mr Smale is now complaining to the Authority. The Trusts have sought copies of the rulings from the Electoral Commission and the Department of Internal Affairs, but those requests are subject the Official Information Act 1981. Once these decisions have been received by the respondents they will be provided to the Authority, if that is required, given the overlap in the complaint and the grounds for complaints.

15. The WALTAG position, and that of Mr Smale, is a political position: that Trusts should be removed, or replaced by members from WALTAG who would have a different strategy and would utilise the assets of the Trusts in a different manner.

16. Whilst there is no issue with this position in and of itself, it is an issue when Mr Smale has provided a waiver as part of his complaint that he is not a competitor to the advertiser.

17. Mr Smale is not part of a charitable organisation, neither is WALTAG. However, Mr Smale as a person who is actively electioneering, is seeking to misuse the voluntary process established by the Rules of the Authority. Whilst the issue of 'advertiser' is discussed elsewhere in these submissions, the key issue is that Mr Smale's complaint is that of a competitor – he is competing with those on the Trusts for a seat on the licensing trust, as are other WALTAG members. Mr Smale himself is not abiding by the Rules of the Authority and by the Advertising Standards Code.

18. Mr Smale is a competitor and advertiser because his electioneering platform is to seek an alternative model for licensing in the west of Auckland. He advertises this position on his Facebook Page, on the WALTAG page and the Blog. He provides comments and statements through social media and the WALTAG blog. He also appears on public platforms such as television and radio with messaging aimed at influencing the public to vote for him.

19. Under the definition of advertiser adopted by the Authority his actions constitute as 'advertising' because his messages contain content which is controlled directly or indirectly by the advertiser (Mr Smale), 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*.
20. Mr Smale and WALTAG's desire is to gain seat on the licensing trusts and to change the current licensing trust model; as part of that Mr Smale has been campaigning and has been seeking to petition for a referendum to end the statutory monopoly of the licensing trusts. Whilst there is no issue with these actions, Mr Smale is free to pursue any political agenda, however, in choosing to pursue a complaint with the Authority, without advising the Authority of his position as a competitor, he is breach of the rules of the Authority. The waiver he has given is erroneous or at worse false and takes his complaint outside of the ambit of what the Authority may be able to determine.
21. Accordingly, it is submitted that under Second Schedule, Advertising Standards Complaints Board Complaints Procedures, Rules of the Authority – July 2016 (**the Complaints Procedure**), clause 1.2, the Authority should exercise its discretion not to accept Mr Smale's complaint on the basis of the erroneous and false waiver given by Mr Smale.
22. Should the Authority exercise its discretion under clause 1.3, to proceed to determine the complaint, despite the erroneous and false waiver provided by Mr Smale, then the respondent submits that it has the right to be heard for the following reasons:
- a. In seeking to determine Mr Smale's complaint, under the First Schedule of the Rules of the Advertising Standards Complaints Board, Rules of the Authority – July 2016 (**the Rules**), it is submitted that under Rule 2.2, the Authority ought to consider whether an in-person hearing is appropriate.
  - b. Under clause 1.3 the Complaints Procedure, the Authority may determine whether it may adjudicate on the matter with the parties in attendance.
23. Should the Authority consider it has grounds to proceed with the determination of Mr Smale's complaint, given the background provided, the respondent submits it is entitled to an in person hearing in accordance with section 27 of the Bill of Rights Act 1990. Section 27 (relevantly) provides as follows:
- “27 Right to justice***
- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.*
- (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.”*
24. A hearing in person would enable the parties to set their positions out fully and call evidence to support those positions. As it stands, there is no independent expert evidence on the subject of the complaint, whereas the respondent has based this submission on audited financial statements.

25. The Authority has sufficient processes in place under clause 3.1 – 3.3 of the Complaints Procedure to hold a hearing. As noted in clause 3.2 of the Complaints Procedure, an in person hearing avoids an appeal to the Complaints Appeal Board, should either party be dissatisfied with the outcome. However, in accordance with section 27 of the Bill of Rights Act 1990, it does not void the possibility of judicial review for any unsatisfied party.
26. Should the Complaints Board proceed with the determination of the complaint, with or without a hearing, there are a number of matters to consider in the respondent's submission. These are addressed as follows:
- a. The legal status of the two licensing trusts
  - b. The subject of the complaint and its function
  - c. Whether the guide can be considered to be advertising
  - d. Summary response to each ground of the complaint

## **B. The legal status of licensing trusts and the subject of the complaint**

### ***The law***

27. The Waitakere and Portage Licensing Trusts were established by Order in Council in accordance with the provision which is now section 300 of the Sale and Supply of Alcohol Act 2012 (**the SSAA**). Attachment "A" to these submissions are the Gazette Notices notifying the orders in Council establishing the trusts.
28. Once a licensing trust is established it has monopoly over the sale of alcohol from off-licence premises and for the sale of alcohol from on-license venues which operate as pubs or night clubs. In respect of all other alcohol sales, such as cafes and restaurants, cellar-door and related sales, there are no restrictions on other retailers. This is the effect of what is now a combination of sections 28, 32, 305 and 350 of the SSAA.
29. To obtain licenses for the sale of alcohol in any capacity, the licensing trust must apply to the District Licensing Committee, in this case situated as part the Auckland Council, and satisfy the requirements of the Act, in particular sections 105 (new licenses) and 106 (renewal of licenses) of the SSAA. This same process applies to any person seeking a license to sell alcohol.
30. Section 302 states that a licensing trust is a body corporate, and section 305 sets out the functions of a licensing trust. These are:

### ***"305 Functions of licensing trust***

- (1) The functions of a licensing trust are to—*
- (a) sell and supply alcohol; and*
  - (b) establish and operate premises for—*
    - (i) the sale and supply of alcohol; and*
    - (ii) the provision of accommodation for travellers; and*
    - (iii) the sale and supply of food and refreshments; and*
  - (c) carry on any other business that, in the trust's opinion, can be conveniently carried on in conjunction with the functions set out in paragraphs (a) and (b).*

- (2) *For the purpose of performing its functions, a licensing trust may—*
- (a) *do anything that a natural person may do; and*
  - (b) *issue debt securities.”*

31. The manner in which profits of a licensing trust are regulated is the subject of section 307 of the SSAA. It states:

***“307 How licensing trust may spend profits***

*A licensing trust may spend or distribute the net profit that it makes in performing its functions for all or any of the following purposes:*

*(a) the promotion, advancement, or encouragement of education, science, literature, art, physical welfare, and other cultural and recreational purposes:*

*(b) building, laying out, maintaining, or repairing buildings or places intended to further any of the purposes described in paragraph (a):*

*(c) any other philanthropic purposes.”*

32. Section 331 states that a trust may determine how to conduct its business and as such how to invest its monies to meet its objective under section 307.

33. Section 334 of the SSAA specifies the requirement for the production of audited financial statements. In summary, these are independently audited and the auditor is appointed by the Auditor-General. To support its submissions, the respondent has referred to its audited financial statements in the guide which is the subject of this complaint. Those audited reports are being provided as separate attachments to these submissions as Attachment “B”.

34. The way licensing trusts will have their statutory monopoly removed is if a poll of electors is held where either 15% of registered electors request for a competition proposal to be held, or the licensing trust resolved to hold a competition proposal – commonly referred to as a referendum (section 350 of the SSAA).

35. It is noted that Mr Smale and WALTAG have been in the process of seeking for a competition proposal to be held since May 2018. This has not yet occurred.

36. As the Authority is aware, the purpose of the SSAA and its key objective is the reduction of harm from alcohol sales. In the seminal work of the Law Commission which preceded the SSAA, it was noted that licensing trusts are a positive influence on the moderation of alcohol sales as the community runs and operates them – the motives of those in charge is set by the public who elect the members of a licensing trust every three years.<sup>1</sup> The Law Commission report goes on to state at paragraph 15.3 that:

*“Licensing trusts are somewhat of an anomaly because they retain a degree of trade protection in an Act that is targeted at contributing to the reduction of liquor abuse. Trusts are controversial because they are seen as anti-competitive. In particular, because licensing trusts with monopoly rights have the sole right to establish off-licence premises, the two main supermarket chains (Australian-owned Progressive*

*Enterprises and New Zealand cooperative, Foodstuffs) are unable to sell alcohol in these districts. This is a significant restriction on competition in off-licence alcohol sales. However, the licensing trusts are generally well supported in their communities because of the return of profits to community initiatives. The amount of money available to these communities would almost certainly reduce if the monopoly rights were removed.<sup>2</sup>*

37. The Law Commission then goes on to address the potential for removal of licensing trusts, and refers back to the Laking Committee's work. It concludes by stating at paragraph 15.4 -15.5 that:

<sup>1</sup> *Alcohol in our Lives: Curbing the Harm*, Law Commission Report, April 2010, Report 114. Chapter 15 specifically relates to licensing trusts.

*"The removal of licensing trusts' monopolies has been considered previously. In doing so, the 1986 Working Party on Liquor (the Laking Committee) made it clear*

*that, in its view, neither public nor private control of liquor sales could claim greater success in the struggle against alcohol abuse, but acknowledged licensing trusts were generally accepted as a valuable community asset and declined to recommend their removal. In 1997, the Liquor Review Advisory Committee recommended the removal of trust monopolies. However, the government determined not to make changes to licensing trusts in 1999.*

*We consider the reasons are not sufficiently powerful to make major changes to licensing trusts in the new legislation. The community approval of the role of trusts and the democratic means available for the removal of trust monopolies leads us to the conclusion that the new legislation should not alter the law in relation to licensing trusts in a major way.*

*Few submitters expressed a desire for the monopoly rights of licensing trusts to be removed. Consultation with the public in areas with licensing trusts indicates there is strong support for retaining the current rights of these trusts. Communities are supportive of the notion that profits made from the sale of alcohol are returned to the community through the funding of projects that benefit a range of local people. There is also a perception that the licensing trusts place greater controls on the proliferation of alcohol outlets. [emphasis added]*

38. It is in light of this framework and the continued community support behind licensing trusts, as well as Parliament's clear direction contained in many reviews as to the purpose and function of licensing trusts that the information booklet/guide prepared by the respondent must be read in.

39. It is noted that in advertising by WALTAG and Mr Smale the fact that the trusts are community owned is constantly critiqued and questioned. That is likely due to the lack of understanding as to the years of work from the 1940s as to the management of alcohol harm and the reason for the establishment of licencing trusts. However, disliking a regulatory model does not give rise to an argument of deception at law.

40. It is simple to pull apart elements of the guide, critique it and suggest it is seeking to influence the public. However, that is an unusual way to read such a document, given that the type of communication complained of has been in existence

for the last 20 years, the purpose of which is to communicate the statutory role of the respondent.

<sup>2</sup> Supra, page 248-249.

### **The guide: All About Your Trusts**

41. The guide was produced as part of the communication which the respondent undertakes with the public. If read from beginning to end, without being taken out of context, it communicated the legal and operational framework under which the respondent operates. It also contains this information in the “About Us” tab of its website: [www.thetrusts.co.nz](http://www.thetrusts.co.nz). This is an evolving set of information and is regularly updated.

42. Meaning of a single phrase or word cannot be taken from that single word – but is contextual. The Interpretation Act 1999 although applying to statutory interpretation has been used in relation to matters where an aide is required to interpret key words or phrases in dispute. Section 5 of the Interpretation Act 1999 states that meaning must be ascertained from the text and purpose of the document. This principle is applicable to the interpretation of any document. Section 5(3) of the Interpretation Act goes on to say that examples of those indications as to purpose and meaning are “*preambles, the analysis, a table of contents, headings to parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format.*” If this approach is applied to the interpretation of the guide, it is clear that the format and material that the guide is for information. The Trusts have other avenues of communication to influence its market, which the Authority has previously considered. This includes its Facebook page, its magazine Our West and other electronic direct marketing means.

43. How an organisation communicates with the public can at times be by way of advertising, at other times it is by way of information. The two serve very different purposes and this guide is the latter, informational. The submission now turns to discuss the format of the guide and its content.

### **Discussion of the guide**

44. In the introductory page (page 3) it clearly states:

*“We have prepared this booklet to share more about what we do, why we exist, and how you can help us to keep serving you well and in turn give back to West Auckland forever.”*

45. The language is not leading, persuasive or influential. It is information – much like the Auckland Council “About Us” where the roles and functions of the Council are set out, both regulatory and non-regulatory. For an example please see: <https://www.aucklandcouncil.govt.nz/about-auckland-council/how-auckland-council-works/Pages/auckland-council-explained.aspx>.

46. Simply communicating the function of an organisation and the requirements it operates under is not considered to be leading, persuasive or influential. This will be discussed in more detail below.

47. Mr Smale takes great exception in his complaint that the respondent is owned by and gives back to the community. This is a further statement on page 3 of the guide. However, as discussed this is simply the statutory position of the trusts who are the respondents.

48. Page 4 contains several statements which identify the basis of the financial position which Mr Smale complains of. As part of the section “About your West Auckland Trusts” there is a clear statement about the future direction of the trusts. This future direction is relevant to the way an ordinary person will perceive the information Mr Smale complains of.

49. The third and fourth paragraphs on page 4 state:

*“We have a strong focus on our business performance because if there is no profit, we can’t give it back. In the 2019/20 financial year, we will give back over \$3.5 million through our flagship giving programme the Million Dollar Mission, a one-off donation to support the Special Care Baby Unit at Waitakere Hospital, along with a range of donations, sponsorships, grants and household distributions.*

*All the money your Trusts give back comes from retail and hospitality operations and investments.”*

50. This statement specifically sets out that the *future direction* of the respondent – it is a statement of intent for the following financial year. That is the lens through which other financial information on pages 14 and 15 is to be read and understood.

51. This position is further strengthened when the following pages are looked at and the context in which they are presented. Page 5 is a pictorial illustration of how the funds are utilised, there is investment, there is giving back and those funds are regenerated, and the cycle continues.

52. As part of giving back, being a requirement in section 307 of the SSAA, the guide further sets out the future direction of the trusts in fulfilling its statutory function. At page 6 the following statement captures this future direction:

*“We can see from our past donations that every dollar counts. Our investment strategy is designed to help ensure we can give back more in future. We’re on track to be giving back \$5 million per year to the community from 2020 onwards. Read on to see how we’re doing.”*

53. The guide then goes on to specify some projects that have been funded, their stores and hospitality venues, their off and on-license premises. The only advocacy contained in the guide is on page 11 where three specific venues are advertised.

54. The guide then turns to its investment strategy at page 12. First it looks back and then it looks forward. There is a statement as to the historic position by referencing a review in 2013. Then an explanation of what the past looked like, from

a giving back point of view, and what the trusts think the future is “likely” to look. The guide clearly states that

*“We are confident that we can grow our community giving to \$5 million a year by 2020, compared to less than \$1 million back in 2012. We want to ensure The Trusts can give back for good and all three parts of our business - retail, hospitality and investment – have a role to play in that.”*

55. This is where Mr Smale’s complaint is deceptive. The complaint alleges that the Trusts are misrepresenting the past giving back numbers. However, it is very clear in the statement on page 12, as quoted above, that in the past the amounts given back were greatly less than present and that which is likely to occur in the future based on the trusts’ financial strategy.

56. This submission is supported by the pictorial on page 14, which in graphic terms shows historic and future forecasts in all areas of the business, including giving back. It is clearly shown that in 2011 in actual terms less than \$250,000 was given back, where as, by 2020, the projected giving back is \$3.5 million.

57. The graphic on page 15 then shows what the 2018/19 revenue was spent on. It is clearly shown that 6% of the revenue is profit. Accordingly, this is the percentage that is given back. The pie chart on page 14 sets out the strategy that will be applied to that 6% which is the profit. It is therefore, not the 47% of income, but the profit.

58. Mr Smale has provided his calculations based on the information he has received through information requests and published data. However, the respondent disagrees with his assertions and has reviewed its information. It stands by its assertion as depicted on the pie chart that as at the date of the publication of the guide, and based on the 2018/19 figures which is shown by way of an astrict it is 47% of the 6% which are the profits that likely to be given back going forward. Given the statements as to what was given back in 2011, it is clear that the pie chart is a depiction of a forward looking strategy and based on the 2018/19 financial year.

59. It is submitted that the language complained of “*where our profits go in a typical year*” is consistent with the current figures as at the date the guide was published. It is noted that since the guide was published audited financial statements have been completed and the on-line version of the guide will refer to the typical ‘giving back’ being based on the 2018/19 financial statements. If any other physical copies are made of the guide a similar update will be provided.

60. With respect, Mr Smale’s complaint is losing sight of the context in which the pies chart was created. The 47% is based on the 2018/19 year, this is clear from the preceding chart which states 2018/19. Furthermore, additional clarity is gained from the use of the words “giving back now”.

61. There can be no allegation of misconception when there are clear statements of fact. Had there been no reference to years on which the profits were received, or that the 47% was what has been given back “now”, then it is arguable that there is uncertainty.

62. This submission is further supported by the words that begin the section in which the pie chart and related charts appear: “investing for the future.” It states on

page 12, as noted above, a very small portion was given back in 2012, and the future strategy is to give back up to \$5 million by 2020. This section is broken into investment in people and the business. As part of the section on the business there is a discussion on the 2018/19 year and where revenues and profits go. This position is further affirmed by the discussion on page 14 as to how low the giving back used to be in 2011.

63. When read from beginning to end, and taking the objective person's viewpoint, it is not logical to arrive at a conclusion that the pie chart on page 14 is misleading or untruthful. To arrive at this conclusion, the chart would have to be read without reference to the preceding information. If read from beginning to end, without being taken out of context, the words used in this section, including "likely", clearly articulate the future direction of the trusts.

64. Furthermore, if Mr Smale is correct as to the 47% being wrong, which the respondent does not accept, then respondent must be wrong on the remainder of its calculations, which has not been alleged. These figures and the basis for them has been reviewed by chartered professional accountants and independently appointed auditors. They confirm that these assertions are factual and correct and as noted in the guide based on the 2018/19 year. The guide invites readers to see the detail by pointing them to the website where the financial information, and now the annual report and 2018/19 audited financial statements are contained.

### **C. Is the guide advertising and is there a breach of Rule 2(b) truthful presentation?**

#### ***Advertising***

65. To fall within the jurisdiction of the Authority and be subject to Rule 2(b), material must first be considered to have been 'advertising'. Therefore, in accordance with Rule 2(a) the matter complained of must be identifiable as advertising. The guideline to the definition of advertising provided by the Authority on its website states that "*it must be obvious to, and well understood by, the audience that they are engaging with an advertisement regardless of the form the advertisement takes or the platform where it appears.*"

66. 'Advertising' is defined by the Authority as 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*. The italics have been empathised as these are the key pre-requisites of material that can be considered to be advertising.

67. For the respondent it is submitted that this first hurdle is not passed: the guide in its entirety is not advertising material and the part of the information complained of is not misleading advertising.

68. The information on which the statements are made are actual and not interpretations of financial information. The guide is not "messaging" or "influential." It is not advocacy and it is therefore not advertising.

69. The guide endeavours to capture the investment and giving back strategy of the two trusts which are forward looking and which relate to the functions of licensing trusts under sections 305 to 307 of the Sale and Supply of Alcohol Act 2012 (**the**

**SSAA**). The manner in which this communication is established in the guide is consistent with the way in which the Law Commission captured the role of licensing trust.

70. The Trusts have other avenues of communication to influence its market, which the Authority has previously considered. This includes its Facebook page, its magazine *Our West* and other electronic direct marketing means.

71. The respondent has provided support for its assertions through the provision of audited financial reports confirmed to correctly support the assertions in this guide. The respondent does not agree with the unaudited and unverified information on which the complainant has created his own self declared approximations.

72. The current situation can be compared to the recent findings of the Authority against the National Party with regard to the lack of data to support their assertions regarding the level of funding to the provisional growth fund.<sup>3</sup>

73. In the case of the National Party complaint, the respondent in that case was clearly advertising a political position and it was clear that was the case. The National Party did not deny that. In their response they accept that they were advertising, but rely on truthful presentation. The decision relied on by the Authority was Complaint 18/200, to substantiate the position as to advertising. Similarly, another related decision where the party was advertising and had created misleading headlines is the advertisement on the New Zealand National Party Facebook page headed “Labour’s Car Tax”. In that case again, the National Party accepted that it was advertising, and that the information required to support the assertion of truthful presentation was lacking. That advertisement was required to be removed.<sup>4</sup>

### ***The average consumer and advertising***

74. The matter of when material is ‘advertising’, and in particular how the public, or affected consumers might receive the information and whether or not it is misleading has been recently considered in the Courts. In *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd*<sup>5</sup>, the Court of Appeal considered the description of the warranties provided by each of the parties and how headline information was to be considered by consumers when it was accompanied by various qualifiers. In that case, the Court held that the focus of the relevant consumer was the reasonable consumer, not the “*the outliers [who] were consumers who were unusually stupid or ill-equipped, or those whose reactions were extreme or fanciful.*”<sup>6</sup>

75. In regard to whether representations could be misleading under the Fair Trading Act, in *Cavalier Bremworth*, the Court of Appeal noted that it was the dominant message being communicated that was relevant; that if there were a number of representations, they were not be viewed or considered in isolation. The material had to be viewed as a whole.<sup>7</sup>

76. In this context, the over-reliance on the term “likely” would lead to a perverse outcome if viewed going backwards as Mr Smale has done. The clear indication to the public as contained in the guide is that based on the

respondent's investment strategy, and its giving back now (ie 2018/19 year), the current trend is likely to continue in the same way. The respondent explicitly states in the guide that previous years show a very low level of giving back and that this was changing as each year went by – this is particularly clear when looking at pages 12-15.

77. It is submitted that in accordance with the authority established by the Court of Appeal in *Cavalier Bremworth*, the average person reading the guide would consider that going forward, the respondent was likely to return more to the community through its giving back strategy, than what it had done historically in 2011, 2012 and preceding years.

#### **D. Response to the complaint: summary of position**

78. The respondent considers that there is a procedural issue invalidating the complaint. The complainant is an advertiser and the waiver provided is erroneous and false. Detail of why the respondent considers the complainant to be an advertiser is address above under procedural issues.

79. Should the Authority exercise its discretion to determine the complaint, the respondent requests a hearing in person in accordance with the powers set out in the Rules and the Complaints Procedure. The respondent is entitled to a hearing under section 27 of the Bill of Rights Act 1990.

80. The respondent's key submission is that the guide is neither advocacy or advertising. Rule 2(b) of the Advertising Code requires that material must first be considered to have been advertising. Therefore, in accordance with Rule 2(a) if it is not clearly advertising, then Rule 2(b) cannot be applied. To come within the definition of advertising, the suggested publication "*must be obvious to, and well understood by, the audience that they are engaging with [that the material is] an advertisement regardless of the form the advertisement takes or the platform where it appears.*"

81. The respondent does not consider that the guide or any part complained of is advertising. The guide is not intended to *influence the choice, opinion or behaviour of those to whom it is addressed*. The guide endeavours to capture the investment and giving back strategy of the two trusts which are forward looking and which relate to the functions of licensing trusts under sections 305 to 307 of the Sale and Supply of Alcohol Act 2012.

82. In regard to Ground 1 of the complaint, that "*the brochure is designed to promote the Trusts and their current strategies, performance and advocate for the continuation of their monopoly rights*", the respondent refutes this allegation. The guide is not advocacy or advertising and is not a brochure. It is information to communicate the function of the respondents under the statutory requirements of the Sale and Supply of Alcohol Act 2012. The detailed reasoning associated with this response is set out above.

83. With regard to the complaint referred to as Ground 2, the use of the infographic in the form of a pie chart to show how the trusts spend their income on page 15, the respondent has stated above that this is not a form of advertising and it is information as to the way the 2018/19 profits have been distributed - in accordance with the 2018/19 distributions, 47% of profits (profits having been 6% of income), were returned to the community. This is supported by the preceding information in the guide and the 2018/19

financial records, which have now been audited and available, along with the annual report.

84. Lastly, as to the Ground 3 of the complaint, that “*the average consumer would interpret the words “a typical year” to mean that the figures presented were representative of recent activity/results*”, this is incorrect. According the principles applied in the Court of Appeal in the *Cavalier Bremworth* case, the average consumer, reading the entire guide would arrive at the conclusion that the recent year is typical of the direction of the respondents going forward based on their investment and giving back strategy. Especially because, the guide expressly states how low the giving back figures were in the past.

85. The respondent respectfully submits:

- a. The complaint not be considered and should be struck out due to the erroneous and false waiver provided by the complainant;
- b. In the event that the complaint is to proceed, the respondents seek a hearing in person;
- c. In the alternative, and in the event that the matter is determined on the papers, the respondents request that the complaint is not upheld.

<sup>3</sup> Complaint 19/279: New Zealand National Party – Advertisement, 27 August 2019 and Complaint 18/200: New Zealand National Party.

<sup>4</sup> Complaint 19/275: New Zealand National Party – 27 August 2019.

<sup>5</sup> *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, 3 NZLR 611 (Court of Appeal, Wellington).

<sup>6</sup> *Ibid*, see para [20], [24], [26], [43], [44], [48], [49], [50].

<sup>7</sup> *Ibid*, see para[59].

## **FURTHER RESPONSE FROM ADVERTISER REGARDING DEFINITION OF AN ADVERTISEMENT**

### **May it please the Authority**

1. On 9 October the Advertising Standards Authority (**the Authority**) advised the parties that further submissions were to be provided as to whether the Guide subject to the complaint could be classified as advertising.

### **Waiver**

2. By way of the same letter the Chair of the Authority’s Complaint’s Board advised that even if Mr Smale is a ‘competitor’ there is no bar to the complaint being considered.

3. By way of summary, the respondent’s position on this point is that as an advertiser, Mr Smale must make a disclosure of the fact that he is also in advertising and pay the requisite fees for the filing of the complaint. Only lay persons can make a complaint without paying the fee and that is the purpose of the waiver.

4. The respondent’s submission on this point remains and is comprehensively addressed in its submission.

### **Nature of the complaint**

5. With regard to the nature of the complaint, the respondent's position is that the issue of electoral advertising as an issue has been addressed by another body. As such, whilst there is no bar to a complaint to the Authority on the same issue, the fact that during the period of electoral advertising this matter was dealt with makes it moot now.

6. The Complainant appears to suggest he did not take the same complaint elsewhere. However, an article by Stuff, the news site, quotes Mr Smale and suggests otherwise. A link to the articles is in the email attaching the submission. Additionally, the Electoral Office advised that that it was looking at the complaint whether the Guide was advertising and dismissed the complaint. A copy of the decision has been requested.

### **Veracity of the information**

7. The respondent maintains its assertion that:

a. The guide was produced as part of the communication which the respondent undertakes with the public. If read from beginning to end, without being taken out of context, it communicated the legal and operational framework under which the respondent operates. It also contains this information in the "About Us" tab of its website: [www.thetrusts.co.nz](http://www.thetrusts.co.nz). This is an evolving set of information and is regularly updated.

b. The meaning of a single phrase or word cannot be taken from that single word – but is contextual. The respondent relies on the Interpretation Act 1999 submission it made in its original submission.

c. It is clear from the format and material in the Guide that it is for information. The Trusts have other avenues of communication to influence its market, which the Authority has previously considered. This includes its Facebook page, its magazine Our West and other electronic direct marketing means. These other avenues have been accepted as being advertising.

d. This submission is supported by the pictorial on pages 14 and 15 of the Guide, which in graphic terms shows historic and future forecasts in all areas of the business, including giving back. It is clearly shown that in 2011 in actual terms less than \$250,000 was given back, whereas, by 2020, the projected giving back is \$3.5 million. This is based on the investment strategy that is set out in the Guide. This issue is comprehensively addressed in the first submission on behalf of the respondent.

e. Mr Smale has not provided support for his assertion that the diagrams on pages 14 and 15 are wrong. The financial reports, which formed part of the submission support the information contained in the Guide. Mr Smale has not refuted this. Neither has he produced any alternative information to support his assertion.

f. Mr Smale states his figures are approximations. The respondent has provided real audited figures. Mr Smale has not refuted the figures provided by the respondent and the 2018/19 annual report which supports the diagrams on pages 14 and 15 of the Guide.

g. Mr Smale's complaint is losing sight of the context in which the pie chart was created. The 47% is based on the 2018/19 year, this is clear from the preceding chart which states 2018/19. Furthermore, additional clarity is gained from the use of the words "giving back now".

8. When read from beginning to end, and taking the objective person's viewpoint, it is not logical to arrive at a conclusion that the piechart on pages 14 or 15 are misleading or untruthful. To arrive at this conclusion, the chart would have to be read without reference to the preceding information.

9. If read from beginning to end, without being taken out of context, the words used in the section giving back, including "likely", clearly articulate the future direction of the trusts. In the most recent update to the Guide on the Trusts website (thetrusts.co.nz), there is reference to the 2018/19 figures now that the audited financial information has been released.

### **Is the guide advertising and is there a breach of Rule 2(b) truthful presentation?**

10. With regard to the request for further submissions on whether or not the guide can be considered to be 'advertising' under the code, comprehensive submissions have been made by the respondents.

11. Mr Smale's submission of 19 October does not refute those submissions of the respondents or provide any alternate assessment. He simply asserts that the guide, and the section on giving back, is "unambiguously advertising". No support is provided for this assertion.

12. Without a foundational basis for making the assertion, and how under the Code the Guide or any aspect of the Guide meet the test, the complaint remains unsubstantiated.

13. To fall within the jurisdiction of the Authority and be subject to Rule 2(b), material must first be considered to have been 'advertising'. Therefore, in accordance with Rule 2(a) the matter complained of must be identifiable as advertising. The guideline to the definition of advertising provided by the Authority on its website states that "it must be obvious to, and well understood by, the audience that they are engaging with an advertisement regardless of the form the advertisement takes or the platform where it appears."

14. 'Advertising' is defined by the Authority as 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*. The italics have been empathised as these are the key prerequisites of material that can be considered to be advertising.

15. For the respondent it is submitted that this first hurdle is not passed: the guide in its entirety is not advertising material and therefore that part of the Guide complained of is not misleading advertising because it is not advertising to begin with.

16. The information on which the statements are made are actual and not interpretations of financial information. The guide is not "messaging" or "influential." It is not advocacy and it is therefore not advertising.

17. The guide endeavours to capture the investment and giving back strategy of the two trusts which are forward looking, and which relate to the functions of licensing trusts under sections 305 to 307 of the Sale and Supply of Alcohol Act 2012 (**the SSAA**). The manner in which this communication is established in the Guide is consistent with the way in which the Law Commission captured the role of licensing trusts. This issue has been comprehensively set out in the earlier submission on behalf of the respondents.

18. The Trusts have other avenues of communication to influence its market, which the Authority has previously considered. This includes its Facebook page, its magazine *Our West* and other electronic direct marketing means.

19. As noted in the seminal text on Media Law in New Zealand, the spirit and intent of the matter subject to the complaint must be considered in the application of the relevant code.<sup>1</sup> The purposive interpretation of the Guide and the Code result in a finding of fact that the guide is not seeking to *influence the choice, opinion or behaviour of those to whom it is addressed*.

20. The effect of the code and in particular Rule 2(b) is to complement and not replace the law. To be subject to the Code the matter complained of must be within the terms of the Code. For the reasons set out in the first submission on behalf of the respondents and in this submission, the Guide is not advertising.

21. If material communicating a statutory function is presented in a colourful and interactive way, such as the Guide, (printed and online) is considered to be 'advertising' merely by its appearance, rather than its content, then a host of other communications by various entities can be considered advertising. This is not the intent of the law. A communication method cannot be considered advertising merely due to how it looks; it is the substance which must satisfy the test under Rule 2 and the Code.

22. Mr Smale has not specified how the guide seeks to *influence the choice, opinion or behaviour of those to whom it is addressed*.

<sup>1</sup> Burrows and Cheer, *Media Law in Zealand*, Lexis Nexis, 7th Edition, 2015. See in particular Chapter 15.

23. In the absence of why the material is considered to be 'advertising' by Mr Smale, the Authority only has the viewpoint of the respondent, which is that the guide is not advertising, and is not caught by the code. Even if it is, the average reader would consider the Guide as informational and setting out the operations of the two Trusts and their future direction.

24. With regard to the average consumer and advertising, the matter was comprehensively addressed in the earlier submission of the respondent. In reliance on the Court of Appeal decision of *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd*<sup>2</sup>, the respondent submits that the average member of the community who would read the Guide, is unlikely to consider it to be advertising. The guide contains information about the activities of the respondents.

25. In this context, the over-reliance on the term "likely" would lead to a perverse outcome if viewed going backwards as Mr Smale has suggested. The clear indication to the public as contained in the Guide is that based on the respondent's investment strategy, and its *giving back now* (i.e. 2018/19 year), the current trend is likely to continue in the same way. The respondent explicitly states in the guide that previous years show a lower level of giving back if compared to 2018/19 and that this was changing as each year went by – this is particularly clear when looking at pages 12- 15.

## Conclusion

26. It is submitted that in accordance with the authority established by the Court of Appeal in *Cavalier Bremworth*, the average person reading the guide:

- a. Would not consider it be advertising under the Code and Rule 2(b);
- b. Would consider the guide to be informational; and

- c. Going forward, would read the Guide in the manner suggested: that going forward the Portage and Waitakere Licensing Trusts are likely to return more to the community through their giving back strategy; that is more than what it had done historically in 2011, 2012 and preceding years.

27. The guide is not intended to *influence the choice, opinion or behaviour of those to whom it is addressed*. The guide endeavours to capture the investment and giving back strategy of the two trusts which are forward looking, and which relate to the functions of licensing trusts under sections 305 to 307 of the Sale and Supply of Alcohol Act 2012.

<sup>2</sup> *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, 3 NZLR 611 (Court of Appeal, Wellington).