

<b>COMPLAINT NUMBER</b>	19/425
<b>APPEAL NUMBER</b>	19/017
<b>COMPLAINANT</b>	C Wright
<b>APPLICANT</b>	Imperial Tobacco Brands New Zealand
<b>ADVERTISER</b>	Imperial Tobacco Brands New Zealand
<b>ADVERTISEMENT</b>	Myblu Radio
<b>DATE OF MEETING</b>	19 March 2020
<b>OUTCOME</b>	Appeal Dismissed, Complaint Upheld

### SUMMARY

The Complaints Board ruled the complaint made by C Wright about the radio advertisement for *myblu* vaping was Upheld.

The Advertiser appealed the Decision. The Chairperson considered that the Application raised sufficient grounds for the matter to be considered by the Appeal Board de novo.

In accordance with the majority, the Appeal Board ruled the Therapeutic and Health Advertising Code did not apply.

In accordance with the majority, the Appeal Board ruled the advertisement was misleading under the Advertising Standards Code.

In accordance with the majority, the Appeal Board ruled the advertisement was in breach of Principle 2 and Rule 2(b) of the Advertising Standards Code.

The Appeal was Dismissed and the Complaint was Upheld.

**Decision:** Complaint **Upheld**, Appeal **Dismissed**

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

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### APPEAL BOARD DECISION

The Complaints Board ruled on 10 December 2019 the complaint made by C Wright about the radio advertisement for *myblu* vaping was Upheld.

The Advertiser appealed the Decision. The Chairperson considered that the Application raised sufficient grounds for the matter to be considered by the Appeal Board de novo.

The Chairperson directed the Appeal Board to consider the advertisement with reference to Principles 1 and 2 of the Therapeutic and Health Advertising Code and Principle 2 and Rule 2(b) of the Advertising Standards Code.

## THERAPEUTIC AND HEALTH ADVERTISING CODE

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

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

## 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 decisions

In considering this complaint the Complaints Board referred to three precedent decisions, Decisions 18/428 and 19/305, which were Upheld and 19/363, which was Not Upheld.

The full versions of these decisions can be found on the ASA website:

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

**Decision 18/428** concerned four advertisements for Alt New Zealand, each with a theme: “Get Fit”, “Get Old”, “Get Young” and “Get Rich”. The “Get Free. Get Fit” advertisement showed a fit-looking woman leaping through a line drawing in the shape of an alt e-cigarette device. The text says: “Get Free, Get Fit. Stop smoking and your lung capacity can increase by up to 30%.” The “Get Free. Get Rich” advertisement showed a man with a handful of \$100 bills feeding them through a line drawing in the shape of an alt e-cigarette device. The text says: “Stop smoking and you could save \$7000 Dollars a Year”. The “Get Free. Get Old” advertisement showed a close-up of a man’s eye as he is looking through a line drawing in the shape of an alt e-cigarette device. As he does so the camera pans backwards to reveal the man has white hair and a white beard. The text says: “Stop smoking and you could add 10 years to your life expectancy.” The “Get Free. Get Young” advertisement shows an image of a smiling woman looking through a line drawing which is the shape of an alt e-cigarette device. As she does so she gives a wink. The text says: “Stop smoking before you’re 25 and your lungs can regenerate.”

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

**Decision 19/305** concerned a television advertisement for *myblu* Vape Device. The advertisement introduces three different people who use *myblu* Vape Device, each for different reasons: savings, appearance and fitness. The script includes the following: “My Savings - \$60 last week – more than we made on tips... My Appearance – Not bad. Hey, that’s not my good side... My Fitness – Keep up bro.” The advertisement ends with the line: “My Freedom – *myblu*. Vape with confidence.”

The Complaints Board said the advertisement did not observe a high standard of social responsibility because the advertisement implies that vaping is a safe activity and you can “Vape with Confidence”. The Complaints Board said that while the studies referred to by the Advertiser support the view that vaping is less harmful than smoking, they do not support the view that there are no risks at all associated with vaping.

**Decision 19/363** concerned three television advertisements for ALT vaping products, each featuring a different fruit or vegetable: broccolini, banana and rhubarb. The Complaints Board said the general consumer takeout of the advertisements was switching from smoking to ALT will cost less and cause less harm. The Complaints Board agreed two of the advertisements made health benefits claims that were substantiated and were socially responsible.

### **The Complaints Board Decision**

The Complaints Board said the advertisement made a health benefit claim and therefore the Therapeutic and Health Advertising Code did apply. The Complaints Board said the health benefit claim made in the advertisement was if you vape instead of smoking, it will benefit your appearance. The Complaints Board agreed however that the health benefit claim made in the advertisement had been adequately substantiated.

The Complaints Board said the advertisement was misleading under the Advertising Standards Code. This is because the advertisement implied that vaping is a safe activity because you can “Vape with Confidence”. The Complaints Board said that while the studies referred to by the Advertiser support the view that vaping is less harmful than smoking, they do not support the view that there are no risks at all associated with vaping.

Accordingly, the Complaints Board ruled the advertisement did not observe a high standard of social responsibility and was in breach of Principles 1 and 2 of the Therapeutic and Health Advertising Code and Principle 2 and Rule 2(b) of the Advertising Standards Code.

The Complaints Board ruled the complaint was Upheld.

### **Advertiser’s Appeal**

The Advertiser appealed the Complaints Board decision on the grounds that:

- the advertisement does not contain any health benefit claims and therefore the Therapeutic and Health Advertising Code does not apply.
- “Vape with Confidence” does not imply that vaping is a safe activity
- even if the Therapeutic and Health Advertising Code did apply, the advertisement does show a high standard of social responsibility
- the Complaints Board made “directly contradictory findings” because it “appears to have incorrectly applied a finding from decision 19/305 which materially influenced its finding that the 19/425 Advertisement was misleading.”

### **The Complainant’s response to the Appeal**

No response to the Advertiser’s Appeal was received from the Complainant.

### **Appeal Board Discussion**

The Appeal Board carefully considered the complaint, the advertisement, the information provided by the Complainant and the Advertiser and the Complaints Board Decision.

### **Vaping and the advertising of vaping is currently not an illegal activity**

The Appeal Board noted that vaping and the advertising of vaping products is currently legal under New Zealand law. The Board noted that the Smokefree Environments and Regulated Products (Vaping) Amendment Bill was introduced to Parliament on Monday 24 February 2020. For further information see: [https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL\\_94933/smokefree-environments-and-regulated-products-vaping](https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_94933/smokefree-environments-and-regulated-products-vaping)

### **Complaints Board application of precedent decisions**

The Appeal Board discussed the Advertiser's comments about the Complaints Board application of precedent decisions.

The Appeal Board reviewed the Complaints Board decisions for Complaints 19/305 and 19/425.

In Decision 19/305, for a television advertisement, a majority of the Complaints Board said:

- the Therapeutic and Health Advertising Code applied to the advertisement.
- the advertisement did not observe a high standard of social responsibility under the Therapeutic and Health Advertising Code, because the advertisement implies that vaping is a safe activity and you can "Vape with Confidence"
- the advertisement was not misleading, because the Advertiser provided sufficient substantiation to support the view that if you vape instead of smoking you will save money and improve your appearance and your fitness

In Decision 19/425 for a radio advertisement, the Complaints Board said:

- the Therapeutic and Health Advertising Code applied to the advertisement.
- the advertisement did not observe a high standard of social responsibility under the Therapeutic and Health Advertising Code, because the advertisement was misleading
- the advertisement was misleading under the Therapeutic and Health Advertising Code because the advertisement implies that vaping is a safe activity and you can "Vape with Confidence"
- the advertisement was misleading under the Advertising Standards Code because the advertisement implies that vaping is a safe activity and you can "Vape with Confidence"

The Appeal Board noted that the decisions applied to two different *myblu* advertisements, one for television (19/305) and one for radio (19/425).

The Appeal Board noted that in both decisions the Complaints Board said the advertisements did not observe a high standard of social responsibility under the Therapeutic and Health Advertising Code, and in both cases the Complaints Board took issue with the implication that vaping is a safe activity and you can "Vape with Confidence".

The Appeal Board noted that in the earlier decision 19/305 this aspect of the complaint was upheld as a breach of social responsibility, whereas in 19/425 it was regarded as misleading.

The Appeal Board acknowledged the Applicant's view that the two previous decisions, one for a television and one for a radio advertisement, created a level of uncertainty regarding the differing application of the Codes. The Board noted that a number of factors contribute to consumer takeout and Board decision-making, including context, medium, audience and product.

#### *Consumer Takeout*

The Appeal Board agreed the consumer takeout of the advertisement was vaping with *myblu* improves your appearance, or makes you look cool.

In addition to this, a majority of the Appeal Board said the advertisement implied that vaping is a safe activity because you can “Vape with Confidence”.

*Audience*

The Appeal Board agreed the target audience for the advertisement included non-smokers. The Board said the inclusion of the voiceover at the end of the advertisement “This actor is a former smoker who vapes, contains nicotine, R18 only” was not sufficient to support the view that the advertisement was only targeting current smokers.

**Therapeutic and Health Advertising Code: Does it apply?**

The Appeal Board considered the Complaint under the Therapeutic and Health Advertising Code.

*Are there any therapeutic or health benefit claims made, and if so, have they been substantiated?*

A majority of the Appeal Board said the advertisement did not reach the threshold to make any therapeutic or health benefit claims and therefore the Therapeutic and Health Advertising Code did not apply. The majority said the advertisement claims that vaping improves your appearance, by making you look cool. The majority said the advertisement doesn’t refer to any specific health benefits which could result from vaping, such as improving physical fitness or having better skin.

A minority disagreed. The minority said the advertisement made an implied health benefit claim and therefore the Therapeutic and Health Advertising Code did apply. The minority said the advertisement makes a health benefit claim by suggesting that vaping, in contrast to smoking, will improve your appearance by making you look good.

The minority said the average consumer is aware that cigarette smoking can damage the skin on your face and leave nicotine stains on your fingers. These negative impacts from cigarette smoking are not associated with vaping and therefore the advertisement implies that vaping is better for your appearance than smoking.

In accordance with the majority, the Appeal Board ruled the advertisement did not make any therapeutic or health benefit claims and therefore the Therapeutic and Health Advertising Code did not apply.

*Was the advertisement misleading, under the Therapeutic and Health Advertising Code?*

A majority of the Appeal Board said the Therapeutic and Health Advertising Code did not apply.

A minority disagreed. The minority said the Therapeutic and Health Advertising Code did apply, and the advertisement was misleading under this Code. This is because the advertisement implied that vaping is a safe activity and you can “Vape with Confidence”. The minority said while the studies referred to by the Advertiser support the view that vaping is less harmful than smoking, they do not support the view that there are no risks at all associated with vaping.

*Did the advertisement observe a high standard of social responsibility, under the Therapeutic and Health Advertising Code?*

A majority of the Appeal Board said the Therapeutic and Health Advertising Code did not apply.

A minority disagreed. The minority said the Therapeutic and Health Advertising Code did apply, and the advertisement did not meet a high standard of social responsibility under this Code. This is because the advertisement was misleading.

In accordance with the majority, the Appeal Board said the Therapeutic and Health Advertising Code did not apply.

### **Advertising Standards Code**

The Appeal Board then considered the complaint under the Advertising Standards Code.

#### *Was the advertisement misleading?*

A majority of the Appeal Board said the advertisement was misleading under the Advertising Standards Code. The majority said the consumer takeout of the advertisement included the implication that vaping is a safe activity because you can “Vape with Confidence”. The majority said the advertisement encourages consumers to vape. The majority said while the studies referred to by the Advertiser support the view that vaping is less harmful than smoking, they do not support the view that there are no risks at all associated with vaping. The majority noted the studies only apply to people who switch from smoking to vaping, they do not refer to non-smokers who adopt the practice of vaping.

A minority disagreed. The minority said the advertisement did not reach the threshold to be considered misleading. In the minority view, the advertisement is promoting vaping and the phrase “Vape with Confidence” means: Have confidence in the *mybu* product. The advertisement is not claiming that vaping is a risk-free activity and the average consumer is aware that vaping products may contain nicotine.

### **In Summary**

In accordance with the majority, the Appeal Board ruled the Therapeutic and Health Advertising Code did not apply.

In accordance with the majority, the Appeal Board ruled the advertisement was misleading under the Advertising Standards Code.

In accordance with the majority, the Appeal Board ruled the advertisement was in breach of Principle 2 and Rule 2(b) of the Advertising Standards Code.

### **Outcome**

The Appeal was **Dismissed** and the Complaint was **Upheld**.

## APPENDICES

1. Description of Advertisement
  2. Complaint from C Wright
  3. Summary of the Complaints Board Ruling
  4. Appeal Application from Imperial Tobacco Brands New Zealand
  5. Response to the Appeal Application from the Media
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### Appendix 1

#### DESCRIPTION OF ADVERTISEMENT

The radio advertisement for My Blu vaping features a woman explaining why she vapes. "Why do I vape with myblu? I care about my appearance. (*Sound of a dress zip*) How do I look sis? Hang on that's my dress! myblu. Try yours today and vape with confidence." The advertisement ends with the voiceover: "This actor is a former smoker who vapes, contains nicotine, R18 only."

### Appendix 2

#### COMPLAINT FROM C WRIGHT

Advertising vaping is the same as cigarettes. And our schools are changing their policies to reflect this. Synthetics and all, it is a serious problem.

This is breakfast radio, listening for the news... it is suggested that I could be vaping instead of smoking a cigarette, because I look good in what I am wearing? What about all the negative health implications?

Is vaping better than cigarettes? We no longer allow advertisements promoting smoking, why are we promoting vaping?!

Under the guidance of a professional stop smoking programme facilitator maybe this is helpful.

But certainly not on national radio at breakfast time.

### Appendix 3

#### SUMMARY OF COMPLAINTS BOARD RULING

##### Issues Raised:

- Truthful Presentation
- Social Responsibility

##### Summary of the Advertiser's Response

The Advertiser defended the advertisement and said it was not misleading and had been prepared and placed with a due sense of social responsibility. The advertisement is not currently playing on New Zealand radio.

##### Summary of the Complaints Board Decision

The Complaints Board upheld a complaint about a radio advertisement for myblu vaping equipment. The Board said the advertisement was misleading because it implied that vaping is a safe activity and you can "Vape with Confidence".

## Appendix 4

### APPEAL APPLICATION FROM THE ADVERTISER

#### Introduction

1. Imperial Tobacco Brands New Zealand ("ITNZ") recently undertook a cross-platform advertising campaign for its myblu vaping product. ITNZ has received complaints about two aspects of that campaign:
  - (a) A television commercial which was the subject of complaints decided in a 15 October 2019 decision ("Decision 19/305").
  - (b) A radio commercial ("Advertisement") which was the subject of a complaint decided in a 18 December 2019 decision ("Decision 19/425").
2. This is an appeal against Decision 19/425, in relation to the Advertisement. In Decision 19/425, the Complaints Board made the following findings:
  - (a) That the Therapeutic and Health Advertising Code ("THA Code") applied to the Advertisement, as it made health benefit claims that, if you vape instead of smoking:
    - (i) it will benefit your appearance; and
    - (ii) you will keep in good physical shape,but that both of these alleged health benefit claims were substantiated by evidence supplied by ITNZ.
  - (b) That the Advertisement breached Principle 2 of the THA Code and Principle 2 and Rule 2(b) of the Advertising Standards Code ("ASA Code") as it misleadingly implied vaping is a safe activity because you can "Vape with Confidence".
  - (c) That the Advertisement breached Principle 1 of the THA Code as it did not observe a high standard of social responsibility, taking into account context, medium, audience and product.
3. ITNZ wishes to appeal Decision 19/425 because:
  - (a) the Advertisement does not contain any health benefit claims, such that the THA Code does not apply;
  - (b) in the overall context of the Advertisement, "Vape with Confidence" does not imply that vaping is a safe activity; and
  - (c) even if the THA Code did apply, the Advertisement does observe a high standard of social responsibility.

4. We address each of these points in further detail below.

Appeal grounds

5. ITNZ relies on the following appeal grounds:<sup>1</sup>

- (a) Rule 6.4(e): It is in the interests of natural justice that the matter be reheard as:
- (i) There is an inconsistency between Complaints Board findings on a similar advertisement produced by ITNZ for a common cross-platform campaign, being the advertisement which was the subject of Decision 19/305. There is uncertainty as to which decision is to be preferred and ITNZ seeks clarity about the interpretation of the THA Code for itself and other advertisers to ensure that advertisements meet appropriate standards going forward.
  - (ii) The Complaints Board appears to have incorrectly applied a finding from decision 19/305 which materially influenced its finding that the 19/425 Advertisement was misleading.
  - (iii) There is case law relevant to how the Advertisement would be viewed by consumers which the Complaints Board may not have considered.
- (b) Rule 6.4(c): Evidence provided to the Complaints Board has been misinterpreted to the extent it has affected the decision. Specifically, the Complaints Board appears to have considered isolated elements of the Advertisement only and misinterpreted precedent decisions in reaching its findings.

Health benefit claims were not made

6. ITNZ says that the Advertisement does not make any health benefit claims. The THA Code therefore does not apply.

*Decisions in 19/305 and 19/425 are directly contradictory*

7. As noted above, the advertisements subject to complaints 19/305 and 19/425 were produced as part of the same advertising campaign.

8. The TVC subject to Complaint 19/305 contains three sections. One of those sections contains content that is essentially the same as the content in the Advertisement subject to Complaint 19/425. A comparison of the relevant extracts of the two advertisements is set out below, for reference:

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<sup>1</sup> Rule 6.4, Second Schedule, Advertising Standards Complaints Board Complaints Procedures

Advertisement addressed in Decision 19/305 (relevant extracts)	Advertisement addressed in Decision 19/425
[Woman applying lipstick and then vaping with myblu]	[Sound of hairdryer]
My appearance? [as she's putting on jacket]	Why do I vape with myblu? I care about my appearance.
Not bad. Hey! That's not my good side [as she pushes camera away]. ...	[Zip dress sound] How do I look sis? Hang on that's my dress!
My freedom. myblu. Vape with confidence.	My appearance. myblu. Try yours today and vape with confidence.
R18+ This product is for adults over the age of 18. The actors featured in this advertisement represent former smokers who have transitioned to vaping.	This actor is a former smoker who vapes, contains nicotine, R18 only.

9. Both advertisements:
- (a) present a female actor getting ready to go out. The use of images showing her putting her jacket on in the TVC serve the same contextualising purpose as the sounds of the actor blow-drying her hair and putting her outfit on in the Advertisement;
  - (b) contain the same high-level implied claim about appearance benefits of a former smoker who vapes with myblu;
  - (c) feature identical consumer take-outs about former smokers transitioning to vaping because they care about their appearance;
  - (d) contain prominent disclaimers specifying that the advertisements feature former smokers who have transitioned to vaping and an age restriction. The advertisement in 19/425 goes further by specifying that myblu features nicotine; and
  - (e) use the "Vape with Confidence" tagline at the end of the advertisements.
10. There is therefore considerable similarity between the tone, content and intended message of the two advertisements. Despite this similarity, the Complaints Board has made directly contradictory findings in respect of whether the two advertisements make health benefit claims.
11. In Decision 19/305, after deciding that the THA applied to the advertisement in relation to the reference to fitness (which the Advertisement does not contain) the Complaints Board said:

The Complaints Board agreed that the Therapeutic and Health Advertising Code does not apply to the other two implied claims in the advertisement, relating to making savings and improving appearance, as they were not making any therapeutic or health benefit claims.

(emphasis added)

12. In Decision 19/425, the Complaints Board said:

The Complaints Board said the health benefit claim made in the advertisement was if you vape instead of smoking, it will benefit your appearance.

The Complaints Board said the advertisement contained an implied claim that if you vape, you will keep in good physical shape. This suggestion was conveyed when the woman in the advertisement zipped up her dress and asked: "How do I look sis?"

(emphasis added)

13. In other words:

- (a) in Decision 19/305, the Complaints Board held that a claim of "improving appearance" was not a therapeutic or health benefit claim; whereas
- (b) in Decision 19/425, the Complaints Board held that a claim of "benefitting appearance" was a therapeutic or health benefit claim.

14. "Improving appearance" and "benefitting appearance" are synonymous. As such, those two findings are directly contradictory.

*"Benefitting appearance" is not a health claim*

15. The finding in Decision 19/305 is the correct one. General claims about appearance are not statements about health or wellness. The statements are not claims about maintaining or promoting health, wellness or the normal structure or function of the body. More is required for a claim of a benefit to appearance to be a health claim.

16. For example: the application of makeup is (on one view) likely to benefit a person's appearance, but there could be no suggestion that a statement that applying makeup benefits one's appearance makes any implied or express claim about the health or wellness benefits of applying makeup.

17. The high level appearance claims made in the advertisements addressed in Decisions 19/305 and 19/425 can be distinguished from the specific health benefit claim based on a "better looking skin" claim in Decision 19/363. The advertisements in Decision 19/363 compared vaping to smoking, with the use of various fruits or vegetables in place of cigarettes. One of the advertisements depicted an actor "smoking" a banana and saying:

Wrinkly, saggy skin, that's where bananas can take you. So I switched to ALT...

18. The advertisement therefore included a specific health benefit claim about maintaining the normal structure of the body: that whereas smoking causes wrinkly, saggy skin, vaping does not.
19. The Advertisement in issue in Decision 19/425 does not contain a specific health benefit claim of this nature. The Advertisement says nothing about maintaining the normal structure of the body. Instead, at most, it contains a generic claim that vaping is better for your appearance than smoking: much in the same way that applying makeup may be better for your appearance than not doing so.
20. It follows that the "benefiting appearance" claim should not be considered a health benefit claim.

*The Advertisement does not make another implied health benefit claim*

21. As noted above, Decision 19/425 also identified a second implied health benefit claim in the Advertisement, being that vaping keeps former smokers in good physical shape.
22. The Advertisement is presented from the perspective of a former female smoker getting ready to go out. This perspective is conveyed by:
  - (a) the sound of the hairdryer;
  - (b) the accompanying noises of dressing, specifically a zip being done up; and
  - (c) the actor asking her sister a question about her appearance before she leaves.
23. At no point does the advertisement refer or allude to the physical appearance or weight of the voice actor. There is no wording or representation made that could reasonably lay the groundwork for such an interpretation. There is no implied health benefit claim that vaping keeps you in good physical shape.
24. In its Decision, the Complaints Board identified the sound of the dress zipping up and the "How do I look sis?" line as conveying the implied health claim that vaping keeps former smokers in good physical shape. To begin with, ITNZ disagrees with the implied suggestion in that finding that a person only looks good if they are physically fit or trim. In any event, the purpose and, in ITNZ's submission, the effect of those elements of the Advertisement is to identify the perspective from which the Advertisement is being presented, being a woman who is concerned about smoking-related effects on appearance. That is the target audience for the Advertisement. The Advertisement is designed to be relatable and appealing to smokers, particularly women, who are concerned about the effects of smoking on appearance. Such smokers are likely to be concerned, for example, with tar stained fingers, which (unlike smoking) vaping does not cause.
25. It is an unreasonable and artificial stretch to derive a claim about physical fitness or shape from the Advertisement. To do so ignores the substance of the Advertisement, and is inconsistent with the Complaints Board's findings in Decision 19/305 about a substantially similar advertisement.

"Vape with Confidence" is not misleading

26. ITNZ does not accept that the Advertisement makes misleading representations that vaping is a safe activity.
27. ITNZ notes that the Complaints Board purported to rely on Decision 19/305 to support its finding. In particular, the Complaints Board says that the advertisement in issue in Decision 19/305 was found to be misleading, as the advertisement implied that vaping is a safe activity because you can "Vape with Confidence".
28. The Complaints Board did not reach this conclusion in Decision 19/305. In fact, it reached the opposite conclusion, specifically finding that, in the context of an advertisement which also includes the "Vape with Confidence" statement, "the advertisement was not misleading".
29. In fact, the Complaints Board's comments in Decision 19/305 about the meaning of "Vape with Confidence" were in respect of whether the advertisement observed a high standard of social responsibility.
30. In any event, the interpretation of "Vape with Confidence" reached in Decision 19/425 is incorrect when the meaning of that phrase is assessed in context. In determining whether a representation is misleading, the conventional approach is to assess the "overall impression", or "dominant message", of the representation in context.<sup>2</sup> The various elements of a particular representation should be analysed together without analysing the separate effect of each representation.<sup>3</sup> They are analysed by reference to a reasonable consumer (who will not be lacking in perception and can be expected to bring to bear a reasonable degree of common sense").<sup>4</sup>
31. ITNZ submits that the Advertisement consists of the following:
  - (a) the appearance claim;
  - (b) the identification of the specific vaping product "myblu";
  - (c) the "myblu, try yours today and Vape with Confidence" statement; and
  - (d) the disclaimer following immediately after where the Advertisement explains that it is voiced by an actor who formerly smoked, contains nicotine and is R18 only.
32. With this in mind, the overall impression that a reasonable consumer would derive from the Advertisement is:
  - (a) That smokers will experience appearance benefits if they choose to vape instead of smoking.
  - (b) That they can have confidence in the myblu product. The myblu product is identified immediately ahead of the "Vape with Confidence" phrase, with the meaning of the entire sentence inviting listeners to try the myblu product. Listening to the sentence in its full context makes it immediately clear that "Vape with Confidence" means that consumers can have confidence in the myblu product, and not in all forms of vaping with any device. The purpose

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<sup>2</sup> *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] 3 NZLR 611, [2014] NZCA 418 at [59].

<sup>3</sup> At [59].

<sup>4</sup> *Unilever New Zealand Ltd v Cerebos Gregg's Ltd* (1994) 6 TCLR 187 at 10.

and, in ITNZ's view, effect of this claim is to assure customers that the myblu product, being a product sold by ITNZ, a reputable and longstanding international company, undergoes rigorous scientific testing, adopts manufacturing, testing and quality control standards, testing and processes, and vets the quality of ingredients for use.

- (c) That vaping is not a risk free activity. Even within the very limited time available for radio advertising, ITNZ has included prominent disclaimer which makes clear that vaping is not a risk free activity. The disclaimer is not hidden in small print. It is placed prominently in the Advertisement and immediately after the "Vape with Confidence" tagline. The disclaimer explains that the Advertisement is presented by a former smoker who now vapes and that myblu contains nicotine. Consumers are alerted to the fact that vaping is being discussed within the context of smoking and nicotine. The effects of smoking and nicotine are common knowledge to consumers. Consumers would not assume that vaping is a risk free activity where it is discussed in such a context. This is confirmed by the "R18 only" reference.

The Advertisement observes a high standard of social responsibility

33. While, for the reasons set out above, ITNZ's position is that no health benefit claims have been made so the THA Code does not apply, in any event Advertisement observes a high standard of social responsibility.
34. ITNZ conscientiously prepared the Advertisement in line with recommended New Zealand practices in relation to the advertising of vaping and its own internal procedures. It takes its approach to advertising seriously and its intention and goal is always to advertise in a responsible way.

*Standards applied by ITNZ*

35. The Ministry of Health ("MoH") has recognised that responsible advertising of vaping products is acceptable until suitable regulations are introduced. The MoH also considers that vaping products have the potential to contribute to the "Smokefree 2025" goal.
36. MoH guidelines recommend that retailers trade responsibly and not advertise or sell vaping products to children and young people under 18 years of age.<sup>5</sup> ITNZ's approach to the advertising of vaping generally, including in relation to the Advertisement, has been guided by the MoH's directive to "trade responsibly".
37. ITNZ has also adopted Fontem Venture's<sup>6</sup> E-Vapour Product Marketing Standards ("Standards"), which demonstrate ITNZ's commitment to advertising its vaping products (including myblu) responsibly. ITNZ has committed to:

only direct our E-Vapour Products advertising /promotional materials and activities at Adults...

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<sup>5</sup> See <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/vaping-and-smokeless-tobacco>.

<sup>6</sup> Fontem Ventures, a subsidiary of Imperial Brands plc, is a leader in vaping technology and owns e-vapour brand blu.

target our marketing of our E-Vapour Products to Adult Consumers; and

respect the individual's choice ...

provide clear and accurate information about our E-Vapour Products and their relative risks.

38. "Responsibility & Respect" is one of three key commitments in the Standards (alongside "Adults Only" and "Transparency"). The Standards state the following about "Responsibility":

We believe and are committed to providing effective alternatives to Conventional Tobacco Products and that there is a potentially significant public health benefit if smokers switch to our E-Vapour products. In particular, we will:

- direct our marketing activities towards Adult Consumers; and
- only portray and promote images of usage of our E-Vapour Products in safe and appropriate environments.

*Advertisement and target audience*

39. The Advertisement has been designed to appeal to and focusses on current smokers (particularly women). In particular:

- (a) it depicts a female voice actor who indicates a concern for her appearance
- (b) the appearance concern noted is common to female smokers who are over the age of 18 and has no obvious appeal to young children or minors;
- (c) it mentions an 18+ age restriction;
- (d) the appearance claim made in the Advertisement is a comparative claim between vaping and smoking; and
- (e) it represents former smokers that have switched to vaping, as described in the disclaimer at the end of the Advertisement.

40. The Advertisement's target audience is female former smokers between the ages of 30 and 50 who are concerned about the effects of smoking cigarettes on their appearance. Focusing on this target audience, ITNZ scheduled the Advertisement for broadcast on More FM, the target audience of which is women between 30 and 49, with 51% of listeners are between 35 and 64.<sup>7</sup>

**Conclusion**

41. ITNZ is concerned by the significant disparities in the Complaints Board's decisions on fundamentally similar advertisements, in its Decisions 19/305 and 19/425. In our view, the meaning of the advertisements in each case is obvious and the application of relevant advertising codes is clear-cut. With respect, the question of whether

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<sup>7</sup> See <https://www.trb.co.nz/brand-profiles/more-fm>.

advertising of vaping should be allowed is a question for the MoH, and it has recognised that responsible advertising of vaping products is acceptable.

42. In light of the above, ITNZ submits that its appeal of Decision 19/425 should be allowed.
43. ITNZ remains available to assist with any enquiries or requests for information.

## **Appendix 5**

### **RESPONSE TO THE APPEAL APPLICATION FROM THE MEDIA, MEDIWORKS**

Following up on our initial response to this complaint, Mediaworks reiterates that we followed due diligence, querying several aspects of the campaign. We consider the Agency should be responding on behalf of the client as they created the audio and stated they had done " their due diligence in making sure it complies with the current legislation".