

COMPLAINT NUMBER	19/465
APPEAL NUMBER	20/002
COMPLAINANTS	D Reeve & 3 Others
APPLICANTS	D Reeve, N Jones, J Langworthy
ADVERTISER	NZ National Party
ADVERTISEMENT	NZ National Party, Facebook/Twitter
DATE OF MEETING	19 March 2020
OUTCOME	Appeals Dismissed, Complaints Not Upheld

SUMMARY

The Complaints Board ruled the complaints made by D Reeve and three others about the Facebook/Twitter advertisement for the NZ National Party on fuel prices were Not Upheld.

Three Complainants appealed the Decision. The Acting Chairperson considered the Applications raised sufficient grounds for the matter to be considered by the Appeal Board de novo.

The Appeal Board said the advertisement met the requirements to be considered under the liberal interpretation of an advocacy advertisement. The Board agreed the hyperbole used in the graphic illustrations in the advertisement were mitigated by the presence of the actual figures used from a credible data source. The Appeal Board noted the placement of the advertisement on the Advertiser's own social media platforms and the context of robust debate about fuel pricing at the time of posting.

The Appeal Board unanimously ruled in agreement with the majority of the Complaints Board that the advertisement was not likely to mislead or deceive consumers, taking into account context, medium, audience and product and when viewed through the lens of advocacy advertising.

The Appeal Board dismissed the Appeals and ruled the Complaints were Not Upheld under Principle 2, Rule 2(b), Rule 2(c) and 2(e) of the Advertising Standards Code.

The Appeals were Dismissed and the Complaints were Not Upheld.

Decision: Complaints **Not Upheld**, Appeals **Dismissed**

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

APPEAL BOARD DECISION

The Complaints Board ruled on 22 January 2019 the complaint made by D Reeve and three others about the Facebook/Twitter advertisement for the NZ National Party were Not Upheld.

Three Complainants appealed the Decision. The Acting Chairperson considered that the Applications raised sufficient grounds for the matter to be considered by the Appeal Board de novo.

The Acting Chairperson directed the Appeal Board to consider the advertisement with reference to Principle 2 and Rules 2(b), 2(c) and 2(e) of the Advertising Standards 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.

Rule 2 (c) Use of data: Advertisements must not use tests, surveys, research results or quotations from technical and scientific literature in a manner which is misleading or deceptive.

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

Relevant precedent decision

In considering this complaint, the Appeal Board referred to precedent Decision 19/279 Appeal 19/011 in which the Appeal was Allowed and the Complaint was Not Upheld

The full version of this decision can be found on the ASA website
<https://www.asa.co.nz/decisions/>

Decision 19/279 Appeal 19/011 concerned an advertisement on the New Zealand National Party's Facebook page comparing the Budget funding allocation for Pharmac and the Provincial Growth Fund.

The Appeal Board said that the context of the advertisement, posted during the Budget debate in 2019 and the placement on the Party's social media platform was important given the likely audience would have an appreciation of the political landscape and advocacy advertising.

Summary of Complaints Board Decision 19/465

The majority of the Complaints Board did not uphold the complaints and said the actual data displayed in the advertisement was correct which saved the hyperbolic graphic from being misleading, given the political medium used and the principles of advocacy advertising.

A minority disagreed and said the medium and political advocacy arena did not save the advertisement from potentially misleading some consumers who did not take the time to examine the data figures which accompanied the graphic representation.

Summary of Complainants' Appeals

Three Complainants appealed the Complaints Board Decision. The Appeal applications raised matters relating to the likely audience and the nature of social media platforms; the visual impact of the image relative to the words; the truthfulness of the data and the basis for the comparison of the petrol pricing.

Full versions of the Complainants' Appeal submissions can be found in Appendix 4

Summary of the Advertiser's response to the Appeals

The Advertiser reiterated that previous advocacy complaints were dismissed given the political environment and advocacy principles. It stood by its previous arguments and said appeals should not be a forum for political activists.

The Advertiser said by accepting the appeals under grounds (e) Natural Justice, no threshold applies to the other grounds for appeal.

The Advertiser reiterated comments it made in relation to the original complaints:

Hyperbole is acceptable if not misleading, which it cannot be given the figures and source are clearly visible. Context is key with the release of the MBIE report into fuel prices. The sampling period used was the average during National's term in Government and the average at the time of the report when Labour is in Government. The information used has been sourced and presented with complete transparency.

Appeal Board Discussion

The Appeal Board carefully considered all the information provided by the Complainants, the Advertiser, the advertisement, the Complaints Board Decision and relevant precedent Decisions.

Procedural matter

The Appeal Board noted the Advertiser's view with regard to the application of the grounds for Appeal. The Board confirmed the Chairperson ruled to accept the Appeal and it was placed before the Board for *de novo* consideration. The ground or grounds the Appeal was accepted on does not form part of the Appeal Board's consideration in this instance.

Consumer Takeout

The Appeal Board broadly agreed with the Complaints Board about the likely consumer takeout of the advertisement. It said the advertisement's message was that petrol was more expensive under the current Labour Government than the average price during the nine years the National Party were in Government.

Is the advertisement an advocacy advertisement?

The Appeal Board said the advertisement before it fell into the category of advocacy advertising and noted the requirements of Rule 2(e) of the Advertising Standards Code. This Rule required the identity of the advertiser to be clear; opinion to be distinguished from factual information; and factual information must be able to be substantiated. The Advocacy Principles developed by the Complaints Board in previous decisions considered under Rule 11 of the Code of Ethics remain relevant. They state:

1. That section 14 of the Bill of Rights Act 1990, in granting the right of freedom of expression, allows advertisers to impart information and opinions, but that in exercising that right what was factual information and what was opinion, should be clearly distinguishable.

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

Having established the advertisement was from the New Zealand National Party, the Appeal Board noted that political advertisements were not only acceptable but encouraged, as they were an essential and desirable part of the functioning of a democratic society.

The Appeal Board also observed that in a free and democratic society, differences of political opinion should be openly debated without undue hindrance or interference from authorities such as the Complaints Board or Appeal Board, and in no way should political parties, politicians, lobby groups or advocates be unnecessarily fettered by a technical or unduly strict interpretation of the rules and regulations. The Appeal Board considered the rest of the appeal in conjunction with this liberal interpretation under the application of the Advocacy Principles.

Is the identity of the Advertiser clear?

The Appeal Board agreed the Advertiser had met the identity requirements of an advocacy advertisement. The advertisement was approved by the New Zealand National Party leader, Simon Bridges, and had been posted on the New Zealand National Party's Facebook page and Twitter feed. The advertisement also contained the National Party logo. Therefore, the Board said the context, placement and content made the identity of the Advertiser clear.

Placement of the advertisement

The Appeal Board agreed the placement of the advertisement meant it was a message by invitation rather than by intrusion. The Appeal Board said the placement of the advertisement on the Advertiser's own social media platforms, Twitter and Facebook, and the fact the Advertiser had not sponsored or boosted the advertisement to a wider audience was an important consideration.

In assessing the likely audience viewing the advertisement, the Appeal Board said the placement limited its reach. The Appeal Board noted the Advertiser had not taken steps to further distribute the advertisement. It agreed the main target audience was likely to be those who have a political interest in policy and performance comparisons between the major parties and an appreciation of the party's political stance on its own social media platforms. The Appeal Board acknowledged the Applicants' concerns that the post reached a wider audience through individuals sharing it, however the Board noted that this was outside the Advertiser's control and their social media subscribers were the main audience for the advertisement.

Is the advertisement misleading?

The Appeal Board said the graph in the advertisement was clearly not mathematically correct but agreed it did not purport to be an independent analysis of petrol pricing. The advertisement included a hyperbolic graph which aimed to support the Advertiser's political point on petrol

pricing. The Appeal Board said this would not have been acceptable in isolation, but the exaggeration of the graph was saved by including the actual figures.

The Board agreed the visual impact of the graphic may have more impact than the quoted figures for some consumers, however the Board said it had to consider the advertisement in its entirety, which clearly showed the figures used, the basis for comparison and a credible data source.

Is the use of data appropriate?

The Appeal Board considered whether the sampling timeframes used in the advertisement were misleading. The Advertiser had used the nine-year average fuel price during the National Party's term in Government, as opposed to the national average at the time of release of the MBIE report on fuel prices to represent the fuel price in the Labour Government's term.

The Board agreed the date chosen for the Government's fuel price was close enough to the MBIE report release date to be considered a relevant comparison within the context of the political debate about the impact of fuel tax on the price of fuel. The Appeal Board said the advocacy nature of the advertisement meant the Advertiser could present factually correct statements with a bias in its favour in order to make a political point.

The Appeal Board said there was no obligation for the Advertiser to present a balanced argument in an advocacy advertisement. The Board noted an Applicant had suggested an example of a more reasonable datapoint comparison in relation to the fuel tax applied by the respective Governments. The Appeal Board agreed that in most advocacy advertising there is a more balanced way to present data and viewpoints, but that is not the purpose of this type of communication which by its nature supports the Advertiser's position.

The Appeal Board unanimously ruled in agreement with the Complaints Board Decision that the advertisement was not likely to mislead or deceive consumers, taking into account context, medium, audience and product and when viewed through the lens of advocacy advertising.

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

Outcome

The Appeals were **Dismissed** and the Complaints were **Not Upheld**.

APPENDICES

- 1. Description of Advertisement**
 - 2. Complaints from D Reeve, J Langworthy, N Jones, S Popham**
 - 3. Summary of the Complaints Board Ruling**
 - 4. Appeal Applications from D Reeve, J Langworthy, N Jones**
 - 5. Response to the Appeal Applications from Advertiser, NZ National Party**
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Appendix 1

DESCRIPTION OF ADVERTISEMENT

The advertisement on the New Zealand National Party Facebook and Twitter platforms show a background of a petrol pump with the heading "Price of fuel." The accompanying text says, "This government is fleecing New Zealanders through petrol taxes and Jacinda Ardern is the Fleecer-In-Chief."

The image in the advertisement shows the price of \$1.91 /L with a blue bar with the National Party logo and "Tax: \$0.87. *Average Nov 2008-Sep 2017." A red bar shows the Labour Party logo and "Tax: \$1.12 *National average price as at 29 Nov 2019." The advertisement contains the data source and an authorisation statement.

Appendix 2

COMPLAINT FROM D REEVE

The New Zealand National Party posted a campaign advertisement on their Twitter and Facebook pages (and likely other locations) that I believe breaches a number of provisions of the codes, specifically 2(b), 2(c), 2(d) and potentially 1(c) in the identification of the Prime Minister as "Fleecer-in-Chief"

The issues of truthfulness are mostly contained within the deceptive use of data to imply information that is untrue. The graphic compares a 9-year average of price data to a single sample which presents an unrealistic impression of the situation they're describing. Using an average, and showing absolute prices rather than proportional figures, gives the previous National government unreasonable advantages based on inflation, international price changes and increasing distributor profit margins that have contributed to overall cost increases during the period they're averaging.

Additionally, the graphic which presents that misleading data is constructed to further mislead by exaggerating the relative proportions of the Labour graph compared to the scaling in the National graph.

Actual price data when analysed objectively does not present the same outcomes. Depending on the sampling and period it will generally show that tax as a proportion of pump prices rose slightly during National's 9-year term and has remained largely unchanged in Labour's term so far.

The proportion cited in the graphic, for example (\$1.12 tax on a \$2.23 pump price - a 50% tax component), is functionally no different from a sample at the end of National's last term (\$0.94 tax on a \$1.88 pump price - also 50% tax component).

The end result is that this ad is deliberately constructed to be misleading and it presents data in a dishonest way. Additionally, it needlessly demeans the Prime Minister with the phrasing "Fleecer-in-Chief"

COMPLAINT FROM J LANGWORTHY

This ad is deliberately misleading.

1. The scales of the comparative graphs are inconsistent and misleading (vertically and horizontally)
2. The comparison itself is statistically invalid as it compares an average over 9 years when the price increased with a single data point. A more valid comparison would be to compare the final price and tax portion under National with the current price under Labour.
3. The lack of inflation, crude price or exchange rate adjustments further reduces the value of any comparison.

COMPLAINT FROM N JONES

My complaint relates to this digital advertisement from the New Zealand National Party, posted to the party's Twitter account on December 5, 2019:

<https://twitter.com/NZNationalParty/status/1202349076336889856>

I contend that the advertisement is in breach of Principle 2 of the Advertising Standards Code. I draw your attention in particular to Rule 2(b) Truthful Presentation, Rule 2(c) Use of Data and Rule 2(d) Comparative Advertising.

The advertisement features a bar graph purporting to show fuel prices under both National and Labour. The presentation of this data is likely to mislead, deceive or confuse consumers.

1. The Labour bar is thicker than the National bar. There is no reason for this, other than to misrepresent the data.
2. The tax component of the Labour bar (\$1.12) is presented twice as high as the National bar's tax component (\$0.87). Clearly, \$1.12 is not twice the amount of \$0.87.
3. The Labour bar representing total fuel cost under Labour is \$2.23. The National bar representing total fuel cost under National is \$1.91. However, the relative sizes of the bars bear no comparison to the actual figures. The Labour bar has been presented much larger than the figures would justify.
4. For their own bar, the National Party have used an average from 2008-17, not where prices and taxes actually were when they left office. This artificially makes their bar look smaller, and makes it appear it has increased more than it has. For Labour's bar they do not use an average over their term, but a specific point in time. The two are simply not comparable.

This is of course a common pattern from the National Party's social media. The intention, repeatedly, is to mislead, confuse and deceive consumers. I ask that the Advertising Standards Authority act to preserve the integrity of our democracy.

COMPLAINT FROM S R POPHAM

Blatant manipulation of facts in order to send a political message, unfortunately many people see graphics as the truth, but subtle and not so subtle manipulations misrepresent the message and underlying facts. I won't go into the many ways in which this is misleading because it has been summarised very well in this article -
<https://www.statschat.org.nz/2019/12/05/graphicalinflation/>

I am not sure if this is in the purview of the ASA but someone needs to hold the truth to account because this appears to fast becoming the norm,

Appendix 3

SUMMARY OF COMPLAINTS BOARD RULING

Issue Raised:

- Truthful Presentation

Summary of the Advertiser's Response

The Advertiser said the figures are sourced from the MBIE Weekly Fuel Price Monitoring and are extrapolated to show average figures. The numbers are clearly and prominently displayed on the advocacy advertisement and therefore the hyperbole used in the visual representation of a bar graph would not be misleading. The Advertiser said the source data for the graphic is displayed as a footnote and is publicly available information. The Advertiser confirms it is clearly identified as required for Advocacy advertisements.

Summary of the Complaints Board Decision

The majority of the Complaints Board did not uphold a complaint about a National Party fuel tax advertisement which used average fuel price comparisons between National and Labour and an illustrative bar graph which exaggerated the difference between the two figures. The majority said the data displayed was correct which saved the hyperbolic graphic from being misleading, given the political medium used and the principles of advocacy advertising.

Appendix 4

APPEAL APPLICATIONS FROM COMPLAINANTS

APPEAL APPLICATION FROM COMPLAINANT, D REEVE

I would like to appeal the decision rendered in my recent complaint (19/465) in relation to an ad from The National Party that aims to compare petrol prices between the previous National Government and the current Labour Government.

There are a number of points in the decision that I feel don't reasonably apply the principles of the Authority, and which overlook some of the flaws in the original advertisement.

Liberal Interpretation

Per the Advocacy Advertising guidance, the board decided - once being satisfied that the National Party was clearly identified as the advertiser - to use a more liberal interpretation of the codes.

While I accept the basis for this guideline when considering matters of differing policy, the complaint at issue were in relation to factual information and the presentation of those facts. It did not dispute the broader policy issue of whether taxation on fuel was a good policy or reasonable means on raising revenue.

Graph Scale

The decision cites a previous decision in 08/201 in which a graph presented by The National Bank was found to be misleading because there was "no room for hyperbole within financial advertising"

While it's perhaps out of scope for this appeal, it seems that a similar level of honesty should be the baseline with direct political advertising also. This appears to be something that is not currently addressed adequately by ASA standards.

Also, when considering this issue the majority found that the design of the graph was "mischievous" but, due to the liberal interpretation of the code in relation to the ad they decided that it was not misleading. The minority disagreed, I believe rightly, stating that consumers would be likely to assume the visual representation was representative of the figures.

Sampling Timeframes

Regardless of the visualisation of the data, and whether the actual figures were displayed within that visualisation, the underlying data was constructed in such a way as to present a misleading impression to consumers.

The choice by the advertiser to compare a 9-year average to a single sample is invalid by all reasonable measures. Ignoring all other factors, the basic reality of inflation over that sampling period would serve to lower the average the longer the period in question.

This is clearly not a like for like comparison.

If the Labour figure had been a similar average over the period of their leadership then perhaps it could be argued that it was a fair comparison, but even in that case the difference in sample duration would reasonably cast the result into question.

Were an ad presented in which Toyota compared the RRP of a Toyota Corolla, averaged from 1980 to 2020, to the current price of a Mazda 3 I can't imagine that the board would find that it were a fair comparison.

In the Upheld Decision 15/274 the board rightly found that a internet speed comparison by My Republic was misleading as it did not compare "like for like" when it relied on factually accurate data that was not representative of the situation it claimed to represent.

The National ad in question is plainly a false representation of the reality of the situation it describes.

Again the Minority identified that this was fundamentally misleading.

Likely Audience

The decision cites a previous decision (19/279) and subsequent appeal (19/011) in assessing the likely audience for the ad in question.

Based on this precedent and the specifics of this ad, the Majority was of the opinion that the medium (National's Facebook and Twitter pages) limited the audience to those that were more likely to have a "political interest in policy and performance comparisons between the major parties"

However, this opinion fundamentally misunderstands the nature of social media, where it is a primary goal that content be seen much more widely than a given user's own followers.

In the specific case of the post in question, it has received approximately 35 retweets and 130 likes on Twitter. Engagement on Facebook is significantly higher with more than 630 comments, 210 shares and 1,300 reactions.

While it's not possible from the outside to estimate the real reach as a result of those interactions, there is no question that it was seen far more widely than just those who've opted to engage directly with National on either platform.

Twitter: <https://twitter.com/NZNationalParty/status/1202349076336889856>

Facebook: <https://www.facebook.com/NZNATS/posts/3277327968949442>

In both cases these social media platforms alert users to various interactions made by those in their wider network. So a Twitter user may see a notification that someone they follow Liked a Tweet from a user they themselves do not follow. On Facebook, users are often alerted to comments or reactions by their friends on posts from pages or people they don't connect with directly. This is in addition to the explicit tools on both platforms that are intended to allow users to extend the reach of a given post (Retweets and Shares, respectively).

For this reason it is absolutely not reasonable to assume that being posted on National's page limits the audience to those who opt to follow the page themselves. In fact posts on social media are often constructed very purposefully to get users to share them more widely than a page's native reach.

As was seen very prominently in the 2016 US election campaign, social media is a very powerful and easily exploited medium for political messaging. It's important that the nature of the platform is understood.

Truthfulness

The fundamental claim in the ad, as evidenced by the wording that accompanied it, "this Government is fleecing New Zealanders through petrol taxes," is that the current Labour government has been responsible for a significant increase in petrol costs by way of increased taxes..

The source data used by the National Party proves that the underlying claim is untrue.

Data: <https://www.mbie.govt.nz/building-and-energy/energy-and-natural-resources/energy-statistics-and-modelling/energy-statistics/weekly-fuel-price-monitoring/> (Weekly table - the Nov 2019 figures have been revised since the ad was made, I will use the data as it was at the time of the ad)

The price of \$2.23 with a tax component of \$1.12 is derived by subtracting the Petrol Price Excluding Taxes of \$1.11 from Discounted Retail Price of \$2.23. This is a tax proportion of 50.2%

A reasonable comparison datapoint to measure Labour's real influence on that cost would be a price immediately before they formed a Government. The same Discounted Retail Price and Price Excluding Taxes for September 22, 2017 are \$1.88 and \$0.94 respectively yielding a tax component of \$0.94 - 50% of the pump price.

By this measure the underlying presentation within National's ad is untrue - the proportional tax burden on New Zealand consumers has not been increased by this Government's "fleecing"

APPEAL APPLICATION FROM J LANGWORTHY

I wish to appeal the decision regarding complaint number 19/465 on the following grounds:

1. The assumption that "*the audience was likely to have a political interest in policy and performance comparisons between the major parties and an appreciation of the political stance a party's own Facebook and Twitter platforms were likely to present*" is flawed.

Most people involved in running social media campaigns for businesses or other organisations have the goal of creating content that is so compelling it "goes viral". Going viral means that the ad would be seen by many outside the above group as it can take on a life of its own and be shared very widely.

The fact that it was an unpromoted post placed on their Facebook page and Twitter accounts is meaningless when both of these sites have various Share and Like features that are extremely simple to use. By its very nature as a social media post, it was designed to be shared to a wider audience than those who would view it in its original channel.

2. The categorisation of the bar graph distortion as “*hyperbole*” is incorrect. Hyperbole is defined as “*exaggerated statements or claims **not meant** to be taken literally*” and “**obvious** and intentional exaggeration”.

The key word here is “obvious”. The distortions on this graph are not obvious enough to be noticed at first sight by the average viewer. However they are still significant enough to mislead.

If it can be reasonably assumed that a material number of people would take these literally, then I believe they fail the test for hyperbole. The fact that some of your board felt this way shows that this is a reasonable assumption.

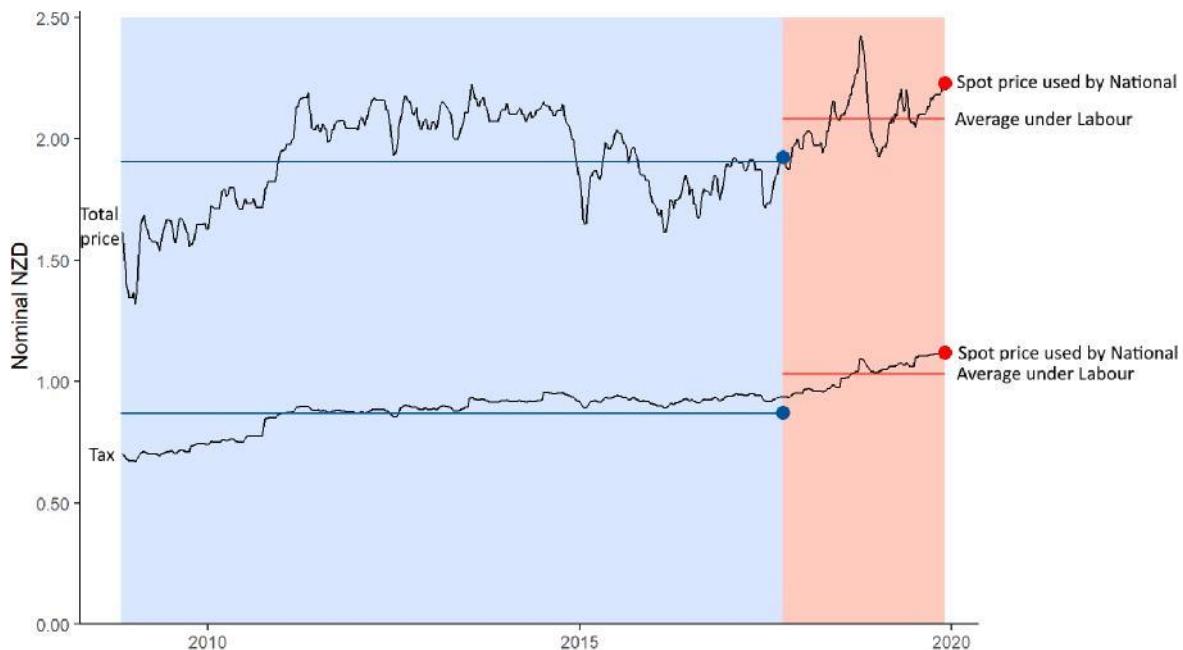
However, even if you disagree and believe that this is simply (visual) hyperbole, rule 2(b) states that hyperbole may [only] be acceptable if it is **unlikely to mislead**. As discussed below (points 3 and 4 below), this ad is likely to mislead many casual viewers.

- 3 The advertiser is not correct in their claim that, because the dictionary definition of a bar graph is “*a graph or chart that uses narrow columns of different heights to show and compare different amounts*” then this example “*is not misleading as the figures are displayed prominently on the graphic*” (emphasis mine).

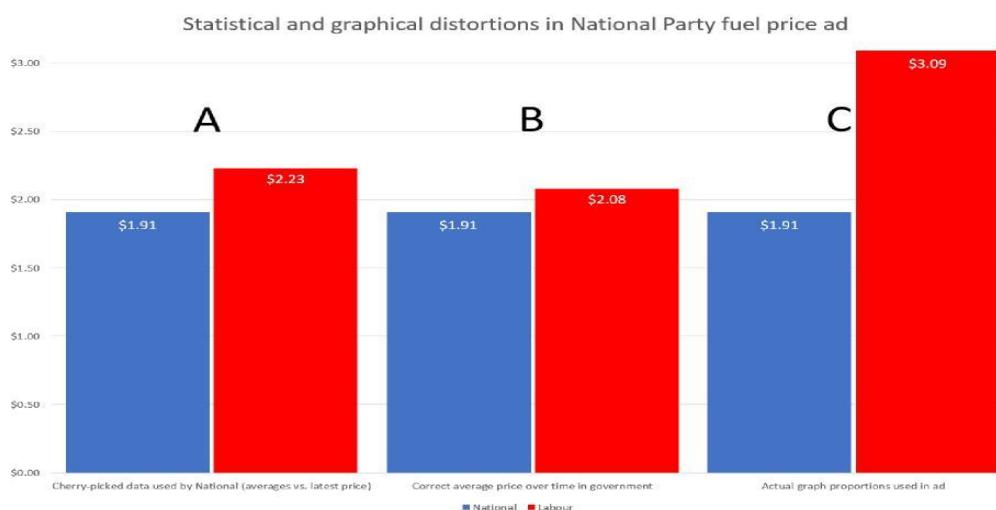
This bar graph does not fit the definition they quote because it does not help the viewer “compare” the different amounts displayed. In fact, it hinders the viewer’s comparison of these amounts by making the difference seem far greater than it is.

4. The data used to substantiate the amounts shown in the ad contravenes rule 2(d) that “*the elements compared must not be selected in a way that gives the advertiser an artificial or unfair advantage*”. According to this rule, “*Comparative advertisements must only compare ‘like with like’*.”

As the image below shows, selecting an average price over a long period of time and comparing it to a single price creates a distortion. For it to be a “like with like” comparison, they should be comparing the blue and red lines (average vs. average) rather than the blue and red dots (average vs. spot price).



The impact of this cherry-picking of data and not drawing to scale can be seen in this chart:



- Comparison A is of the incorrect **figures** used by National (the dots from the first chart above) which show a **17%** increase.
- Comparison B is a **correct** “like with like” comparison (the lines from the first chart above) which only shows a **9%** increase (approximately half of the amount used by National)
- Comparison C is the **actual proportions** used in the National Party ad which show a **62%** increase ($7 \times$ the true figure!).

In summary

The advocacy principles (#3) state that “ *the Codes fetter the [freedom of expression] right granted by [The Bill of Rights] to ensure there is fair play between all parties on controversial issues*”.

Being allowed to present misleading infographics will not ensure there is fair play between all parties.

The principles (#4) also state that “ *robust debate in a democratic society is to be encouraged*”.

"Robust" is used by some to excuse offensive, deceitful or bad faith actions - i.e. as a euphemism for unethical behaviour. However, its true meaning is "strong, healthy, vigorous, uncompromising". Robust does not infer a lowering of standards but rather people and organisations holding each other accountable for their opinions and actions.

Healthy democracy relies on these standards being maintained and organisations like ASA are vital to doing this. As new mediums appear and people figure out new and creative ways to use them for advocacy, some will also figure out unethical, deceitful ways to use them. Ads like this set an unhealthy precedent if they are allowed to go uncensured.

In the words of your own advertising, "*you should be able to trust the ads you see*". NZ voters are generally very trusting by nature partly because we have independent watchdogs like ASA. We rely on you to prevent this kind of misleading advertising becoming the norm.

APPEAL APPLICATION FROM N JONES

I am writing to appeal the decision by the Complaints Board to not uphold Complaint 19/465 regarding an advertisement by the New Zealand National Party regarding petrol prices.

I believe the decision made was against the weight of evidence presented and creates a new and dangerous precedent that will serve to diminish and undermine our democracy.

I wish to make the following points:

- 1) There are three misleading elements to the presentation of the figures and the Complaints Board did not address them separately or their cumulative effect.
 - a) The width of the bars is misleading. The Labour bar is presented 8% wider than the National bar. This is entirely gratuitous, misleading and flies in the face of any ethical presentation of data. It can only be intended to falsely represent the size of the change.
 - b) The height of the bars is misleading. The tax component is listed as 0.87 cents for National and \$1.12 for Labour. This is a 28% difference. Yet the Labour tax component is presented as 100% higher as the National tax component. It goes beyond 'mischief' and 'hyperbole'. It is fundamentally dishonest because it attempts to present Labour as having doubled the tax component, which is simply untrue.
 - c) The numbers do not compare like for like. If, as the Complaints Board contends, the consumer takeout is that "petrol was considerably more expensive under the current Labour Government and consumers were paying more tax on petrol than when the National Party were in power", and even if we put to one side the questions about visual representation, surely an advertisement aiming to show this should compare current petrol prices under Labour with the amount of tax paid when National left office (\$0.91, not \$0.87 as implied). By comparing an average tax component during National's time in office (2008-2017) with the tax component on November 29, 2019, the advertisement is deliberately misleading voters about the scale of increase under Labour. In fact, the advertisement is including increases that happened under National in the Labour bar. This goes beyond hyperbole and into deliberate misrepresentation given the ad attributes the increase to Labour's actions.
 - d) These three errors or misrepresentations have a cumulative effect, something the Complaints Board did not address.

- e) In addition, when I check the source data (MBIE Weekly Fuel Price Monitoring) it gives a figure of \$1.0544 per litre in petrol tax on the week ending 29 November 2019. This does not match the figure given in National's graph (\$1.12). It is possible the official data has been revised or there is other data that National has counted but not provided a data source for, but I would urge the Complaints Board to also query the accuracy of this figure. More broadly, this further undermines the view of the majority of the Complaints Board that the average citizen can simply go and check the data.
- 2) The decision fundamentally misunderstands how human beings process and understand information.

The majority of the Complaints Board decided not to uphold the complaint based on the belief that the execution of the infographic was mischievous but did not reach the threshold to mislead because "despite the selection of data points and the visual presentation, the actual figures are presented". The majority concluded that the advertisement was "saved" because actual figures were presented.

As the dissenting minority noted, it is "reasonable for an audience to assume the visual element of a graphic comparison would match the numerical data it represents... some consumers would rely solely on the bar graph proportions rather than the numbers provided, especially when viewed in conjunction with the strong wording used in the text of the advertisement that said the government was 'fleecing New Zealanders.'"

The minority also agreed that comparing a nine-year average fuel price with the average price on a single day "did not present like-for-like data and this could also cause confusion."

The academic research supports the minority's position.

People's brains process images much more reliably than they process text. One set of studies¹ for example shows that while people remember around 80% of the visual information that they see, they only remember around 20% the text they read. In the context of National's advertisement, this means the highly misleading visual information is four times as powerful as the less misleading text that accompanied it.

In addition, people who viewed National's ad will have processed it very quickly. The advertisement originally appeared on Facebook, and Facebook themselves report that its users spend an average of only 1.7 seconds engaging with each piece of content² - such as National's advertisement - that appears on their newsfeed on their phones.

That 1.7 seconds of engagement is only enough to process simple comparisons like "This is about tax, and the red bar is about twice the size bigger of the blue one." If that's what a user takes out of this advertisement in the 1.7 seconds they spend on it on average, then they have been misled by the advertisement's visual elements.

That same 1.7 seconds of engagement is not, however, enough for users to process complex information like "while the tax component of the red bar may be twice the height of the tax component of the blue bar, I've noticed an incongruity between the relative bar heights and (having done the division in my head) the relative size of the statistics above

¹ https://medium.com/@iDashboards_UK/on-average-people-remember-only-20-of-what-they-read-but-80-of-what-they-see-8411224769e2

² <https://www.facebook.com/business/news/insights/capturing-attention-feed-video-creative>

them. Faced with this incongruity, I conclude that I should disregard the visual element and rely instead on the figures."

National is likely well aware of this level of attention, as its staff receive private briefings from Facebook representatives each Parliamentary term (as do other parties), so there is reason to believe there is intent from the advertiser to mislead.

The average Facebook user won't have given National's advertisement enough attention to look through the misrepresentations to seek, find, and process the truth in the figures. Instead, the science says the ad will have misled them.

- 3) The Complaints Board decided by majority that the audience of the advertisement was likely to have special interest and knowledge about politics because it was initially posted on National's site and feeds. Such advertisements are of course designed to be shared, and supporters are encouraged to share them widely with voters. Even if it's true that the original recipients did have that contextual understanding (which is not clear) it is inevitable that the ads will be shared with those who do not. To overlook this is to deny the nature and our experience of social media. Indeed, given the ability of political parties to use social media to bypass the scrutiny of the media and spread messages directly into voters' feeds, it is even more important that there is a standard of truth and accuracy for such advertisements.
- 4) The Complaints Board found the ad to be "hyperbolic". When considering a claim like "fleecing in chief", a defence of hyperbole in the context of political advocacy has merit. But this is a question of mathematics. An incorrect bar graph is black and white wrong.
- 5) The Complaints Board says the ad is "mischievous". But there is no indication in this ad that there is any humour at play. Mischievous, then, can only mean misleading.
- 6) The Complaints Board relied on two precedents for this decision. One of these, Decision 08/201, "concerned an advertisement for the National Bank which used actual figures together with an illustrative bar graph to compare the relative interest earned on a bank deposit versus a National Bank investment fund." The Complaints Board noted that the "high standard of social responsibility required by the Code for Financial Advertising meant that it was not appropriate to use a graph which did not accurately reflect the data points it was representing." The worrying conclusion in not applying the same standard in this case, is that politicians seeking the power to run the country are held to a lower standard than financial institutions.
- 7) Finally, I ask that the Appeal Board consider the incentives created by this decision. On the Complaint Board's reasoning, it seems to excuse any misleading depiction, so long as the numbers are provided. These numbers need not even be measuring like-for-like. This gives parties carte blanche to mislead voters in their visual representation of data and degrades the quality of democratic debate. Seeing trends internationally, this is a dangerous development and one that the ASA exists precisely to protect voters against. The ASA must be mindful of the precedent this decision sets and the incentives it creates.

SUMMARY OF COMPLAINTS BOARD DECISION

Summary of the Complaints

Four Complainants are concerned the advertisement is misleading by visually showing a bar graph which is not to scale. The complainants also consider the advertisement is misleading to compare an average price over nine years for National with a single month period for

Labour. One Complainant also says the use of the term “Fleecer-in-Chief” in reference to the Prime Minister, Rt Hon Jacinda Ardern, is demeaning.

Summary of the Advertiser’s Response

The Advertiser said the figures are sourced from the MBIE Weekly Fuel Price Monitoring and are extrapolated to show average figures. The numbers are clearly and prominently displayed on the advocacy advertisement and therefore the hyperbole used in the visual representation of a bar graph would not be misleading. The Advertiser said the source data for the graphic is displayed as a footnote and is publicly available information. The Advertiser confirms it is clearly identified as required for Advocacy advertisements.

Summary of the Complaints Board Decision

The majority of the Complaints Board did not uphold a complaint about a National Party fuel tax advertisement which used average fuel price comparisons between National and Labour and an illustrative bar graph which exaggerated the difference between the two figures. The majority said the data displayed was correct which saved the hyperbolic graphic from being misleading, given the political medium used and the principles of advocacy advertising.

RESPONSE TO THE APPEAL APPLICATIONS FROM THE ADVERTISER, NZ NATIONAL PARTY

Thank you for your email offering a right of reply to the Appeal lodged by complainants in the case of decision 19/465.

In regard to advocacy advertising, and particularly regarding political matters, it has been the previous view and practice of the Advertising Standards Authority that the spirit of the Code is more important than any minor technical breaches. People have a right to express their views and this right should not be unduly or unreasonably restricted by Rules.

Furthermore, in very recent previous rulings the Chair of the ASA Board noted that political advertisements were not only acceptable but encouraged, as they were an essential and desirable part of the functioning of a democratic society. The Chair also observed that in a free and democratic society, differences of political opinion should be openly debated without undue hindrance or interference from authorities and in no way should political parties, politicians, lobby groups or advocates be unnecessarily fettered by a technical or unduly strict interpretation of the rules and regulations.

We stand by our previous statements and arguments in relation to this complaint and would only re-iterate the core aspects of the decision reached by the Complaints Board on the facts of the matter as it relates to the Code.

Appeals should not be the forum for political activists, in the case of one complainant a former senior Labour Party advisor, to debate political points instead of the factual application and interpretation of the code.

I would note that the complainants have provided a large volume of information to support their claim in appeal. However, this information appears to be a political debate and does not affect the relevance of the decision at hand for the advocacy advertisement in question.

Noting that in the lodgement for an appeal, the Appeals Board has five criteria to establish an appeal under Clause 6 (c) of the Second Schedule of Advertising Standards Complaints Board Complaints Procedures, this appeal was granted under section (e) “It is in the interests of natural justice that the matter be reheard”.

The Acting Chairperson having reviewed the substantial information provided by the complainants for this appeal has effectively stated to interested parties that under the further criteria for appeal, no such threshold of Appeal applies on the following grounds:

- (a) The proper procedures have not been followed.
- (b) There is new evidence of sufficient substance to affect the decision.
- (c) Evidence provided to the Complaints Board has been misinterpreted to the extent that it has affected the decision
- (d) The decision is against the weight of evidence

This is instructive and cuts to the nature of earlier points raised in our submission. It establishes a clear fact that this appeal has:

1. Not established that proper procedures were not followed;
2. That there is no new evidence supplied that has not already been traversed by the complaints board in its original decision;
3. That evidence was not misinterpreted in its original decision;
4. and that the original decision was not against the weight of evidence.

These alone are grounds to establish the Appeal is without merit, should be dismissed, and the original decision upheld.

Looking back at the original complaint that was made and applying the code to our advocacy advertisement, as the complaints board rightly did, the following grounds of complaint were examined and cited:

- Principle 2 - Rule 2(b), Rule 2(c), and Rule 2(e).

In response to the original complaint I would like to note the following for the benefit of clarity in regard to each section:

Rule 2 (b) states that hyperbole may be acceptable if it is unlikely to mislead. Given the fuel price monitoring information, which is extrapolated to show average figures, are clearly and prominently displayed on the advocacy advertisement, it is unreasonable to suggest viewers of the advertisement could be misled.

This point was acknowledged and supported in the decision handed down by the Complaints Board.

Furthermore, evidence of source of the figures used in the advertisement are displayed as a footnote. This information is publicly available, so viewers have the ability to check the veracity of the information.

Rule 2 (c) is not relevant to this instance. The data is properly sourced and compared equally for the periods of the previous government with the current Government.

The bars displayed on the graphics are simply a visual tool to show that there are two separate figures and one is more than the other. It is not misleading as the figures are displayed prominently on the graphic. The dictionary definition of a bar graph is "a graph or chart that uses narrow columns of different heights to show and compare different amounts."

This point was acknowledged and supported in the decision handed down by the Complaints Board.

Rule 2(e) is not relevant in this case as the complainant has sought to address the concern to the National Party. As such it is clear who the advertiser is, and the advert contains our correct authorisation and was displayed on our publicly available Facebook page.

This point was acknowledged and supported in the decision handed down by the Complaints Board.

At the time of the advocacy advert being made it was a relative point of comparison to make due to the release of a report by MBIE into fuel prices. This is the source information provided and noted on the advocacy advert.

The period for National dictates the average between our term in government from 2008-2017. And the Labour side shows the national average as at the time of the report released considering Labour are the Government, and ultimately responsible.

We were completely and utterly transparent in how it was calculated, with foot notes below each column and going further than that, additional source information included at the bottom of the advocacy advert. We couldn't have been clearer.

The information as presented and sourced is not incorrect, nor is it misleading. Some people who view the information may have chosen not to read how it is calculated, even given the source and methodology. That is their prerogative, but it still doesn't make the information incorrect as sourced and noted clearly on the advert.

The requirements of an advertiser under the code have been met in our opinion, and a majority of the complaints board.

The criteria for appeal have not established that there is any new information to affect that complaints board decision, that there was a procedural fault, that information was interpreted incorrectly, or that a decision was reached against the weight of evidence provided.

It is for this reason that we ask that this matter be dismissed and the original complaint upheld as decided by the Complaints Board.

I thank you again for your email and trust the above settles the matter in question.