

COMPLAINT NUMBER	20/377
ADVERTISER	The Advance New Zealand Party
ADVERTISEMENT	New Zealand Public Party, Out of Home
DATE OF MEETING	15 September 2020
OUTCOME	Not Upheld No Further Action Required

Summary of the Complaints Board Decision

The Complaints Board did not uphold a complaint about the New Zealand Public Party (NZPP) billboard advertisement. The Complaints Board agreed the opinion statement was not misleading and reflected the Advertiser's position on the Covid-19 Public Health Response Act 2020.

Description of Advertisement

The New Zealand Public Party (NZPP) billboard advertisement promotes party policies for the 2020 Election. The advertisement shows Co-leader Billy Te Kahika and the words: "Its time" followed by three policy statements. One statement says: "to protect our tamariki from forced medical tests". The advertisement includes the New Zealand Public Party logo and a promoter's statement.

Summary of the Complaint

The Complainant was concerned the advertisement is spreading misinformation and fear by stating that tamariki will have forced medical procedures. The Complainant said it may stop someone seeking care for their child with dire consequences.

Issues Raised:

- Truthful Presentation
- Advocacy Advertising

Summary of the Advertiser's Response

The Advertiser refers to section 11(1) of the Covid-19 Public Health Response Act 2020 which it says provides orders may be made which includes "requiring persons to do any of the following: (viii) report for and undergo a medical examination or testing of any kind, and at any place or time, specified and in any specified way or specified circumstances". It notes these orders are not limited to adults. It considers the statement is supported and the complaint should be dismissed.

Relevant ASA Codes of Practice

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

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 (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.

About Advocacy Advertising

The Complaints 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 say:

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.

Role of the ASA when considering an advocacy advertisement

The Complaints Board noted its role is to consider the likely consumer takeout of an advertisement. It will consider whether the advertisement includes statements of fact or

opinion and decide whether any factual claims have been adequately substantiated by the Advertiser. The Complaints Board noted that a fact is something that is objectively true and can be verified as such whereas an opinion is a personal belief. Others may agree or disagree with an opinion, but they cannot prove or disprove it. Some statements contain both fact and opinion. The Board referred to the ASA Guidance Note on Advocacy which says:

“Evidence may be cited in support of the opinion, but it should be clear it supports an opinion rather than being the full factual position. Evidence in support of an opinion should be clearly cited and readily obtainable. Academic studies are often cited as evidence. Such studies are treated as expert opinion rather than the full factual situation...the Board will not determine which of competing academic studies or other evidence is correct. The Complaints Board’s only role is to determine whether there has been a breach of the ASA Codes, taking into account the Advocacy Principles.”

The Complaints Board observed that in a free and democratic society, issues should be openly debated without undue hindrance or interference from authorities such as the Complaints 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. Therefore, the Complaints Board considered the rest of the complaint in conjunction with this liberal interpretation under the application of the Advocacy Principles.

Complaints about advocacy advertising are considered differently to complaints about advertising for products and services.

Under Rule 2(e) Advocacy advertising of the Advertising Standards Code:

- The identity of the advertiser must be clear
- Opinion must be clearly distinguishable from factual information, and
- Factual information must be able to be substantiated.

If the identity and position of the Advertiser is clear, a more liberal interpretation of the Advertising Standards Code is allowed.

Relevant precedent decisions

In considering this complaint the Complaints Board referred to two precedent decisions, Decision 19/465 Appeal 20/002 and Decision 20/037, both of which were Not Upheld.

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

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

Decision 19/465 Appeal 20/002 concerned a Facebook/Twitter advertisement for the NZ National Party on fuel prices. The Appeal Board agreed with the Complaints Board decision and 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” and “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.”

Decision 20/037 concerned a Labour Party Facebook post which was headed “Better cancer care with new radiation machines.” The text said “1 in 3 New Zealanders are affected by cancer. We’re directly funding 12 new life-saving cancer radiation machines ...” and “Number of these machines National invested in fixing or upgrading over nine years – 0.”

The Complaints Board said the statement the Complainant considers misleading is that the Labour Government have funded 12 LINAC’s machines in its two years in office while

National did not fund any during its nine years in Government. The Board said this is a factual claim which required substantiation.

The majority of the Complaints Board said by using the word “directly” the Advertiser has sufficiently qualified its comparison of funding 12 machines versus 0 from the National Government.

The Complaints Board agreed the likely consumer takeout of the advertisement may not distinguish between the direct funding approach taken by the Labour Government and the National Government funding DHBs to manage the procurement process. However, the majority of the Complaints Board said that the advocacy nature of the advertisement and the context of its placement on the Labour Party Facebook page meant the Advertiser could present a factually correct statement with a bias in its favour.

Complaints Board Discussion

Preliminary Matter

The Complaints Board noted the advertisement included the name and logo for the New Zealand Public Party. It confirmed the New Zealand Public Party is described as a component party of The Advance New Zealand Party on the Electoral Commission Register of Political Parties for the 2020 Election. The response to the complaint is from The Advance New Zealand Party.

Consumer Takeout

The Complaints Board agreed the likely consumer takeout of the advertisement was this is an election advertisement for the New Zealand Public Party, highlighting some of their key policy areas.

Has the advocacy advertisement been adequately identified?

The Complaints Board agreed the advertisement had been adequately identified as an advocacy advertisement. The Board said the identity of the Advertiser, the New Zealand Public Party, was clear along with its position on various issues in the 2020 Election campaign.

Is the statement in the advertisement likely to mislead?

The Complaints Board considered the statement “to protect our tamariki from forced medical tests”, to assess whether it was a statement of fact, supported by adequate substantiation, or opinion.

The Complaints Board agreed this statement is opinion and reflects the Advertiser’s position on section 11(1)(viii) of the COVID-19 Public Health Response Act 2020. It did not require substantiation.

The Board noted this section of the Act provides for Orders that can be made under the Act including “requiring persons to do any of the following: (viii) report for and undergo a medical examination or testing of any kind, and at any place or time, specified and in any specified way or specified circumstances”.

The Complaints Board said the advertisement was not in breach of Principle 2 and Rules 2(b) and 2(e) of the Advertising Standards Code.

Outcome

The Complaints Board ruled the complaint was **Not Upheld**.

No further action required.

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. Appeals must be made in writing via email or letter within 14 calendar days of receipt of this decision.

APPENDICES

1. Complaint
 2. Response from Advertiser
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Appendix 1

COMPLAINT

This political party billboard is spreading misinformation and fear by stating that tamariki will have forced medical procedures. As a nurse and midwife it concerns me that this misinformation causes concern for whanau and may stop someone seeking care for their child with dire consequences. This statement is unfounded

Appendix 2

RESPONSE FROM ADVERTISER, ADVANCE NZ

Section 11(1) of the COVID-19 Public Health Response Act 2020 provides that Orders may be made which includes “requiring persons to do any of the following: (viii) report for and undergo a medical examination or testing of any kind, and at any place or time, specified and in any specified way or specified circumstances”.

The Ministry of Justice advised the Minister of Justice on 11 May 2020 in a report entitled "Consistency with the New Zealand Bill of Rights Act 1990: COVID-19 Public Health Response Bill" that the Section 11 powers prima facie limit the right to refuse to undergo medical treatment. The Ministry referred to the COVID-19 test as a “moderately invasive procedure”.

The right to refuse a medical procedure is not free from coercion in this circumstance given section 26 of the Act provides that "intentionally [failing] to comply with a COVID-19 order" is an imprisonable offence.

Section 11 orders are not limited to adults.

The power to make orders clearly is a power to require a person to undergo a medical examination or test in a coerced manner under threat of imprisonment.

A candidate promising to “protect our tamariki from forced medical tests” could not be said to be spreading misinformation on the basis of the provisions relating to testing in the COVID-19 Public Health Response Act 2020.

The complaint should be dismissed