COMPLAINT NUMBER	21/161
ADVERTISER	New Zealand National Party
ADVERTISEMENT	New Zealand National Party Twitter
DATE OF MEETING	11 May 2021
OUTCOME	Not Upheld No further action required

Summary of the Complaints Board Decision
The Complaints Board did not uphold a complaint about a National Party Twitter advertisement. The Board said the advertisement did not meet the threshold to be misleading, in the context of an advocacy advertisement via a National Party Twitter post.

Advertisement
The National Party Twitter post included a video of the National Party's Shadow Treasurer Andrew Bayly talking about the Labour Government's announcement on its new housing policy. Andrew Bayly said: "If you spend five years not living in your family home and end up selling it… you will have to pay the tax on any increase in the capital gain of your property…".

Summary of the Complaints
There were two complaints about this advertisement. Both Complainants said the advertisement was misleading because in the example given, the tax would only apply for the five years the person did not live in the house.

Issues Raised:
- Truthful presentation
- Advocacy advertising

Summary of the Advertiser's Response
The Advertiser defended the advertisement and said the Inland Revenue Department's official explanation of the proposed changes used the same language as that used in the advertisement.

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 a precedent decision, Decision 19279 Appeal 19011, which was Not Upheld.

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

Decision 19/270 Appeal 19/011 concerned an advertisement which appeared as a post on the New Zealand National Party Facebook page, around the time of the 2019 budget. The advertisement featured a picture of Hon Shane Jones, Minister for Regional Economic Development with the text "Despite claiming to be caring and compassionate, this Government only put an extra 1% in the Budget for life-saving drugs. That doesn't even cover inflation. National will invest $200 million more into cancer drugs. Our bottom line is you." The text under the photo said "The Govt has put 75x more into Shane Jones' slush fund than it has for Pharmac." The small print said "Source Budget 2018 & Budget 2019.

The Complaints Board upheld the complaint, saying the substantiation provided by the Advertiser was insufficient for the level of claim made in the advertisement and the political advocacy advertisement was likely to confuse or deceive consumers. The Advertiser appealed the Decision. The Complainant commented on the appeal, saying only the most "savvy" of viewers would understand the context of the 2018-2019 appropriation comparisons.

The Appeal Board considered the additional context and substantiation provided by the Advertiser in their Appeal Application and said it showed that, read as a whole, the Facebook advertisement focused on what the National Party considered to be "new" budget appropriations, to highlight it's view of the Coalition Government's spending priorities in the 2019 Budget. The Appeal Board agreed the advertisement, seen within the lens of advocacy advertising, presented a political point of view which was not misleading, when considered in this context.

Complaints Board Discussion
The Chair noted that the Complaints Board's role was to consider whether there had been a breach of the Advertising Standards Code. In deciding whether the Code has been breached the Complaints Board has regard to all relevant matters including:

- Generally prevailing community standards
- Previous decisions
- The consumer takeout of the advertisement, and
- The context, medium, audience and the product or service being advertised:
    - Context: The New Zealand National Party responding to the Labour Government's new housing policy, which includes an extension of the bright line test
    - Medium: Social media: Twitter
    - Audience: Twitter account holders, who receive this post
    - Product: Party political advertising

Consumer Takeout
The Complaints Board agreed the likely consumer takeout of the advertisement was the National Party is critical of the Labour Government's new housing policy, in particular the new tax charged on the capital gain of the family home, in certain circumstances, where the home is rented out.

Has the advocacy advertisement been adequately identified?
The Complaints Board agreed the advertisement had been identified as an advocacy advertisement. The Board said the identity of the Advertiser, the New Zealand National Party, was clear, along with its position on the Labour Government's new housing policy.

Is the advertisement likely to mislead?
The Complaints Board agreed the advertisement, in the context of political advocacy advertising, did not reach the threshold to be misleading.

The Board said the advertisement conveyed the Advertiser's perspective about the potential negative impacts of the Government's new housing policy in certain circumstances. The Board said the Advertiser had provided sufficient substantiation to support the statement: "If you spend five years not living in your family home and end up selling it… you will have to pay the tax on any increase in the capital gain of your property…" by providing a link to the following statement on the Inland Revenue Department website: *"If you sell the property within 10 years of acquiring it (or 5 years for a new build), and it was never your main home for the entire time you owned it, you will pay tax under the bright-line test on any gain in value."* https://taxpolicy.ird.govt.nz/-/media/project/ir/tp/publications/2021/2021-other-fact-sheet-bright-line-test/2021-other-fact-sheet-bright-line-test.pdf

The Complaints Board said while the detail of the new policy is complex and not easy to summarise in a short video the Advertiser had substantiated the likely consumer take-out of the advertisement. The Board confirmed a more liberal interpretation of the Advertising Standards Code applies to political advertising, in recognition of section 14 of the Bill of Rights

Act. In reaching this decision the Board took into account the post was from the National Party Twitter account to people who have chosen to follow the party and its views via Twitter.

The Complaints Board said the advertisement did not meet the threshold to be misleading, taking into account context, medium, audience and product and was not in breach of Principle 2, Rule 2(b) or Rule 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**

Appendix 1

COMPLAINT 1
The National Party and Andrew Bayly have released a video and are promoting it on their social media in opposition to the Government's proposed housing changes. In this advertisement/social media video, Mr Bayly states if you spend 5 years not living in your family home and end up selling it, you'll "have to pay the tax on any increase in the capital gain" when you sell it. This is not true - it would only apply for the 5 years you didn't live in it. This is confirmed by the IRD documents and is misleading advertising

https://www.interest.co.nz/sites/default/files/embedded_images/IR%20FACTSHEET%20Brighthline%20test_0.pdf

COMPLAINT 2
" National's Shadow Treasurer @bayly_andrew explains how Labour's new tax changes could hit your family home. These are the same tax changes Labour ruled out before the election. You can't trust Labour on tax." National states if you spend 5 years not living in your family home and end up selling it, you'll "have to pay the tax on any increase in the capital gain" when you sell it. This is not true - it would only apply for the 5 years you didn't live in it.

Appendix 2

RESPONSE FROM ADVERTISER, NZ NATIONAL PARTY

In regard to the complaint at hand I note the relevant sections you mention are: Principle 2 - Rule 2(b) and Rule 2(e).

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/Twitter page.

On the substantive matter under the grounds of 2(b) we would note the following in response:

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.

It is also important for the Board to consider previous rulings in regard to audience and context, notably Appeal 19/011 "the Appeal Board ruled that consideration context and placement of the advertisement was important given the likely audience on a political party's social media platform would have an appreciation of the political landscape and advocacy advertising.

We would note Inland Revenue's official explainer about the proposed changes to the bright-line test - used as evidence by one of the complainants - uses exactly the same language as

Mr Bayly to describe potential tax liability under the bright-line test for someone who does not live in a property they own.

"If you sell the property within 10 years of acquiring it (or 5 years for a new build), and it was never your main home for the entire time you owned it, you will pay tax under the bright-line test on ***any gain in value.****"* Referenced on page 3, paragraph 4, of Inland Revenue's own documentation.

This short video was an organic post and was not 'boosted' on social media. Those viewing it would most likely be engaged in, or at least aware of, the debate around Labour's broken promise to make no changes to the bright-line test.

It is irrefutable that tax will be payable on the capital gain on a house if the owner of the house does not live in it for a period of more than 12 months during the course of the extended 10-year bright-line test.

Mr Bayly deliberately used the words 'five years' as an example to prove the point made in the complaint: You will be taxed on the increase in any capital gain over the five years you are not living in it. That is not just implied, it is deliberate.

The consumer takeout – owing to the inclusion of the words 'five years' - is that you will incur a tax on the increase in the value of your home under these changes to the bright-line test if you do not occupy it for a period of five years. If the video was intended to mislead in the way alleged by the complainants, the words 'five years' would not have been included.

We would also note the context of the particular issue at the core of this social media video: Labour breaking its promise not to make changes to the bright-line test.

September 9, 2020: Heather du Plessis-Allan Drive Show, Newstalk ZB:

Heather du Plessis-Allan*: So the bright-line tax for example you will not change?*
Grant Robertson*: No.*
Du Plessis-Allan*: Not the rate and not the years?*
Robertson*: No.*

Grant Robertson later tried to justify Labour's failure to keep its promise to New Zealanders by saying he was being 'too definitive' in ruling out changes to the bright-line test. It is likely the heightened sensitivity around Labour breaking its promise to New Zealanders and the Opposition holding them to account on this – as opposed to legitimate concerns about the content of this video – is the primary motivation behind these two almost identical complaints being lodged.

On the grounds used by these complainants, given the above in response and supporting information publicly available by IRD to substantiate the facts of the matter, we believe the complaint is without merit.