

COMPLAINT NUMBER	16/072
COMPLAINANT	T. Walker
ADVERTISER	NZ Flag Referendum Panel
ADVERTISEMENT	NZ Flag Referendum Panel Print
DATE OF MEETING	8 March 2016
OUTCOME	Not Upheld

SUMMARY

The newspaper advertisement from the NZ Flag Referendum Panel showed the proposed flag design and the current flag side by side with relevant information about the history and meaning of each. The advertisement also included a summary of “commonly expressed views” about each flag.

The Complainant said the image of the Union Jack on the existing flag was “graphically altered to be less attractive” and was smaller than the proposed flag. The Complainant said as the advertisement was influencing the public, the image “needed to be representative of the available choice.”

The Complaints Board said the images in the advertisement were an accurate representation of both flags and neither flag option was given prominence over the other. The Complaints Board said the advertisement provided balanced information about both flags in order to encourage people to vote in the referendum, and did not to encourage people to vote for a particular option.

The Complaints Board said the advertisement was unlikely to mislead consumers and it had been prepared with a due sense of social responsibility to consumers and society.

The Complaints Board ruled the complaint was Not Upheld.

[No further action required]

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

COMPLAINTS BOARD DECISION

Preliminary matter: The Complaints Board noted the Advertiser, The NZ Flag Referendum Panel, was of the view the item subject to complaint was not a referendum advertisement for the purposes of the New Zealand Flag Referendums Act 2015. The Complaints Board acknowledged the New Zealand Flag Referendum Act 2015 had precedence over the ASA

Codes of Practice. However, the Complaints Board confirmed its consideration of the content before it was confined to whether or not it was advertising for the purposes of the ASA Codes and its status under the Act was not material to this.

The Chairman directed the Complaints Board to consider the advertisement with reference to Basic Principle 4, Rule 2 and Rule 11 of the Code of Ethics. This required the Complaints Board to consider whether the advertisement contained any statement or visual representation that was likely to mislead or deceive the consumer and whether it had been prepared with a due sense of social responsibility to consumers and society.

The Complaints Board was of the view the advertisement before it fell into the category of advocacy advertising and noted the requirements of Rule 11 of the Code of Ethics. The Complaints Board noted Rule 11 allowed for expression of opinion in advocacy advertising, provided that the expression of opinion is robust and clearly distinguishable from fact. Also applicable were the Advocacy Principles, developed by the Complaints Board in previous Decisions for the application of Rule 11. These said:

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 right 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.

The Complaints Board said the newspaper advertisement before it was clearly an advocacy advertisement about the second NZ Flag Referendum. It noted the Advertiser was clearly identified as The NZ Flag Referendum Panel and included their website address (www.flag.govt.nz) and the Flag Consideration Project logo. The Complaints Board confirmed the identity of the Advertiser on the advertisement was clearly displayed and therefore, met the identification provision.

The Complaints Board noted the concerns of the Complainant the image of the Union Jack on the existing flag was "graphically altered to be less attractive" and was smaller than the proposed flag. The Complainant said as the advertisement was influencing the public the image "needed to be representative of the available choice."

The Complaints Board noted the Advertiser, The NZ Flag Referendum Panel, said the advertisement was produced by their advertising and design agency and was approved by representatives of the Panel. The Complaints Board noted where the Advertiser said, in part:

- “...the agency treated each flag equally and fairly, which included rendering each flag in the same digital format using the same process;
- representatives of the Panel carefully reviewed the advertisement to ensure, to the best of their ability, that it was fair and balanced in the treatment of each flag option; and,
- the Chair of the Panel formally approved the final version of the advertisement for publication.”

The Complaints Board noted the Complainant’s interpretation the existing flag had been altered to appear less attractive to voters.

The Complaints Board disagreed. It said the images in the advertisement were an accurate representation of both flags and neither flag option was given prominence over the other in the advertisement. It also said most consumers would not notice the minimal variation in size between the current flag and proposed option.

The Complaints Board said it would be clear to most consumers the advertisement had been prepared by an independent panel whose role was to promote voting in the referendum, not a particular flag option. It said the advertisement provided balanced information about both flags in order to encourage people to vote, and did not to encourage people to vote for a particular option in any way.

In consideration of the above, the Complaints Board said the advertisement was unlikely to mislead consumers and it had been prepared with a due sense of social responsibility to consumers and society. As such, the Complaints Board said the advertisement was not in breach of Rule 2 or Basic Principle 4 of the Code Ethics and observed the requirements of Rule 11 of the Code of Ethics.

Accordingly, the Complaints Board ruled to Not Uphold the complaint.

DESCRIPTION OF ADVERTISEMENT

The newspaper advertisement for the NZ Flag Referendum showed the proposed flag design and the current flag side by side with relevant information about the history and meaning of each. The advertisement also included a summary of “commonly expressed views” about each flag. The advertisement stated, in part:

“Our nation. Your choice. The people of New Zealand have a unique opportunity to decide the future of our flag in the final referendum 3-24 March 2016.”

COMPLAINT FROM T. WALKER

I would like to make a formal complaint about the full page advertisement shown on page 9 of the Western Leader on the 25th February 2016

The image of the union jack on the large existing NZ flag has been graphically altered to be less attractive. The bottom right hand corner of the flag has been removed. This effect cannot be created due to the fabric wave through the flag.

As this add is influencing the public on appearance alone (and not the legal implication of removing the union jack) the images need to be representative of the available choice. I require this error to be corrected.

Also the image of the smaller flags together shows the flag with the fern as being 8% longer than the union jack flag. This needs to be corrected. (i received a speeding ticket for going 8% over the limit so 8% is legally important.)

CODE OF ETHICS

Basic Principle 4: All advertisements should be prepared with a due sense of social responsibility to consumers and to society.

Rule 2: Truthful Presentation - Advertisements should not contain any statement or visual presentation or create an overall impression which directly or by implication, omission, ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading).

Rule 11: Advocacy Advertising - Expression of opinion in advocacy advertising is an essential and desirable part of the functioning of a democratic society. Therefore such opinions may be robust. However, opinion should be clearly distinguishable from factual information. The identity of an advertiser in matters of public interest or political issue should be clear.

RESPONSE FROM ADVERTISER, NZ FLAG REFERENDUM PANEL

1. Thank you for this opportunity to respond to the complaint by T. Walker dated 26 February 2016. I am replying on behalf of the New Zealand Flag Consideration Panel (Panel).
2. You have indicated that the relevant sections of the Advertising Codes of Practice appear to be Basic Principle 4, Rules 2 and 11 of the Code of Ethics. Those rules state:

Rule 2: Truthful Presentation - Advertisements should not contain any statement or visual presentation or create an overall impression which directly or by implication, omission, ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading).

Rule 11: Advocacy Advertising – Expression of opinion in advocacy advertising is an essential and desirable part of the functioning of a democratic society. Therefore such opinions may be robust. However, opinion should be clearly distinguishable from factual information. The identity of an advertiser in matters of public interest or political issue should be clear.
3. This response is framed in terms of those rules.

Background:

4. The terms of reference for the Panel were established by Cabinet and are set out in Appendix 3 to an October 2014 Cabinet paper CAB (14) 541. These terms of reference include requirements that:
 - 4.1. the Panel design and lead the public engagement process over the New Zealand Flag;
 - 4.2. a key feature of this group is that it is independent and non-partisan;
 - 4.3. all communications will need to reinforce that retaining the current flag will be a possible outcome and that there is no presumption in favour of change;
 - 4.4. the Panel will continue its public communications role in the lead-up to the referendums by providing information on the alternative flag designs; and,
 - 4.5. a project secretariat will provide support and advice to the Panel.
5. When it met on 15 December 2015, the Panel finalised its communications objectives for the lead-up to the final referendum as being to:
 - 5.1. encourage people to vote by emphasising that this is a decision for the future and everyone's view is equal;
 - 5.2. enable people to get to know the stories behind the two flags and see them in real-life situations;
 - 5.3. stimulate informed discussions and decision-making by ensuring balanced and factual information is provided to the public; and,
 - 5.4. help people understand the unique significance of this world-first opportunity.
6. In response to the discussion at this meeting and the agreed objectives, the Panel worked with its advertising and design agency, Clemenger BBDO, to develop an advertisement that would:
 - 6.1. provide the public with some background information on the two flag options; and,
 - 6.2. present the most common views that the public has expressed for support of each flag option.
7. This was designed with graphical elements to help attract the attention of readers and make the content accessible to diverse audiences. The resulting graphic has been presented by the Panel in a number of different online and printed media contexts.

The complaint:

8. The Panel notes that the sections of the Advertising Standards Authority Code of Ethics relevant to this complaint appear to be Rules 2 and 11.
9. In relation to Rule 2, the Panel maintains that the following claims made by the complainant are not correct:
 - 9.1. the 'image of the Union Jack on the large current New Zealand flag has been graphically altered to be less attractive';
 - 9.2. 'the bottom right hand corner of the flag has been removed'; and,
 - 9.3. the images of the smaller flags are perceptively different sizes.
10. As noted above, the advertisement was produced by our advertising and design agency. It was reviewed and finally approved by representatives of the Panel. In doing so:

- 10.1. the agency treated each flag equally and fairly, which included rendering each flag in the same digital format using the same process;
- 10.2. representatives of the Panel carefully reviewed the advertisement to ensure, to the best of their ability, that it was fair and balanced in the treatment of each flag option; and,
- 10.3. the Chair of the Panel formally approved the final version of the advertisement for publication.
11. Further, the Panel notes the Advocacy Principles, developed by the Board in previous Decisions for the application of Rule 11, under which the complaint is being made. The Panel believes that, with reference to the individual principles:
- Advocacy Principle 1:* it is clearly stated that the views expressed in the lower part of the advertisement are the summarised opinions of members of the public;
- Advocacy Principle 2:* the Panel took care to ensure other people's rights were not infringed;
- Advocacy Principle 3:* both the Panel and its agency took steps to ensure there was fair play between parties given the subject matter;
- Advocacy Principle 5:* in keeping with the Panel's objectives, the purpose of the advertisement was to support robust and informed debate in a democratic society; and,
- Advocacy Principle 6:* the advertisement clearly identifies the Panel as being the advertiser.
12. On the basis of the above, the Panel does not believe that the subject of the complaint breached the Advertising Standards Authority Code of Ethics, Basic Principle 4, Rule 2 or Rule 11.

New Zealand Flag Referendums Act 2015

13. In addition to the above, the Panel notes the New Zealand Flag Referendums Act 2015 addresses matters related to 'Advertising' in section 7. This section states that:
- "(2) ..., none of the following is a referendum advertisement:
- (a) an advertisement that—
- (i) is published, or caused or permitted to be published, by a panel, an agency, or the Electoral Commission; and
- (ii) relates to electoral matters or the conduct or subject matter of 1 or both of the referendums; and
- (iii) contains—
- (A) a statement indicating that the advertisement has been authorised by the panel, agency, or Electoral Commission, as the case may be; or
- (B) a symbol indicating that the advertisement has been authorised by the panel, agency, or Electoral Commission, as the case may be"
14. With reference to the above, the Panel believes that the subject of the complaint is not a referendum advertisement because, as covered by section (2) (a), it was; caused to be published by the Panel, related to the final referendum, and included both statements and symbols indicating that the advertisement has been authorised by the Panel.

15. The Panel would be happy to provide more information to the Advertising Standards Authority and the Complaints Board at any time.

RESPONSE FROM MEDIA, FAIRFAX MEDIA

Thank you for your letter dated 26 February in reference to the above complaint from T. Walker.

The material for this advertisement was supplied to Fairfax Media as shown and has not been adjusted by us.

We await a decision or recommendation from the ASA as to the creative relative to the Code of Ethics – Basic Principle 4, Rule 11, Rule 2.