

COMPLAINT NUMBER	18/216
COMPLAINANT	N Smale
ADVERTISER	The Trusts
ADVERTISEMENT	The Trusts, Digital, Print
DATE OF MEETING	11 September 2018
OUTCOME	Not Upheld

SUMMARY

The print advertisement in the 'Our West' mailer publication said: "According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas"

The Trusts website advertisement, www.thetrusts.co.nz, said: "Is it working? It sure is! According to the Auckland Regional Public Health Service, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas."

The pamphlet advertisement said: "It's working! According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in the Auckland Council urban zone areas."

The Complainant said it was misleading for the Advertiser to claim the lowest incidence of alcohol related crashes in urban Auckland as the use of absolute numbers is not a reasonable basis for comparison between geographic areas of different sizes and populations. The Complainant supplied recent NZTA data which showed that percentage-wise, West Auckland was not the lowest.

The Advertiser said the claim made in its advertising was sourced from NZTA data and factually correct in that West Auckland had the lowest number of crashes. The Advertiser provided two reports substantiating the claim.

The Complaints Board noted the use of the word 'incidence' and discussed it's meaning. The majority of the Complaints Board said the likely consumer interpretation of 'incidence' was that it referred to the number of crashes. It said the use of the data to support a specific position was permissible under advocacy advertising and this saved the advertisement from being misleading. The advertisement was not in breach of Basic Principle 4 or Rules 2 and 11 of the Code of Ethics.

A minority of the Complaints Board disagreed and said the advertisement was misleading as the use of the term 'incidence' meant the rate of alcohol related crashes as a percentage which was not supported by the data. The minority view was that advocacy did not save the advertisement from being misleading.

In accordance with the majority, 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

The Chair directed the Complaints Board to consider the advertisement with reference to Basic Principle 4 and Rule 2 and Rule 11 of the Code of Ethics. Basic Principle 4 required the Board to consider whether the advertisement had been prepared with a due sense of social responsibility to consumers and to society. Rule 2 required the Board to consider whether the advertisement contained anything which, either directly or by implication, was likely to deceive or mislead the consumer. Rule 11 for advocacy advertising required the Board to consider whether the identity of the advertiser was clear and opinion was clearly distinguishable from fact.

The Complaints Board ruled the complaint was Not Upheld

The Complaint

The Complainant said it was misleading for the Advertiser to claim the lowest incidence of alcohol related crashes in urban Auckland as the use of absolute numbers is not a reasonable basis for comparison between geographic areas of different sizes and populations. The Complainant supplied recent NZTA data which showed that percentage-wise, West Auckland was not the lowest.

The Advertiser's Response

The Advertiser said the claim made in its advertising was factually correct in that West Auckland had the lowest number of crashes and provided two reports as substantiation

- Auckland Regional Public Health Service - *Need Assessment Community Action on Alcohol Policy*
- Auckland Council – *Local Alcohol Policy Research Report*

Preliminary Matters

In the process of obtaining responses from the parties, several preliminary matters were addressed by both parties and the Chair.

Are the statements advertising?

The Advertising Standards Authority (ASA) confirmed its definition of advertising to be “any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed.”

In assessing whether the material complained about was advertising, the Chair took into account the above definition and whether the message was controlled by the advertiser.

The content was on a publicly available website, in a mailer and a pamphlet available in stores and controlled by the Advertiser, The Trusts. In the Chair's view the content promoted the value of licensing trusts and did come under the jurisdiction of the Advertising Standards Authority and the Advertising Codes of Practice.

Jurisdiction

The Advertiser referred to the Commerce Commission as the regulator that dealt with misleading conduct in trade. The Chair confirmed that although the Commerce Commission is a senior jurisdiction to the ASA, its existence does not prevent the ASA dealing with complaints about advertising.

Natural Justice

The Advertiser said that its right to natural justice required that it be heard in support of its case. The ASA provided clarification on matters of procedure including the Second Schedule to the ASA Rules which states that no parties are able to attend the Complaints Board meeting.

Having sought and considered the parties' further views on being heard in support of their case, the Chair of the Complaints Board decided it was appropriate to hear the complaint at the Complaints Board meeting, without the attendance of the parties. After a preliminary discussion with the Board at the meeting, she confirmed her decision to do so. The Chair considered that the Parties would be afforded natural justice through the standard Complaints Board process where the parties' written evidence and submissions are considered.

The Complaints Board Discussion*Likely Consumer Take-out*

The Complaints Board began by discussing the likely consumer take-out of the advertisement and whether the claims were misleading based on the average consumer's interpretation. The Board said the consumer take-out would be that Advertiser, as a community-based licencing trust, was attributing the "lowest incidence of alcohol related crashes in Auckland Council urban zone areas" to the existence of The Trusts.

Lowest incidence of alcohol related crashes in Auckland Council urban zone areas?

The Complainant said that whilst the absolute numbers of crashes are lowest in West Auckland, the region has a much lower population than the other urban areas. The Complainant said the use of absolute numbers is not a reasonable basis for comparison between geographic areas of different sizes and populations and therefore the advertisement is misleading.

The Advertiser said the advertisement was factually correct in terms of West Auckland having the lowest number of alcohol related crashes.

The Complaints Board discussion focused on the language in the advertisement, specifically the word 'incidence' which was used in each version of the advertisement and whether the general consumer take-out would consider this to mean the lowest number of alcohol related accidents or the lowest rate of crashes, taking into account population.

The Board noted the Oxford English dictionary definition of the word 'incidence' was "occurrence, rate or frequency of a disease, crime or other undesirable thing". It agreed this definition was open to interpretation.

The Board took into account the New Zealand Transport Agency (NZTA) comment including that the more recent data showed that a smaller number of alcohol related crashes occur in West Auckland than elsewhere each year, but that West Auckland has a higher percentage of crashes which are alcohol related.

The majority of the Complaints Board said that to the average consumer, the word 'incidence' would most likely mean the number of crashes over a given time. Using this definition of the word 'incidence' the advertisement was factually correct to state West Auckland had the lowest incidence, based on the substantiation provided by the Advertiser.

A minority of the Complaints Board disagreed and said its understanding was that 'incidence' meant rate. Therefore, the evidence provided did not substantiate the claim being made, as the rate would take into account the lower population of West Auckland. The minority said

the word 'incidence' was a public policy term and should not have been used by the Advertiser in conjunction with Government reports if the intended use of the word was in relation to a number and not a rate.

The Complaints Board noted the reports provided in substantiation referred to data from 2006-2011. The Complaints Board noted that the NZTA had been asked to comment on the NZTA data provided by the Complainant and the Advertiser. In response, NZTA confirmed the numbers in the reports were consistent with recent data.

The Board acknowledged the Advertiser had accepted the data was outdated and had removed the references from the website until more up-to-date information is available from the Police and NZTA.

Advocacy

The Complaints Board said 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 said 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 first considered whether the identity of the Advertiser was clear as required by Rule 11. It said the identity of the Advertiser was clear under the requirements of the Advocacy Rule with logos and explanations of the Trust's purpose included in the advertising material. The Complaints Board noted that advocacy advertising is often characterised by parties having differing views that are expressed in robust terms. It was not uncommon in advocacy advertising for parties to apply a selective use of data to support a particular perspective.

The majority of the Complaints Board said the fact the advertisement fell under the Advocacy Rule was a key consideration in its decision.

Given that the use of the word 'incidence' is clearly open to interpretation, the majority of the Complaints Board said the claim was factually correct, if interpreted as the lowest number of alcohol related crashes and as such the advertisement would not be likely to mislead or deceive consumers within an advocacy environment where consumers understand a certain perspective is being represented.

The majority of the Complaints Board said the advertisements did not meet the threshold to mislead or deceive consumers and were not in breach of Basic Principle 4 or Rules 2 and 11 of the Code of Ethics.

A minority of the Complaints Board said the advertisements were not saved by advocacy and the reference to 'incidence' in the advertisement meant that the claim was not supported by the evidence and it was therefore misleading.

In accordance with the majority, the Complaints Board ruled the complaint was Not Upheld.

DESCRIPTION OF ADVERTISEMENT

Three medium types were used to advertise The Trusts message about West Auckland have the lowest incidence of alcohol related crashes in Auckland's urban zones.

The print advertisement in the 'Our West' mailer publication said: "According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas"

The Trusts website advertisement, www.thetrusts.co.nz, said: "Is it working? It sure is! According to the Auckland Regional Public Health Service, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas."

The Pamphlet advertisement said: "It's working! According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in the Auckland Council urban zone areas."

COMPLAINT FROM N SMALE

This complaint relates to a claim made by The Trusts in several channels.

1. The first channel is their website <https://www.thetrusts.co.nz/how-we-do-things/>
2. The second channel is their mailer "Our West" dated May 2018.
3. The third channel is a pamphlet distributed in their stores entitled "Helping West Auckland achieve big things"
4. The final channel is displayed on screen in-store at West Liquor outlets Copies of #1 to #3 are attached.

I believe the following claims are misleading

- Our West: "According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas"
- Website: "Is it working? It sure is! According to the Auckland Regional Public Health Service, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas."
- Pamphlet / On-screen: "It's working! According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas."

These claims are misleading because the NZTA data shows that West Auckland has consistently had the highest rates of alcohol related crashes among Auckland's Urban Areas and are therefore in breach of the Advertising Code of Ethics: • Basic Principle #3 "No

advertisement should be misleading or deceptive or likely to mislead or deceive the consumer” • 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).” The NZTA data is attached as “3 2018 06 14 NZTA data C20180607 - Auckland crashes”. Whilst the absolute numbers of crashes are lowest in West Auckland, an inspection of the urban area definitions (map shown in the attached file “1 2018 06 TRUSTS ASA complaint”) it is obvious that West Auckland has a much lower population than the other urban areas. Comparison of absolute numbers is not a reasonable basis for comparison between geographic areas of different sizes and populations. The Trusts have framed the data in such a way that misrepresents the true incidence of alcohol related crashes in West Auckland to their own benefit.

Also in the attached file “1 2018 06 TRUSTS ASA complaint”, there is an excerpt from Auckland Council’s “Local Alcohol Policy Research Report - Information to support the development of a local alcohol policy” <https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/ourpolicies/localalcoholkeydocuments/localalcoholpolicyresearchreport.pdf> This research report shows the NZTA data as a percentage of total crashes; thereby compensating for the differences between areas such as population and road nature/quality. This data (2006-2010) shows West Auckland to have the highest rates of alcohol related crashes (with the exception of Urban South – Local Roads). The same analysis with more recent NZTA crash data (attached file “3 2018 06 14 NZTA data C20180607 - Auckland crashes”) shows that in every year 2012 to 2017, Urban West had the highest incidence of alcohol related crashes among Auckland’s urban areas. Analysing the data using crash rates per population also shows Urban West to have a high rate of alcohol related crashes relative to other urban areas.

CODES OF PRACTICE

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, THE TRUSTS

I act for the Portage and Waitakere Licensing Trusts referred to as the Trusts. The operations of the Trusts is run through a corporate entity called West Auckland Trust Services Limited, WATS.

1. The complaint from N Smale on behalf of the West Auckland Licensing Trust Action Group (**WALTAG**) suggests that there has been incorrect information relied on by the Trusts on the WATS website in terms of misleading use of data originating from the New Zealand Transport Agency (**NZTA**).
2. If there is a breach of the Code of Ethics for advertisers, the ASA considers that Basic Principle 4, Rule 11 and Rule 2 are at issue.
3. It is alleged by N Smale that the statements appearing on the WATS website are misleading forms of digital marketing.
4. The Trusts maintain that the data is being correctly relied on. The statements are not those of the Trusts, or the interpretation of raw data by the Trusts. The information on the website comes from independent research conducted by Dr Nikki Jackson, a Director of Alcohol Health Watch, and a complainant in a previous issue earlier this year. Dr Jackson's report is attached as Attachment 1 to this letter. For completeness we have attached as Attachment 2 the Auckland Council report which although dated considers the range of issues in alcohol licensing which supports Dr Jackson's report.
6. We have discussed this subject of the complaint and the data with relevant officers from the NZTA and the NZ Police, and they have confirmed the information remains as presented in the Dr Jackson's report. As such the information has not been removed from the WATS website.
7. The second issue with regard to this complaint is that the statements complained of are not advertising. The statements put on the website and appearing elsewhere are not forms of digital marketing. The statements are not made by the Trusts. These are statements of fact from a third party research paper. N Smale's complaint is therefore incorrect in stating that the Trusts are misleading the public by advertising incorrect information.
8. The third issue with regard to the complaint is that the source of N Smale's complaint is his own analysis of the data. The date he has relied does not appear to have been verified by the NZTA or the NZ Police. Therefore, the subject of the complaint appears to be without substance. The Trusts argue that N Smales' analysis is incorrect and is uncorroborated by an expert in the field. The complaint is lacking in merit.
9. Lastly, N Smale and WALTAG are in essence competitors to the Trusts and barred from making a complaint to the ASA. WALTAG are currently seeking to establish an alternate framework to the Trusts to compete with the Trusts. The complaint to the ASA is without jurisdiction.
10. The Trusts maintain that the complaint is without merit or substance. Nevertheless the basis of the complaint appears to be misleading conduct in trade, normally overseen by the Commerce Commission or privately actioned as a tort in the High Court.

RESPONSE FROM THE ASA SECRETARIAT

Thank you for your letter dated 15 August 2018, in response to the complaint about advertising for the Portage and Waitakere Licensing Trusts – 18/216.

The Chair of the Complaints Board has asked me to respond to your letter with some preliminary matters prior to the Complaints Board meeting on 21 August 2018.

Is the material advertising? I note in paragraph 7 of your letter that you do not consider the statements complained of to be advertising. The ASA definition of advertising states ““Advertising and advertisement(s)” are any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed.”

In assessing whether the material complained of is advertising, the Chair took into account the above definition and whether the message was controlled by the advertiser. The content is on a publicly available website, in a mailer and a pamphlet available in stores and controlled by The Trusts. In the Chair’s view the content promotes the value of licensing trusts and does come under the jurisdiction of the Advertising Standards Authority and the Advertising Codes of Practice.

The ASA is a self-regulatory body funded by the advertising industry to support responsible advertising. Over its 45 year history it has dealt with a wide-range of advertising including content from government, local government, advocacy groups, large and small businesses and individuals.

In paragraph 10, you refer to the jurisdiction of the Commerce Commission over misleading conduct in trade. The Commerce Commission is a senior jurisdiction to the ASA, but its existence does not prevent the ASA dealing with complaints about advertising.

Is the Complainant a competitor? As part of the process in accepting the complaint, the Chair considered whether the complainant could be considered a competitor.

While noting the Complainant’s involvement in a group lobbying to establish an alternative framework to the Trusts, the Chair does not consider this prevents the Complainant from making a complaint about the advertising in Complaint 18/216 under our consumer complaints process.

The ASA has a separate competitor complaints process which is user pays.

Substantiation for the statements The Chair has considered the source documents provided relating to the statements challenged in the complaint. I note that our Guidance Note on responding to a complaint about misleading claims <http://www.asa.co.nz/codes/code-guidance-notes/responding-to-a-complaint-about-misleading-claims/> includes the following statement:

“A full copy of the relevant scientific evidence/study should be provided with your response. Please highlight the relevant sections, and include an explanation as to why they are relevant to the issue at hand. Do not just provide the extract which supports the claim – it is the totality of good scientific evidence available that is important. While the Complaints Board is not an arbiter of scientific fact, it will make an assessment as to whether the evidence applies to and supports the advertised claim.”

Thank you for the two attachments provided – Attachment 1, the ARPHS Need Assessment and Attachment 2, Auckland Council Local Alcohol Policy Research report. It would be appreciated if you could provide a highlighted copy of each report, identifying the source information for the statements raised in the complaint.

FURTHER RESPONSE FROM THE ADVERTISER, THE TRUSTS

1. Further to Ms Souter's letter of 16 August, paragraph 11, we refer you to relevant sections of the report supporting the statements made by the Trusts.

2. With regard to Attachment 1: ARPH Need Assessment Report 2012, please note the following:

a. The report from page 27 – 33 is focused on alcohol related harm in the West Auckland area, compared to other areas of Auckland. It refers to the area covered by the Henderson-Massey local board, which is commonly known as the 'urban area of the west'. This is the terminology of the report, not of the Trusts.

b. Page 28, shows that 1:5 crashes attended to by police involve alcohol.

c. Page 29, Figure 17, shows, in the red line the urban west number of crashes vis-à-vis other areas. The other lower areas are rural north and rural south. The statement being complained of is based on the information conveyed in Figure 17. This figure supports the statements made by the Trusts that the lowest number of alcohol related crashes occur in the urban west.

d. Page 29, Figure 18, shows the lowest number of fatalities as being in the urban west. The Trusts have relied on this information in the statements they have made. This figure supports the statements made by the Trusts.

e. Page 30, Figure 19, shows the lowest number of weekend versus weekday crashes in the urban west, out of all other urban areas. The Trusts have relied on this information in the statements they have made. This figure supports the statements made by the Trusts.

f. Lastly, page 32, shows at Figure 22 the number of drink driving prosecutions. It shows that the Waitakere area has the lowest between 2000-2010. This figure supports the statements made by the Trusts.

3. With regard to Attachment 2: Local Alcohol Policy Research Report, please note the following:

a. At 5.3.4 – Liquor Ban Breaches, page 41, the report states that by geographic area, as shown on Table 5.3.2, Waitemata consistently records the lowest number of offences. The Waitemata Police area includes the West (urban, some rural, and a small area of the north shore). The graph clearly shows the 'West' parts of the Waitemata are in the lowest part of the 'urban' area for offences, the lowest being 'Rodney.'

b. Table 5.6.8 (page 66) differentiates the types of crashed in the 'urban west' by local road and state highway. This appears to be what N Smale relies on, however, it is not clear as he has not identified the source of this complaint and how it relates to this Auckland Council report.

4. To clarify any potential for misconception, the Trusts consider it appropriate to identify the source of the information and are currently reviewing all locations, digital or otherwise where information from the reports is referred to. Upon identification, a note will be added as to the source of the information.

5. With regard to other matters, including the nature of the complainant, the issue as to jurisdiction and other matters addressed in the writer's letter of 15 August 2018, the Trusts consider it appropriate to present itself at a hearing if any of these matters are to be determined by the ASA.

6. The Trusts appreciate that hearings are not normally held, however, given the campaign of the complainant, and its apparent intention bring the Trusts into disrepute, the Trusts is entitled to be heard on the allegations made by the complainant. The group which N Smale represents, WALTAG, discussed in the writer's letter of 15 August, are not a charitable entity, a community trust or other philanthropic entity registered for any philanthropic or charitable purposes. Their motivation is relevant when considering the complaint, and the manner in which the complainant has sought to communicate information undermining statements made by the Trusts.

7. As a lay person N Smale cannot make any expert comment on the raw data being relied on by Dr Jackson or the Auckland Council. Dr Jackson's report, being Attachment 1, is what supports statements made by the Trusts. There is additional information in the Auckland Council report which has a different interpretation, in some parts support the statements made by the Trusts and in other parts providing a different interpretation to the same data relied on Dr Jackson.

8. Finally, I note that the complaint itself supports the assertion being complained of.

a. I refer you to the first bullet point beneath para 4 of the complaint: "Our West According to NZTA, West Auckland has the lowest incidence of alcohol related crashes in Auckland Council urban zone areas".

b. N Smale goes on to support the statement complained of: "Whilst the absolute numbers of crashes are lowest in West Auckland" but takes issue with the definition of "urban area", which is not a matter for the Trusts can take any action on.

9. N Smale goes on to relay that Auckland Council Local Alcohol Policy Research report supports his claim. However, he does not identify what part of the paper, falling foul of the requirements brought to the Trusts attention at paragraph 11 of Ms Souter's report.

10 In regards to the interpretation of the NZTA data set, we consider it appropriate for a person with the relevant expertise from NZTA provide a statement as the Trusts do not accept N Smale's interpretation of the data.

FURTHER RESPONSE FROM THE SECRETARIAT OF THE ADVERTISING STANDARDS AUTHORITY

Thank you for your letter dated 20 August 2018, providing additional information for the complaint against advertising for Portage and Waitakere Licensing Trusts – 18/216 and the notification in paragraph 4 that the Trusts have chosen to add the source of the information where reference to the reports is made.

The complaint was due to be considered at the Complaints Board meeting on Tuesday 21 August 2018. The Chair made the decision to remove the complaint from the meeting agenda to allow consideration of the points made in your letter.

The Chair of the Complaints Board has asked me to provide clarification on matters of procedure.

The Complaints Board Process

In paragraph 5 of your letter, you note the Trusts consider it appropriate to attend the complaint hearing to address matters of jurisdiction and other issues raised in your letter of 15 August 2018.

The Advertising Standards Authority Rules are available on the ASA website <http://www.asa.co.nz/about-us/rules-of-the-asa/>

The Second Schedule to the Rules sets out the procedures of the Advertising Standards Complaints Board.

For ease of reference, I include the relevant part of that schedule below:

2. Complaint Resolution by Adjudication Without Attendance of Parties

Once a complaint has been accepted for determination by adjudication without the attendance of parties:

2.1 The complainant shall be advised in writing.

2.2 The complainant shall waive the right to take or continue proceedings against the parties to the complaint including the advertiser, publisher or broadcaster.

2.3 The Secretary shall write to all parties to the complaint seeking opinions and comments on the complaint or responses in justification of or opposition to the advertisement. A party to a complaint to the ASCB is any of the following, or anyone representing any of the following: the complainant, the advertiser, the advertising agency (if applicable), the publisher and/or broadcaster.

The Chairperson of the ASCB may also direct the Secretary to write to any other party or parties that the Chairperson may decide will assist the ASCB in its deliberations, seeking opinions and comments on the complaint or responses in justification of or opposition to the advertisement.

2.4 On receipt of comments and opinions, the Secretary shall place before the ASCB full details of the complaint, the matter subject to complaint, and the comments and opinions for determination by the ASCB in meeting.

2.5 No party to a complaint shall be entitled to attend the meeting.

Under the ASA rules, parties are not entitled to attend a Complaints Board adjudication under Rule 2. Decisions are made on the papers.

In paragraphs 6, 7 and 9, you raise the role of the Complainant and their status. The Complaints Board deals with hundreds of complaints a year from ordinary consumers, from individuals with particular interests, from special interest groups, advocates, lobby groups and businesses.

In the ASA process, following a complaint about an advertisement, the onus is on the Advertiser to support claims made. Prior to the meeting, the Complaints Board will receive the complaint, the advertisement and the responses from the Advertiser along with any relevant precedent decisions to consider in its deliberation.

The Complaints Board will consider the likely consumer takeout of an advertisement and whether the Advertiser can support the claims made.

In paragraph 10, you refer to interpretation of the NZTA data set, separate correspondence will be sent on this matter.

EMAIL SENT TO PARTIES FROM THE ASA SECRETARIAT

In the process of preparing Complaint 18/216 for the Complaints Board, the Chair has decided it would assist with Board deliberations to seek information from the New Zealand Transport Agency as to whether the NZTA data referenced by both parties to the complaint justifies or opposes the claim in the advertisement:

“It’s Working! According to NZTA, West Auckland has the lowest Incidence of alcohol related crashes in the Auckland Council urban zone areas”

If you have any comment on this course of action, please forward this to me by 5pm on Friday 24 August.

LETTER SENT TO NEW ZEALAND TRANSPORT AGENCY FROM THE ASA SECRETARIAT

The Advertising Standards Complaints Board is currently dealing with a complaint about advertising by The Trusts in West Auckland.

The Board has received a complaint about the following claim:

“It’s Working! According to NZTA, West Auckland has the lowest Incidence of alcohol related crashes in the Auckland Council urban zone areas”

This claim has been challenged by a complainant, who supplied the data attached as Appendix A.

Counsel for the Advertiser, Portage and Waitakere Licensing Trusts, has provided substantiation for the claim, attached as Appendix B.

As both parties are relying on different NZTA data, it would be appreciated if NZTA could confirm if the data referenced by them justifies or opposes the above claim.

RESPONSE FROM THE NEW ZEALAND TRANSPORT AGENCY

The claim is that West Auckland has the lowest incidence of alcohol-related crashes. This much is true, in 2017 there were fewer alcohol-related crashes in West Auckland than in other urban zones, as shown in the simplified table at the bottom of Appendix A:

West Auckland = 652 alcohol-related crashes Everyone else = more [Central, 1673; North, 735; South, 1694].

This is not surprising as West Auckland has the lowest population of the four Auckland urban zones – 156,522 in 2017, compared to North 285,240, Central 460,950 and South 404,748, again using the figures presented in the simplified table at the bottom of Appendix A.

However, the percentage of crashes which are alcohol-related is higher in West Auckland than in other urban zones, as also shown in the simplified table at the bottom of Appendix A:

West Auckland = 11% of all crashes are alcohol-related Everyone else = less [Central, 6%; North, 6%; South, 9%].

The substantiation used for the Trusts' claim, Nikki Jackson's report provided as Appendix B, is quite dated, as it refers to alcohol-crashes and crash rates in the period 2006 – 2011, and so is not really comparable to the numbers quoted in Appendix A. The report quotes drink driving offence levels with the statement (p. 31) "As shown in Figure 22 below, Waitakere has the lowest level of drink driving convictions across the Auckland region, with 1551 prosecutions in 2010, representing 1174 persons." Again, this is not surprising as West Auckland has the lowest population of the four Auckland urban zones.

In summary, yes, all the crash data have been supplied by NZTA. The data in Appendix B relate to an earlier period 2006 – 2011. The more recent data in Appendix A show that a smaller number of alcohol-related crashes occur in West Auckland than elsewhere each year, but that West Auckland has the highest percentage of crashes which are alcohol related.

The data do not justify the claim.

EMAIL SENT TO PARTIES FROM THE ASA SECRETARIAT

Further to our earlier correspondence advising that we were going to ask the New Zealand Transport Agency (NZTA) for clarification on the data provided by the Complainant and the Advertiser in Complaint 18/216, we have received a response from NZTA

I attach the letter and appendices sent to NZTA and their response for your information.

The Chair has requested parties be given the opportunity to make submissions only on the response from NZTA. Please forward any submission you wish to make by 12pm, Friday 7 September 2018.

RESPONSE FROM THE COMPLAINANT

Regarding the response from NZTA:

I wholeheartedly agree with the opinion of Mr Graham. I'd like to point out to the Board, that although Mr Graham notes that the data in the report provided as Appendix B (Nikki Jackson) is quite dated, the older data contained therein still does not substantiate the claim. Table 5.6.8 in "Auckland Local Alcohol Policy Research Report" (also appendix B) shows that the Urban West area has the highest percentage (state highways) and second highest percentage (local roads) of the urban areas (based on data from 2006-2010).

That is to say, it is primarily a failure to account for the different sizes of the areas, rather than the age of the data, which has led to the misrepresentation.

Mr Graham states in conclusion: • The more recent data in Appendix A show that a smaller number of alcohol-related crashes occur in West Auckland than elsewhere each year, but that West Auckland has the highest percentage of crashes which are alcohol-related. • The data do not justify the claim.

I would add to that statement: • The more recent data in Appendix A show that a smaller number of alcohol-related crashes occur in West Auckland than elsewhere each year, but that West Auckland has the highest percentage of crashes which are alcohol-related

- Older data in Appendix B also show that West Auckland had a high percentage of alcohol-related crashes relative to the other urban areas
- The data do not justify the claim

RESPONSE FROM THE ADVERTISER, THE TRUSTS

Complaints against Portage and Waitakere Licensing Trusts – Ref 18/216: Digital Marketing

1. I refer to the email from your office dated 4 September 2018. That email contained a response from NZTA as to the data which my clients had quoted on their website.

2. The response from ...NZTA, dated 30 August 2018 states that “in 2017 there were fewer alcohol-related crashes in West Auckland than in other urban zones”. The response then goes on to say that the west Auckland area has the lowest population out of the four urban zones.

3. In the latter part of the email Mr Graham goes on say that “the more recent data in Appendix A show that a smaller number of alcohol-related crashes occur in West Auckland than elsewhere each year, but that West Auckland has the highest percentage of crashes which are alcohol-related.” This statement contains an internal inconsistency. The west cannot have both the lowest number of alcohol crashes in Auckland, yet have the highest percentage simply due to a lower number of people residing in the geographic area subject to this analysis.

4. It is noted that the Auckland Council report specifies that the rural west is larger than other areas rural areas in Auckland. The geographical spread of the west Auckland population skews some of this data and statistical analysis. Without questioning the author of each report and Mr Graham it is difficult to conclusively compare all data. As such the NZTA response does not clarify the situation but creates burger confusion. 5. Despite the NZTA response, my client accepts that the data and information it relied on is no longer valid. As at 4 September 2018, my client has removed the references which refer to lowest incidents of alcohol crashes occur in West Auckland. Until additional information is made available and my client obtains additional information from Police and NZTA.

6. However, my client contests that it breached any advertising codes. It does not consider the NZTA response conclusively shows that the information it relied on was incorrect; it shows that the information was outdated, but that the 2017 data. We note that the 2017 still shows the urban west had the lowest numerical alcohol-related crashes but we will not be publishing this data at this point in time.

7. For reasons outlined in my letter of 15 and 20 August 2018, my client maintains that it relied on was valid at the time my client relied on it. Until the response was received from the NZTA, no public record was in place to override the report from the Auckland Regional Public Health (the Dr Jackson report).

8. If the ASA is minded to make an adverse finding against my client, my client’s rights to natural justice requires that it be heard further on the matter.

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 days of receipt of this decision.