

COMPLAINT NUMBER	19/104
COMPLAINANT	A Stevenson
ADVERTISER	The NZ National Party
ADVERTISEMENT	The NZ National Party, Digital Marketing
DATE OF MEETING	9 April 2019
OUTCOME	Not Upheld

SUMMARY

The Facebook NZ National Party advertisement shows a video and states “A Capital Gains Tax would reduce her KiwiSaver by \$64,000 over her lifetime.” Small print on screen qualifies the claim and states: “Source: Calculated based on the average full-time wage earner over a 45 year working life, assuming 3% wage growth pa and 15% of their KiwiSaver investment in Australian shares.”

The Complainant says the advertisement is misleading by not making it clear its workings and using a 3% annual pay rise which is unrealistic and inflates the numbers for effect. The Complainant is also concerned the advertisement is unbalanced by not including any of the other KiwiSaver proposals such as increasing Government contributions.

The Advertiser said that one of the recommendations of the Tax Working Group was to implement a very broad Capital Gains Tax which the Advertiser believes will have a number of substantially negative effects. It states the advocacy advertisement specifically focuses on the possible effect on KiwiSaver based on cited facts and figures.

The Complaints Board said the advertisement from the National Party is presenting hypothetical scenarios to highlight negative effects a Capital Gains Tax could have on KiwiSaver.

The Complaints Board said the advertisement focused on a particular part of the Tax Working Group’s report on a Capital Gains Tax, to make a political point. The Complaints Board agreed that during political debate about a possible policy shift, scenarios that illustrate potential outcomes are permitted in advertising if sufficient information is given for consumers to understand the basis for claims made.

The Complaints Board unanimously ruled that the advocacy advertisement before it was not in breach of Principle 2 or Rule 2(b) and Rule 2(e) of the Advertising Standards Code.

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 complaints with reference to Principle 2 and Rule 2(b) Truthful Presentation and Rule 2(e) Advocacy Advertising of the Advertising Standards Code.

Principle 2 required the Complaints Board to consider whether the advertisement is truthful, balanced and not misleading.

Rule 2(b) required the Board to consider whether the advertisement was misleading or 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) required the Board to consider whether the advertisement was advocacy advertising, and, if so, whether the identity and position of the advertiser was clearly stated. Opinion in support of the advertiser's position must be clearly distinguishable from factual information. Factual information must be able to be substantiated.

The Complaints Board ruled the complaint was Not Upheld.

The Complaint

The Complainant says the advertisement is misleading by not making it clear its workings and using a 3% annual pay rise is unrealistic and inflates the numbers for effect. The Complainant is also concerned the advertisement is unbalanced by not including any of the other KiwiSaver proposals such as increasing Government contributions.

The Advertiser's Response

The Advertiser said that one of the recommendations of the Tax Working Group was to implement a very broad Capital Gains Tax which the Advertiser believes will have a number of substantially negative effects. It states the advocacy advertisement specifically focuses on the possible effect on KiwiSaver based on cited facts and figures.

The Advertiser explained why they used 3% for wage growth and that this is a conservative figure given current short-term forecasts.

Precedent Decision

Decision 17/327 National Party Facebook, Not Upheld

Two advertisements posted to the National Party Facebook Page and YouTube channel made statements about Labour's tax policy. The majority of the Complaints Board considered the likely consumer take out of the advertisement and said it referenced Labour's tax policies as part of a political discourse that had been widely discussed in the public domain. The majority said the context of the advertisement from the National Party, on their Facebook page and YouTube channel, made it clear it presented their opinion and what they considered to be a point of difference in policy. The complaints were not upheld.

The Complaints Board Discussion

Consumer Takeout

The Complaints Board began by discussing the likely consumer takeout of the advertisement. They said it presented the NZ National Party's opinion that a Capital Gains Tax on KiwiSaver will mean less money when you retire and the details of this will be different depending on individual circumstances.

Is the advertisement an advocacy advertisement?

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 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 NZ National Party, the Complaints 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 Complaints 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, 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.

Is the identity of the Advertiser clear?

The Complaints Board agreed the Advertiser had met the identity requirements of an advocacy advertisement. The advertisement appears on the Facebook page of the NZ National Party leader, Simon Bridges, and contained the National Party logo. Therefore, the Board said the context, placement and content made the identity of the Advertiser clear.

Is the advocacy advertisement misleading?

The Complaints Board said the advertisement presented a hypothetical scenario from the National Party to highlight the negative effects a Capital Gains Tax could have on KiwiSaver.

As a significant amount of the capital gains tax debate has been about property, the advertisement is likely to be aimed at voters who might think they will not be affected by such a tax.

The Complaints Board said the advertisement focused on a particular part of the Tax Working Group's report on a Capital Gains Tax, to make a political point. The Complaints Board agreed that during political debate about a possible policy shift, scenarios that illustrate potential outcomes are permitted in advertising if sufficient information is given for consumers to understand the basis for claims made.

The Complaints Board said that based on current treasury forecasting figures, it did not consider the 3% annual growth rate used in the scenario's calculation to be unrealistic. The Board noted Advertisers need to take care with the use of small print to ensure any qualifying statements are legible. The Complaints Board agreed that the medium used in this instance meant the basis for the calculation was clear and the advertisement was not misleading.

The Board also noted the self-regulatory action taken by the Advertiser to add a footnote with the calculations used for the claim in the linked media release.

The Complaints Board unanimously ruled that the advocacy advertisement before it was not in breach of Principle 2 or Rule 2(b) and Rule 2(e) of the Advertising Standards Code.

The Complaints Board ruled the complaint was Not Upheld.

DESCRIPTION OF ADVERTISEMENT

The Facebook NZ National Party advertisement shows a video and says "A capital Gains Tax would reduce her KiwiSaver by \$64,000 over her lifetime." The small print says "Source: Calculated based on the average full-time wage earner over a 45 year working life, assuming 3% wage growth pa and 15% of their KiwiSaver investment in Australian shares."

COMPLAINT FROM A STEVENSON

This ad is not truthful as it fails to disclose it is in a balanced fund as per all of its other material that I have attached and the attached material makes no mention of the 3% wage rise. Based on yearly wage rises this is a well above average amount and is meant to over inflate the numbers for effect. It also worth noting in the links provided there is no mention of the 3% wage rise yearly. I also note the use the phrase but do not show what the average wage is and account for the numerous other recommendations regarding Kiwisaver by the group including boosting Government contributions yearly by 50% to \$780 etc. Being this came up as sponsored and is now all over Facebook in a bid to deceive people and further inflame and misrepresent facts again. I feel this is a breach of advertising standards. Also the title Proposed Capital Gains Tax will hurt your KiwiSaver is not true particularly as before this ad this was on the air this morning. https://www.tvnz.co.nz/one-news/newzealand/majority-kiwisaver-users-would-better-off-if-all-tax-working-group-s-proposed-changesimplemented-expert?variant=tb_v_1

I feel this ad deliberately misrepresents and misleads the public and does not show its workings and the 3% wage rise per annum based on the last 10 years is unrealistic. Links where information is that hasn't been included in the ad. <http://www.scoop.co.nz/stories/PA1903/S00005/cgt-poses-64k-question-for-ordinary-kiwis.htm> https://www.national.org.nz/cgt_poses_64k_question_for_ordinary_kiwis

CODES OF PRACTICE

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.

RESPONSE FROM ADVERTISER, THE NZ NATIONAL PARTY

Thank you for your email dated 12 March 2019 regarding complaint number 19/104, and for your further extension of time in preparing this response.

In regards to advocacy advertising, and particularly regarding political matters, it has been the previous view and practice of the Advertising Standards Authority (ASA) 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. The National Party continues to stand by the ASA in its guardianship of this important democratic right.

You have asserted in your letter the relevant sections of potential breach, according to the complainant's objections, are: Principle 2, Part 2(a) and Part 2(e).

First, the advertisement in question was visibly authorised and published by the National Party, and our Leader Simon Bridges. Therefore, there is no question about the origin of the statement or its contents. This is in line with Principle 2, rule 2(a) around the identification of the advertiser, and in regard to the ASA guidelines of rule 2(e) "*The identity of the advertiser must be obvious and easily recognised. Where an advertiser is not well known, additional information such as a physical address, website address or phone number may be appropriate to include*". The National Party and Simon Bridges are well-known political figures to the general New Zealand public, and any further contact or supporting information can be found, publicly and easily, on the contact section of the Facebook pages/twitter pages the advert was published on. An authorisation statement and logo were also used at the conclusion of the advert to further re-enforce this provision.

A copy of the final slide of the advert with logo and authorisation is shown below:

**National believes you
deserve to keep more
of what you earn.**

National

Authorised by Simon Bridges, Parliament Buildings, Wellington.

The complainant himself addresses the complaint specifically to Simon Bridges, via the National Party, therefore any argument under Rule 2(a) lacks merit.

Secondly, as of the 21st February 2019 the Tax Working Group, chaired by former Labour Finance Minister Hon Dr Sir Michael Cullen, and established by current Finance Minister Grant Robertson, released its final report with many recommendations regarding our tax system. One of those recommendations was to implement a very broad Capital Gains Tax. The report can be found here: <https://taxworkinggroup.govt.nz/sites/default/files/2019-03/twg-final-report-voli-feb19-v1.pdf> (specific mention of Capital Gains tax is on page 55)

As a result of the Government's Tax Working Group's recommended Capital Gains Tax, there are a number of substantially negative effects on New Zealanders. For the purpose of the advocacy advertisement in question, it was narrowly and specifically focused on the negative effects of a Capital Gains Tax on New Zealander's Kiwisaver accounts. This is a highly likely scenario that we have costed and estimated based on correctly cited facts and figures.

In regards to the complainant's assertion that the Kiwisaver scenario put forward by National does not take into account other recommendations by the Tax Working group to be overall neutral, the government itself has said the following: *"As the Working Group has said, the Government is not bound to accept all the recommendations it put forward. There are options to accept some, and/or to phase or sequence aspects of the packages proposed by the Group. Both Ministers said it was highly unlikely all recommendations will need to be implemented."* Source: <https://www.beehive.govt.nz/release/government-response-tax-working-group-report>

At the time of writing this response, we are still none the wiser as to which recommendations the government may, or may not, implement. It is therefore entirely legitimate of an advocacy advert to put forward a credible scenario on the individual effects of one, or any of the recommendations. To do otherwise would require a level of political clairvoyance regarding the Labour-NZ First Government's intentions, and that in itself could potentially be regarded as misleading or presumptive. Especially when the Government does not even know what they are going to implement themselves.

The complainant gives evidence to support his assertion by way of a TVNZ story link. This story/link is misleading and incorrect per rule 2(b) – Truthful presentation, as the source in

question stipulates that the basis of the conclusion reached would be as if all the recommendations of the Tax Working Group would be accepted. That has never been the basis for our argument on this advocacy advertisement. And given the statement by the Minister of Finance cited in a paragraph previously, this TVNZ story/source is not based in reality, and should not be relied on for factual debate. The source for the TVNZ story/link also does not show/cite his workings or background for the figures achieved, and could be a breach of rule 2(e), where in National's case we have been entirely transparent with our supporting information.

The complainant has also asserted that we have not mentioned the 3% annual wage rise anywhere, this is contrary to his own screen shots in provided evidence, and is further shown in the screen shots of the advertisement scenarios below:

Scenario 1: (average wage, 3% contribution to Kiwisaver, 3% wage growth)



Scenario 2: (average wage, 4% contribution to Kiwisaver, 3% wage growth)



Scenario 3: (average wage, 8% contribution to Kiwisaver, 3% wage growth)



Per the ASA guidelines for Part 2(e) “Evidence (e.g. academic studies, expert opinion) in support of factual information must be appropriate and robust and must be readily available and obtainable.” And “Factual information must be able to be substantiated”.

These scenarios have all been individually cited, where a cost element of the advert has been shown. Further supporting information for the advertisement viewer was linked into the comment thread of the advert and pinned to the top of the comments for easy reference. The supplementary information to the advert citation was contained in this link: https://www.national.org.nz/cgt_poses_64k_question_for_ordinary_kiwis

In regard to wage growth assumption of 3% per year, contrary to the claim made by the complainant, **it would in fact be misleading not to assume wage growth** otherwise the average wage would not remain the average wage over the course of the 45 year working life (it would also slowly erode over time in real terms due to inflation).

In regard to using 3% wage growth, as of **HYEFU (Dec 2018) the Treasury is forecasting annual wage growth over the next 5 years of 3.1%, 3.3%, 3.5%, 3.4% and 3.5%**. Therefore 3% appears conservative based on current short-term forecasts.

HYEFU source is can be found here: <https://treasury.govt.nz/sites/default/files/2018-12/hyefu-basics-dec18.pdf>

Furthermore, **2% of the assumed wage growth is simply inflation** (the Reserve Bank target) with 1% of real growth, therefore that is hardly an ambitious assumption, nor based on the information above is it a deliberate attempt to inflate the figures as asserted by the complainant.

Finally, we specifically stated that the \$64,000 would be the effect of a ‘Capital Gains Tax’. That is narrow and very clear. The other offsets are not Capital Gains Taxes.

In any case, the offsets are only part of illustrative revenue neutral packages. While the Government cannot even confirm any changes will produce a revenue-neutral package.

To conclude, we believe we have more than adequately adhered to the provisions of Principle 2, Part 2(a) and Part 2(e), as noted above. Our advocacy advert was clearly identifiable as an advocacy piece by a political party and its leader. References for given scenarios of impact of the Capital Gains Tax Policy recommendation on Kiwisaver were adequately cited and references were made in further supporting information contained in a pinned comment to the advert.

As an organisation, we always seek to be a constructive party in your complaints process. While we didn't think it was necessary, we have added further footnotes to the supplementary press release that was tagged in the comments section of the advert to remove any doubt about our workings.

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.