

COMPLAINT NUMBER	19/324
COMPLAINANT	A. Little
ADVERTISER	Nick Smith MP
ADVERTISEMENT	Nick Smith MP, Print
DATE OF MEETING	2 October 2019
OUTCOME	Not Upheld No Further Action Required

Description of Advertisement

The print advertisement in the Nelson Weekly newspaper was from Nelson MP Nick Smith. It is headed “Nelson Matters with your MP Nick Smith.” It includes an address, a photo and is labelled Advert at the end of the text. The opinion piece states the Government intends exempting itself from the new workplace safety laws to enable re-entry to the Pike River mine. The advertisement gives a brief history of the explosion and aftermath under a National Government and plans for recovery from the Coalition Government. The advertisement refers to mining journalist Gerry Morris calling out the Government’s intention to bypass mine safety regulations and names Pike River Recovery and Justice Minister Andrew Little as belittling Mr Morris in Parliament and escalating this to the Police.

Summary of the Complaint

- The Complainant said the advertisement is misleading to say the Government intends exempting itself from the new worksafe safety laws when the Pike River Recovery Agency is in fact intending to seek an exemption to a regulation which is permissible under law. An exemption will only be sought if the plan can be proven to be as safe or better than the regulation.
- The Complainant said the advertisement is inaccurate and therefore misleading to say that laws require two means of exit from a mine as the regulation referred to does not apply to the Pike River mine before 2024.
- The Complainant said the claim that Hon. Andrew Little complained to police regarding the matters referred to in the advertisement was untrue.

Issues Raised

- Truthful Presentation
- Advocacy Advertising

Summary of the Advertiser’s Response

The Advertiser confirmed the context for the advertisement was as an opinion piece in the newspaper by an Opposition MP expressing a different point of view to the Government.

The Advertiser provided substantiation for the exemption claim and said they are not obliged to repeat the justification for the exemption in an opinion piece.

The Advertiser provided substantiation for his statement that the law requires two means of exit from a mine. The Advertiser also disputed the Complainant’s statement that the regulation referred to does not apply to the Pike River mine.

The Advertiser confirmed they based the statement about the police complaint on information from Mr Morris and Mr Mitchell and supplied statements to support the wording in the advertisement.

Summary of the Complaints Board Decision

The Complaints Board did not uphold a complaint an advocacy advertisement from Nick Smith MP about the Government's plans for the Pike River Mine re-entry. The Complaints Board said within the context of an advocacy advertisement, the Advertiser had provided sufficient substantiation to support the claims made and the advertisement was not in breach of the Advertising Standards Code.

Relevant ASA Codes of Practice

The Acting Chair directed the Complaints Board to consider the complaint with reference to the following code.

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.

Complaints Board Discussion

Consumer Takeout

The Complaints Board said the likely consumer takeout of the advertisement is the Government is exempting itself from its own health and safety laws. It also said the takeout was the escalating dispute over the matter resulted in action by the Police in response to a complaint by Hon. Andrew Little.

Is the advertisement 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 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 Nick Smith MP, expressing his views on the Pike River Mine re-entry plans, 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 for advocacy advertising under Rule 2(e). The advertisement in the Nelson Weekly was headed "Nelson Matters with your MP Nick Smith." It includes an address, a photo and is labelled "Advert" at the end of the text.

Is the advertisement misleading?

The Complaints Board considered each of the claims in turn:

Claim 1: "The Government intends exempting itself from the new worksafe safety laws and mining regulations."

The Complaints Board said the Advertiser had provided sufficient substantiation from Hansard for Claim 1. The Board noted the legislation provides for exemptions but said in the context of advocacy advertising the Advertiser was not obliged to provide further qualification.

Claim 2: "These new laws rightly require two means of exit from a mine."

The Complaints Board said this claim was a statement of fact and continued the theme of the advertisement, questioning the Government on the health and safety processes involved in the mine's re-entry. The Board said the Advertiser had provided sufficient substantiation for this statement.

Claim 3: "Their dispute escalated on Friday with the Minister complaining to police."

The Complaints Board noted the Complainant stated: "I have made no complaint to police regarding any of the matters canvassed in the advertisement." However, the Complaints Board also noted the statements provided by the Advertiser from Mr Morris and Mr Mitchell.

The majority of the Complaints Board agreed the Advertiser had provided sufficient substantiation for the statement made in the advertisement. The evidence provided was sufficient to show there was a dispute, it had escalated, and the Police visited Mr Morris' home.

A minority of the Complaints Board disagreed and said the likely takeout of the statement was that Police were called as a result of Mr Morris' position on the Pike River re-entry, which it said was unfair and misleading.

However, in accordance with the majority, the Complaints Board said the Advertiser has provided sufficient substantiation for Claim 3 in the context of an advocacy advertisement.

The Complaints Board was unanimous in its ruling that Claims 1 and 2 of the advertisement were not in breach of Principle 2 or Rule 2(b) of the Advertising Standards Code. The majority of the Complaints Board also ruled Claim 3 had not breached the 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 days of receipt of this decision.

APPENDICES

1. Complaint
2. Response from Advertiser
3. Response from Media

Appendix 1

COMPLAINT FROM A LITTLE

I submit that the publication is clearly an advertisement. It is published in a printed community newspaper and reads "Advert." in bold print. Therefore the Advertising Standards Code ("the Code") is relevant.

I submit that the advertisement breaches Principle 2 of the Code regarding truthful representation, in particular Rule 2 (b) in that it seeks to deceive or confuse and exploit lack of knowledge through inaccuracy. The ad reads "the Government intends exempting itself from the new workplace safety laws". The Government, or its agency Te Kāhui Whakamana Rua Tekau mā Iwa-Pike River Recovery Agency, is not exempting itself from the law; that is to say it is not seeking to be non-compliant. It intends, however, to seek an exemption to a regulation which is permissible under the law because section 220 of the Health and Safety at Work Act 2015 provides for the regulator, WorkSafe New Zealand, to exempt any person from a regulation made under the Act, provided the exemption is not inconsistent with the purpose of this Act. An exemption will only be sought if the plan can be proven to be as safe or better than the regulation. Dr Smith's statement is factually inaccurate and as a consequence is misleading.

I submit that it again breaches Principle 2 of the Code regarding truthful representation, in particular Rule 2 (b) in that it seeks to deceive or confuse and exploit lack of knowledge through inaccuracy. The advertisement reads "laws rightly now require two means of exit from a mine". The reference to two means of exit from a mine must surely relate to 2016 Health and Safety at Work (Mining Operations and Quarrying Operations) Regulation 170 (1). That regulation does not apply to the Pike River Coal Mine before 16 December 2024.

I submit that it again breaches Principle 2 of the Code regarding truthful representation, in particular Rule 2 (b) in that the Code requires the advertiser to hold evidence to substantiate all claims made. The advertisement reads "Their dispute escalated on Friday with the Minister complaining to police". There reference to a "Minister" patently refers to me, named earlier as "Justice Minister Andrew Little". The advertiser surely holds no evidence of any complaint to Police by me because I have made no complaint to Police regarding any of the matters canvassed in the advertisement.

Appendix 2

RESPONSE FROM ADVERTISER, NICK SMITH MP

Thank you for the opportunity to respond to the complaint by the Minister of Justice Andrew Little regarding my column in the Nelson Weekly. This column was published in a number of publications including the NZ Herald, the Greymouth Star and the Westport News with slight variations to meet different word limits.

I am astounded by this complaint. It was published in the Nelson Weekly on the "Opinion Page" for which I pay a small weekly fee. It is crucial in a democratic society that people can freely express opinions. This complaint is particularly offensive as it is the Government trying to shut down an Opposition MP from expressing a different point of view on an important issue of public policy.

The first complaint quotes my statement "the Government intends exempting itself from the new workplace safety laws." The first full first sentence of the article was "It was revealed last week that the Government intends exempting itself from the new workplace safety laws and mining regulations put in place following the Pike River tragedy." The Parliamentary Hansard of 22 August 2019 (attached) confirms this fact. In response to a question from Mr Mitchell "Will any exemptions from the Health and Safety at Work Act 2015 or any of its regulations be sought in relation to the Pike River Mine re-entry?" Mr Little says "Yes".. The exemption is from another Government agency but the Government is one identity. Mr Little presents justification for seeking exemption but there is no obligation on someone else to have to repeat those in criticising the exemption.

Mr Little's second complaint is that my column states "These new laws rightly require two means of exit from a mine and better ventilation." This is correct see enclosed. Section 170 of the Health and Safety at Work (Mining Operations and Quarrying Operations) Regulation 2016 that requires "at least two exits". The paragraph is in reference to the new laws passed by National after the Pike tragedy.

Mr Little's claim that it is factually inaccurate or misleading because it does not include all the details of these regulations is not reasonable. A statement "the new speed limit is 80 kmph" is not factually inaccurate or misleading for not saying that Police or ambulance may lawfully exceed it. Another example is where the Government has placed ads saying homes must be insulated by 1 July this year but the ad does not list the specific exemptions in the regulations, yet this ad is not a breach of the Advertising Standards. There are exceptions to almost every regulation and law under particular circumstances but this does not make an advertisement false or inaccurate when they are not all included.

I also dispute Mr Little's claim that this regulation does not apply to the Pike River Mine. The transitional provisions to regulation 170 (1) does not apply is to "an existing mining operation". The Pike River Mine was not an existing mining operation in 2016, as mining ceased when it exploded in the tragedy in 2010.

Mr Little's third complaint is over my statement "Their dispute escalated on Friday with the Minister complaining to Police". I based this statement on what Mr Gerry Morris told me about what occurred when Police entered his private home late on Friday night of 23 August. Mr Morris said Police told him that it was in response to a complaint by Mr Little. Mr Little also told my colleague Mr Mark Mitchell in a phone conversation on the afternoon of 23 August that he had complained to Police about Mr Morris. I stand by the truthfulness of the statement as I have no reason to disbelieve the information provided by Mr Morris and Mr Mitchell. It is irrefutable that Police called on Mr Morris and that they cited concerns from Mr Little to justify their late visit to his private home

I conclude by reiterating that the Advertising Standards Authority is unfairly being drawn into political debate and that it needs to be very cautious of curtailing the legitimate rights in a democracy of Opposition MPs legitimately criticising the Government.

The Advertiser provided the following attachments:

- Copy of a comment column from Hon Nick Smith published by the New Zealand Herald
- Copy of an opinion piece from Hon Andrew Little in response published by the New Zealand Herald
- Copy of an opinion column from Hon Nick Smith published by the Westport News
- Copy of an opinion column from Hon Nick Smith published by the Greymouth Star
- Parliamentary Hansard 22 August 2019
- Section 170 of the Health and Safety at Work Regulations 2016

- Extract from Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2016

The Advertiser also provided statements from Mr G. Morris and Hon Mark Mitchell MP.

Statement by Gerry Morris

I wrote a column in the Greymouth Star that was published on 23 August 2019 that was critical of the Government's Pike River Mine Re-entry project. The following day, Thursday, Mr Little made false derogatory comments about me and my family in Parliament in response to questions by Mr Mark Mitchell MP.

I sought confirmation from a colleague of Mr Little's home address that I obtained from the Electoral Roll, as I wished to write to him directly about the false claims he had made and would ensure my correspondence got to him rather than a staff member.

Police visited my home late on the night of Friday 25 August at 10.35pm. My partner was shocked and distraught to be in her nightwear confronted by armed Police. They said they were the Wellington CIB responding to a complaint by Mr Little. I was quickly able to satisfy police that I posed no risk to him. The Police visit is now subject to an IPCA complaint.

Gerry Morris
Journalist
30 September 2019

Statement regarding Police complaint/Gerry Morris by Mark Mitchell MP

On the 23rd of August at 4.27 pm I received a phone call from Justice Minister Andrew Little. He appeared to be highly agitated at Mr Gerry Morris and the Hon Nick Smith. It followed an article published that Wednesday in a Greymouth paper by Gerry Morris that was critical of the Government and its approach to the Pike River Mine Re-entry. When I asked Minister Little questions in the house that related to issues that had been raised by Mr Morris the Ministers response was to mock both Mr Morris and his family. The Minister did this under parliamentary privilege.

During the course of the conversation Mr Little informed me that Mr Morris had made threats against him and that the Police had been informed and were protecting his house. ... I did not personally know Mr Morris and had only recently spoken to him on the phone following the publishing of his article. He struck me as a passionate west coaster with a background in journalism and mining on the West Coast. Mr Morris was visited by Police late that night.

I found it completely inappropriate for a NZ Justice Minister to be attacking the actions and character of both Mr Morris who had done nothing more than challenge the Govt on its approach to the Pike River Mine re-entry and the Hon Nick Smith for same thing. ...

It Is worrying that In New Zealand a Kiwi that openly challenges a Govt receives a Police visit late at night.

For your information.

Hon Mark Mitchell
MP Rodney
30 September 2019

Appendix 3

RESPONSE FROM MEDIA, NELSON WEEKLY LTD

A basic, neutral description of the advertisement	Column written by Nelson MP paid for by Parliamentary Services
Date advertisement began	August 28
Where the advertisement appeared (all locations e.g. TV, Billboard, Newspaper Website)	Nelson Weekly newspaper
Is the advertisement still accessible – where and until when?	Yes, accessible on the Issuu website where digital copies of our newspapers are published.
Who is the product / brand target audience?	All of Nelson