

COMPLAINT NUMBER	20/247
COMPLAINT ON BEHALF OF	Auckland Council
ADVERTISER	Auckland Ratepayers' Alliance
ADVERTISEMENT	Auckland Ratepayers' Alliance, Billboard
DATE OF MEETING	21 July 2020
OUTCOME	Upheld Advertisement not to be used again in its current form

Summary of the Complaints Board Decision

The Complaints Board Upheld a complaint about a billboard advertisement for the Auckland Ratepayers' Alliance. The Board said the identity of the Advertiser had not been made clear and the use of the Auckland Council logo alongside the Auckland Ratepayers' Alliance logo caused confusion about the Advertiser's identity.

Advertisement

The Auckland Ratepayers Alliance billboard advertisement is an advocacy message regarding proposed rate increases in the Auckland region. The advertisement includes the text "Have your say on proposed hike to rates" followed by "Submit now at rates2020.nz". The advertisement shows the Auckland Ratepayers Alliance logo alongside the Auckland City Council logo. The billboard is on a privately owned site.

Summary of the Complaint

The Complainant Auckland Council is concerned the use of the Council's logo in the Auckland Ratepayers' Alliance (ARA) advertisement is misleading by implying the Auckland Council's endorsement when permission to use the logo has not been given. The Complainant has its own consultation campaign on the 2020-2021 annual budget Emergency Budget and is concerned the ARA advertisement will detract from its own campaign.

Issues Raised:

- Truthful Presentation
- Advocacy Advertising
- Use of Endorsements

Summary of the Advertiser's Response

The Advertiser defended the complaint saying the advertisement was only encouraging the audience to engage with the consultation process and the use of the logo does not claim or imply endorsement. The Advertiser said the Council's request for public feedback from ratepayers is directly encouraging interest groups to engage with the submissions campaign and the advertisement in question is simply highlighting another submission portal.

The Advertiser highlights other examples where groups have used the logo and other Council branding and says the Council does not have exclusive rights over the use of the wording "Have your say".

Relevant ASA Codes of Practice

The Chair directed the Complaints Board to consider the complaint with reference to the following codes:

ADVERTISING STANDARDS CODE

Principle 2: Truthful Presentation: Advertisements must be truthful, balanced and not misleading.

Rule 2(b) Truthful Presentation: Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission, false representation or otherwise. Obvious hyperbole identifiable as such is not considered to be misleading.

Rule 2(e) Advocacy advertising: Advocacy advertising must clearly state the identity and position of the advertiser. Opinion in support of the advertiser's position must be clearly distinguishable from factual information. Factual information must be able to be substantiated.

Rule 2(f) Use of testimonials and endorsements: Advertisements must not contain or refer to any personal testimonial unless permission to use the testimonial has been obtained and it is verifiable, genuine, current, and representative of the typical not the exceptional. Advertisements must not claim or imply endorsement by any individual, government agency, professional body or independent agency unless there is prior consent and the endorsement is current and verifiable.

Relevant precedent decisions

In considering this complaint the Complaints Board referred to two precedent decisions, Decision 17/303 which was Not Upheld and 18/340 which was Upheld.

The full versions of decisions since 2015 can be found on the ASA website:

<https://www.asa.co.nz/decisions/>

Decision 17/303 concerned a Twitter video advertisement for the National Party in support of farmers and regional New Zealand. The Complainant said the red colour and Labour Party logo was misleading as it implied it was the official position of the Labour Party and gave the impression Labour intends to implement a Capital Gains Tax if elected.

The majority of the Complaints Board said the brief use of the colour red and Labour Party logo in the advertisement did not reach the threshold to be misleading when the overall context, medium and political nature of the advertisement were considered.

Decision 18/340 concerned billboard advertisement for WAVES NZ about concerns around vaccinations.

The majority of the Complaints Board said the identity of the Advertiser, WAVES NZ, was not sufficiently clear and ruled the identification requirement of an advocacy advertisement had not been met.

Complaints Board Discussion

Consumer Takeout

The Complaints Board agreed the likely consumer takeout is a call to action to have your say on the Auckland Council's proposed increase to Council rates with logos from two organisations, the Auckland Council and the Auckland Ratepayers Alliance.

Is the advertisement advocacy advertising?

The Complaints Board said the advertisements before it fell into the category of advocacy advertising and noted the requirements of Rule 2(e) of the Advertising Standards Code. This Rule required the identity of the advertiser to be clear; opinion to be distinguished from factual information and factual information must be able to be substantiated. The Advocacy Principles developed by the Complaints Board in previous decisions considered under rule 11 of the Code of Ethics remain relevant. They say:

1. That section 14 of the Bill of Rights Act 1990, in granting the right of freedom of expression, allows advertisers to impart information and opinions but that in exercising that right what was factual information and what was opinion, should be clearly distinguishable.
2. That the right of freedom of expression as stated in section 14 is not absolute as there could be an infringement of other people's rights. Care should be taken to ensure that this does not occur.
3. That the Codes fetter the rights granted by section 14 to ensure there is fair play between all parties on controversial issues. Therefore, in advocacy advertising and particularly on political matters the spirit of the Code is more important than technical breaches. People have the right to express their views and this right should not be unduly or unreasonably restricted by Rules.
4. That robust debate in a democratic society is to be encouraged by the media and advertisers and that the Codes should be interpreted liberally to ensure fair play by the contestants.
5. That it is essential in all advocacy advertisements that the identity of the advertiser is clear.

The Complaints Board observed that in a free and democratic society, issues should be openly debated without undue hindrance or interference from authorities such as the Complaints Board, and in no way should political parties, politicians, lobby groups or advocates be unnecessarily fettered by a technical or unduly strict interpretation of the rules and regulations.

Has the Advertiser been adequately identified?

The Complaints Board said the Advertiser had not been adequately identified in the advertisement. This is because the Auckland Ratepayers' Alliance logo and the Auckland Council logo feature side by side with equal prominence. This could lead consumers to believe the call to action to visit the website www.rates2020.nz was from the Auckland Council. The Board said unlike a print or website advertisement, consumers often only have fleeting exposure to the content of a billboard, making first impressions more important. The Complaints Board noted the website address in the advertisement, www.rates2020.nz, did not provide any additional clarity about the identity of the Advertiser.

The Complaints Board unanimously agreed the identity of the Advertiser was not sufficiently clear and ruled the identification requirement of Rule 2(e) had not been met. As the Advertiser's identity was not sufficiently clear to provide context, the Complaints Board said

the more liberal interpretation of the Code which may have otherwise been available under the Advocacy Principles, did not apply in this instance.

Is the advertisement likely to mislead or confuse consumers?

The Complaints Board agreed the advertisement was likely to mislead or confuse consumers. Given the advertisement is about Council rate increases, the Board said the Auckland Council logo is likely to be the more recognisable of the two logos and therefore the one which may engage and resonate with viewers. The Board said the content of the advertisement had negative connotations with the arrow image turning from green to red as it tracks upward and the use of the word “hike.” The Board said the use of the Auckland Council logo in equal prominence with the Advertiser’s logo was likely to cause confusion about the source of the messaging in the advertisement.

The Complaints Board confirmed this Decision related to the particular wording and design of the advertisement before it and the Board did not take a position on the use of the Auckland Council logo per se.

Does the advertisement claim or imply endorsement?

The Complaints Board said the advertisement did not make it sufficiently clear who was promoting the advertisement and therefore the Auckland Council logo could imply endorsement. The Board noted the Advertiser’s comments that by using the URL featured on the advertisement, www.rates2020nz, the website would clarify who was hosting the advertised submission portal. The Complaints Board said that as with precedent decision 18/340, the billboard advertisement needed to comply with the Advertising Standards Code in its own right. The information available if consumers visited the website did not prevent the billboard advertisement from being misleading.

The Complaints Board said taking into account context, medium, audience and product, the advertisement was in breach of Principle 2 and Rules 2(b), Rule 2(e) and Rule 2(f) of the Advertising Standards Code.

Outcome

The Complaints Board ruled the complaint was **Upheld**.

Advertisement to be removed and not used again in its current form.

APPEAL INFORMATION

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website www.asa.co.nz. Appeals must be made in writing via email or letter within 14 calendar days of receipt of this decision.

APPENDICES

1. Complaint
 2. Response from Advertiser
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Appendix 1

COMPLAINT

Auckland Council wishes to lay a complaint under Rules 2(f), 2(b) and 2(e) of the Advertising Standards Code (Code) in respect of an advertisement displayed on a billboard located at the top of Mt Eden Rd, before Boston Rd. The advertisement continues to be displayed at the time of this complaint.

We are aware that the advertisement may also be displayed on other billboards and yard signs around Auckland.

Advertisement

The advertiser is the Auckland Ratepayers' Alliance (ARA).

At the top of the advertisement, the logos of the ARA and the Auckland Council are displayed alongside each other, with equal size and prominence. Underneath it states:
Have your say on proposed hike to Council rates

A zigzagged arrow pointing upwards is displayed next to these words.
Along the bottom is the statement "SUBMIT NOW AT RATES2020.NZ".

The advertisement is clearly intended to influence the choice, opinion or behaviour of its audience, and therefore meets the Advertising Standards Authority definition of "advertisement".

Complaint

Auckland Council complains that the advertisement is in breach of Rule 2(f) of the Code as it "claims or implies endorsement" by the Auckland Council. The use of the Auckland Council logo gives the clear impression that the Auckland Council is working with the ARA to seek input from the public to "have their say" on rates; and/or that it has approved / authorised the advertisement.

This is incorrect. The Auckland Council logo has been used without permission. The ARA has intentionally used the Auckland Council logo in the advertisement to imply that the Auckland Council supports and sanctions the advertisement. We have written to the ARA asking them to remove the logo, but have not received a satisfactory response. Furthermore, the use of the Auckland Council logo in this manner is likely to mislead or confuse the public as to the identity of the advertiser, in breach of Rules 2(b) and 2(e) of the Code.

Context and discussion

The advertisement must be seen and considered within the wider context in which the Auckland Council is currently running its own consultation campaign to seek submissions on its 2020/2021 annual plan (named the "Emergency Budget"). The Auckland Council campaign uses the tagline "Have your say on Auckland's Emergency Budget 2020/2021".

Auckland Council is concerned that the use of its logo in the advertisement may detract from its own campaign, and undermines the statutory consultation process under Part 6 of the Local Government Act 2002. Auckland Council has taken care to comply with its legislative obligations to consult, which includes providing the statutorily prescribed information to properly inform the public on the matters on which it is consulting.

The use of the Council logo is unauthorised, yet strongly implies that the Council has endorsed the advertisement. This implication is strengthened by the size, position and prominence of the logo on the billboard, which is given equal treatment next to the ARA logo. The Auckland Council logo draws the eye due to its placement at the centre top. The logo is deployed in a conventional and straightforward manner that does not in itself raise doubts about its meaning.

The phrase “Have your say ...” is associated with Council requests for submissions (in light of the Council’s current consultation campaign), and further underpins the impression that this is a Council approved advertisement.

We have carefully considered whether the phrase “proposed hike” might counteract this impression. We do not consider that it does due to:

- The totality of the factors described above;
- The likelihood that passing motorists (the main audience for the billboard) would only have a brief opportunity to take in the content of the billboard, and be therefore be influenced by the more obvious components of the advertisement – particularly the visual impact of the Auckland Council logo;
- The otherwise clear and unqualified use of the Auckland Council logo.

The use of the Auckland Council logo to imply that Council has sanctioned the advertisement in itself results in a breach of Rule 2(f) of the Code. Consequent upon this is that the identity of the advertiser is unclear, such that consumers would be likely to be misled or confused, in breach of Rules 2(b) and 2(e). This is particularly concerning given the potential of the advertisement to detract from Council’s statutory consultation process currently being undertaken.

Precedents

Auckland Council refers to Decision 17/318 in respect of an advocacy advertisement by Saving Downs Syndrome. In that advertisement, the Labour Party logo and election tagline was used in a similar style to Labour Party Election advertising, without qualification. The advertiser claimed that the it was a parody of Labour Party advertising. The Complaints Board disagreed, and considered that the identity of the advertiser in relation to the image was not clear and that its use was therefore likely to mislead or confuse the public as to the Labour Party’s position and policies, in breach of the requirements of the Code.

Another potential precedent is Decision 17/303 about a National Party advertisement on Twitter which featured the Labour Party logo in conjunction with what was described as its tax agenda. The Board considered the advertisement did not reach the threshold needed to be misleading when the overall context, medium and political nature of the advertisement was considered. A minority considered that the Labour Party logo could give the impression this was the official position of the Labour Party and the use of an opposition party logo in political advertising was likely to cause confusion for consumers.

Both precedents demonstrate that the unauthorised use of logos can be misleading. The components of the present advertisement are even more clear-cut and leave little room for interpretation, in light of the medium and context.

Summary

The clear implication arising from the advertisement, in the immediate and wider context, is that the Auckland Council has authorised the advertisement. This in turn is likely to mislead the public. The advertisement is in breach of the ASA Code.

Appendix 2

RESPONSE FROM ADVERTISER,

Complaint 20/247: Auckland Ratepayers' Alliance response

Context

1. This is a response from the *Auckland Ratepayers' Alliance* to Complaint 20/247 (the Complaint), laid with the Advertising Standards Authority with regards to a billboard (the Billboard) located at the top of Mt Eden Rd.
2. The Billboard serves to draw motorists' attention to Auckland Council's consultation process on its Emergency Budget and proposed increases to rates. Further, it encourages ratepayers to share their views via an email submission portal hosted by the *Alliance* at www.Rates2020.nz.
3. Specific concerns raised by the Complaint surround the use of Auckland Council's logo (the Logo) to the right of that of the *Alliance*. The Complaint asserts that the Logo implies an endorsement from the Council and is likely to mislead or confuse the public.
4. We do not dispute the Complaint's physical description of the Billboard. We acknowledge that the Complaint includes a photograph of the Billboard, and therefore we have not included a photograph in our response.
5. The Billboard (along with other billboards and yard signs supplementing the same campaign) is no longer on display.

Response

6. The Complaint notes that the Billboard seeks to influence the choice, opinion, or behaviour of its audience. This is only true in the case of behaviour. The Billboard does not cast judgement on the Council or its proposed increase in rates. It simply encourages the audience to engage with the Council's consultation process using the named URL.
7. The Complaint asserts that the advertisement "claims or implies endorsement" from the Council. We disagree. The use of the Logo simply denotes the subject matter: an Auckland Council consultation process. The Logo was used for the sake of efficient communication. The Logo as a symbol is easily recognised by motorists who may otherwise be less inclined to read the text on the billboard.
8. Regardless, the www.Rates2020.nz website advertised by the Billboard explicitly explains that the *Alliance* has opened a submission portal separate to the Council's own, nullifying any perception of an endorsement to the extent that it could possibly matter. If anyone was misled, that would have been immediately remedied upon visiting the website.
9. Crucially, the Complaint goes further in stating that the asserted implication of endorsement is intentional. This is an astounding claim. A large proportion of our members (and indeed Auckland ratepayers generally) have negative perceptions of the Council and its Logo and would withdraw their support for the Alliance if they perceived we were boasting of a Council endorsement. In fact, one of the features of our organisation is that, unlike many other ratepayer

groups, we do not accept financial support from the Council. We remind our 30,000+ subscribed supporters of this fact regularly.

10. Regardless, even if the Billboard did imply an endorsement, and even if this implication was intentional, we note the Council delivered such an endorsement when it asked ratepayers to engage with the Emergency Budget. Our Billboard, and the surrounding submission campaign, complies with the Council's request. The Council cannot be saying that it does not endorse interest groups making known that the Council is asking the public for feedback on a public consultation it has a legislative duty to promote wide public feedback.
11. We note that Auckland Council has explicitly stated¹ that ratepayers may submit through portals other than Auckland Councils' official form – including via email. The Billboard facilitated exactly that.

Previous approval by Auckland Council to use logo on condition

12. We note that in its complaint Auckland Council did not include our recent correspondence with it regarding the Billboard. In that correspondence we asked the Council to review earlier exchanges we have had on our use of the Council's branding.
13. In August 2017, we exchanged correspondence with Council after a political opponent on the Council objected to our use of the Council logo on our website at www.ratepayers.nz and other publicity material. The matter was concluded when the Council specifically acquiesced to our use of the Logo on the proviso that it did not receive reports of members of the public being confused or misled by its use. Reference was made to whether complaints were received by members of the public.
14. As far as we know, that has not occurred, evidence of such has not been provided to the Authority, and no external complaints or reports of the public being misled have been received. We are still awaiting the Council's response to our official information request asking for that earlier correspondence.² Instead it appears the same Councillor has prompted officials to have a change of heart and assert that the Billboard is likely to mislead, notwithstanding the Council's previous approval.
15. In our letter to the Council regarding the Billboard, we pointed out the Mayor, while standing for re-election, had used the logo of Auckland Transport prominently in his election billboards. We asked whether objection was made of those. We have not received a response.
16. Even if objection was raised, we note the Goff billboard (in particular the very large one prominently displayed near our offices) was not taken down by Mr Goff's campaign. That was right. It is common for local body candidates to use a council logo in direct mail advertising material and online – it is shorthand for the position they are standing for.
17. Similarly, other ratepayer and resident groups regularly use the Logo and Auckland Council branding in their communications, without any endorsement,

¹<https://ourauckland.aucklandcouncil.govt.nz/articles/news/2020/05/auckland-council-invites-feedback-on-covid-19-emergency-budget/>

² The acquiescence we are referring to will be in the Council's letter to us responding to our letter of 4 August 2017.

including while encouraging ratepayers to engage in Council consultation.³ Similarly we note ratepayer and resident associations use the Logo on public hoardings advertising ratepayer meetings. As far as we know, the Council has not laid complaints in these instances. We submit the Billboard is no different.

18. The *Alliance's* sister organisation, the *New Zealand Taxpayers' Union*, regularly uses the logos of local councils in its communications and has never received a complaint. Most recently, the *Union* featured Christchurch City Council's logo on a website encouraging Christchurch ratepayers to submit on Christchurch City Council's draft annual budget (www.ChchRates.nz). The context is almost identical to the use of the Logo on the Billboard.
19. The Complaint goes on to assert that the phrase "Have your say ..." is associated with Council requests for submissions and claims that this further implies a Council endorsement. This attempt by the Council to claim exclusive rights to such a common phrase is patently absurd. We do not accept that the Council has a monopoly, trademark, or similar on the 'have your say' message. If anything, it would suggest that even if there was confusion about endorsement, what was endorsed is totally consistent with the Council's own message.
20. The Complaint claims that confusion over the identity of the advertiser would "detract from Council's statutory consultation process currently being undertaken". The Billboard does the opposite: it strengthens the Council's statutory consultation process by advertising it to passing motorists.
21. Third party submission campaigns are a vital part of democratic consultation and work as a hedge against incomplete or misleading consultation documents provided by the powers that run the consultation process. Any question of politicised framing on the part of the Alliance is addressed by [6] and [8] above.
22. It is important to distinguish the difference between the overall consultation process and the specific submission portal. Perhaps the Complaint meant to say that the Billboard detracts from the Council's preferred submission portal (i.e. the Council's own submission form). In response to this we would reiterate paragraph [11] – that the Council's own advice is for people to participate, including through alternative means. Now the Council claims it is concerned that this "detracts" from their own campaign. It need not be.
23. The Complaint's cited precedents are of limited value. In those cases, the advertisers were seeking to undermine or misrepresent the views of the complainant. The Billboard does no such thing. It highlights and strengthens a Council initiative (the statutory consultation process). We note the Complaint makes no claim that the Billboard has misrepresented any of the Council's views.

Conclusion

24. We are surprised and concerned that the Council would devote its limited resources to challenging an effort to strengthen a democratic process.

³ For example, see <https://www.greyllynresidents.org.nz/the-future-of-aucklands-transport-an-important-auckland-council-survey/>; <https://remueraresidents.org.nz/latest-news/have-your-say-on-auckland-councils-2020-21-emergency-budget/>; <https://static1.squarespace.com/static/58e441d2f7e0abde3be51110/t/5d7f4e768b4179725478b5dc/1568624266796/CCRG+E+news+Sept+2019+vol+51.pdf>; and <https://stonefields.org.nz/news/>

25. We do not believe the concerns raised by the Complaint justify singling out our Billboard for any kind of sanction. We doubt the Council would file a complaint about an equivalent billboard erected by a different group.
26. We are concerned that this Complaint was prompted by a separate matter. In April the *Alliance* published a list of the 86 Auckland Council employees paid salaries higher than \$250,000.⁴ Council CEO Stephen Town objected to our publication of this list, which received considerable media attention.⁵ It is not an exaggeration to say that the publication has soured the relationship between officials and our organisation.
27. We trust that the Advertising Standards Authority will give fair consideration to our response, and to the important precedent this Complaint sets for third party groups seeking to engage the public in local council consultation processes.

⁴ https://www.ratepayers.nz/rich_list

⁵ https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12329165