

COMPLAINT NUMBER	20/396
AWAP	20/003
COMPLAINANT	Electric Kiwi
ADVERTISER	Meridian Energy Limited
ADVERTISEMENT	Meridian Energy Limited Television
DATE OF MEETING	1 October 2020
OUTCOME	Upheld Advertisements to be removed

ASA COMPETITOR COMPLAINT

SUMMARY OF DECISION

Description of the Advertisements

There were two versions of a television advertisement for Meridian Energy Limited (Meridian) titled “For Power that Doesn’t Cost the Earth”, a 30 second version and a 15 second version. The 15 second version was an abbreviated version of the 30 second version. The advertisements were also shown on YouTube and Facebook.

The 30 second version of the advertisement featured an “eco warrior” called Nigel as he engages in a range of eco-friendly activities. These activities include refusing plastic straws and refraining from using plastic bags. The voiceover says: “Nigel is always doing his bit for the planet. Doing your bit for the environment just got easier. Switch to Meridian for power that doesn’t cost the earth.”

Both advertisements end with the text “**Switch now** for a great welcome credit*”, Meridian’s name and logo, and the text “The Power to Make a Difference” and, in small print “*T&C’s apply. For more info on the credit see meridian.co.nz”.

Summary of the Written Complaint

The Complainant, Electric Kiwi, was concerned the advertisements made misleading and unsubstantiated environmental claims.

Electric Kiwi said:

- It is misleading to suggest that by switching to Meridian, consumers will receive and support renewable power because there is no connection between the renewable power that Meridian generates and the power retail customers buy from them which is sourced from a pool from all generators.
- It is misleading to represent that Meridian’s power and business practices are adherent to an environmentally sustainable model because Meridian regularly purchases coal-generated electricity and in a preliminary decision by the Electricity Authority, Meridian’s generation practices have been found to have caused harm to the environment, by increasing the demand for non-renewable energy

Summary of the Advertiser's Written Response

The Advertiser, Meridian, defended the complaint.

Meridian said:

- All of Meridian's energy is generated from renewable sources via its wind farms, hydro stations and solar arrays located throughout the country.
- Meridian has a "swaption" agreement with Genesis, to insure itself against volatility in electricity prices and smooth its revenue across each year. It is a financial instrument and doesn't mean they buy electricity from Genesis.
- Meridian has opposed the Electricity Authority's decision, and is confident the preliminary decision will be amended (the reasons for this view were provided)
- Meridian has provided an expert opinion from Dr Richard Starr on what the consumer takeout of the advertisement would be
- Dr Starr said consumers will understand the claim as a reference to Meridian's well-documented renewable energy generation capabilities
- Consumers will not assume from the advertisement that Meridian adheres to an environmentally sustainable model in every aspect of its business
- However, if they did make this assumption, Meridian adheres to an environmentally sustainable model and is committed to sustainability leadership in areas where it can make a meaningful difference.
- "Switch to Meridian for power that doesn't cost the earth" can also be interpreted to mean power from Meridian is reasonably priced.

The full versions of the Complaint and the Advertiser's Response to the Complaint can be found in the Appendices to this document.

Summary of the Panel Ruling

The Panel ruled unanimously that both advertisements were misleading because they made unsubstantiated environmental claims about the nature and attributes of the electricity service delivered to retail customers.

The Panel agreed the advertisements were in breach of Principle 2, Rule 2(b) and Rule 2(h) of the Advertising Standards Code.

The Panel said the complaint was **Upheld**.

[Advertisements to be removed]

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

PANEL HEARING

PROCEDURE

The Chair ruled to deal with the matter by "adjudication with attendance of the parties" pursuant to Rule 3 of the Complaints Procedures of the Advertising Standards Complaints Board. This system is designed to resolve disputes between competitors, and a Panel was appointed. The hearing was conducted via video teleconference.

THE PANEL

Chair – S Taylor, Chair, Member of the Advertising Standards Complaints Appeal Board.
Co-Panelists – C Magee (Public Member of the Advertising Standards Complaints Board) and N Keats (Industry Member of the Advertising Standards Complaints Appeal Board).

THE PARTIES

The Complainant, Luke Blincoe, CEO, Electric Kiwi, Stephen Lowe, Partner, Wynn Williams

The Advertiser, A representative from Meridian Energy and a representative from Russell McVeagh

Relevant Precedent Decisions

In considering this complaint the Complaints Board referred to three precedent decisions, Decision 08/065 AWAP 08/003, which was Upheld, Decision 08/238 AWAP 08/009, which was Upheld in part and Decision 18/103, which was Not Upheld.

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

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

Decision 08/065 AWAP 08/003 concerned two direct mail letters produced and published by TrustPower which included the text “Would you prefer renewable energy for less? ... Switch to TrustPower and you will be supplied by a company that produces its power supply from wind and water. Your current supplier Energy Online is owned by Genesis Energy which produces most of its power by burning fossil fuel. Their Huntly Power station is recognised as the biggest point source of carbon dioxide in the country. By joining TrustPower you'll be supporting clean renewable energy, and you can pay less for your power...”.

The Panel said the advertisements were, by implication, misleading. Although the Panel was of the view that, on their own, the statements were technically correct, it concluded that when read in light of the opening question; “**Would you prefer renewable energy for less?**” the statements implied something different. In other words, if a customer switched to TrustPower the household would be supplied with renewable energy.

The Panel established that the electricity generators sell energy to the electricity pool, which is governed by the Electricity Commission, and the electricity retailers buy energy from that pool to sell to its customers. There is only one pool and various electricity generators provide energy to the pool on any given day. This is determined by what is essentially a price/quantity bidding process. Separate to, but associated with this process, is a market of financial instruments, which moderate the volatility of the electricity market and enable retailers to provide customers with a reasonably stable and sustainable price structure. In the Panel's view, the way the market works is extremely complex, but it is essentially the supply and financial instruments that support the process.

The electricity pool was a “buyer to all sellers and a seller to all buyers”, the energy supplied to customers was derived from a combination of all generation supplied to the pool at any given time and on any given day. The Panel concurred with the Complainant that to imply that power supplied by any one generator would reach any particular retailer was simply incorrect.

Decision 08/238 AWAP 08/009 concerned a direct mail letter produced and published by TrustPower, addressed to individual Genesis Energy customers and headed: “**Would you prefer to support renewable energy?**” “Switch to TrustPower and you will be supplied by a company that produces its power supply from wind and water. If you are a Genesis Energy customer; your power supplier produces most of its power by burning fossil fuel. Their Huntly Power station has been identified as the biggest point source of carbon dioxide in the country.

In the Majority opinion the statements, "Switch to TrustPower and you will be supplied by a company that produces its power supply from wind and water." and, "...If you are a Genesis Energy customer; your power supplier produces most of its power by burning fossil fuel. Their Huntly Power station has been identified as the biggest point source of carbon dioxide in the country..." were simple statements of fact.

The Majority considered the claim that "...by becoming a TrustPower customer you show your support for renewable energy...". The Majority also considered the additional paragraph titled "Will I actually receive renewable energy if I switch to TrustPower?", which highlighted the fact that energy would still be received from the same overall generation pool. In the Majority view, the statement about showing support for renewable energy, although marginal, was considered plausible when read in association with the overarching question, "Would you prefer to support renewable energy?". In addition, and even more importantly, when the word "support" was interpreted in light of the "revenue certainty" that comes from a solid customer base. In the Majority view, this notion is supported by the subsequent paragraph. In other words, by becoming a TrustPower customer you provide the fiscal support required for, among other things, the construction of more renewable generation.

A Minority of the Panel disagreed. In the Minority view, this aspect of the advertisement was confusing, particularly when contemplated from the consumer's perspective. Of particular concern, was the Advertiser's failure to clarify the fact that it had both a generating arm and a retail business which essentially operated independently of each other. This confusion, in the Minority view, was amplified by the overarching question "Would you prefer to support renewable energy?" and the accompanying statement, "Switch to TrustPower and you **will** be supplied by a company that produces its power supply from wind and water" (emphasis added). In its current form, it was the Minority view that the advertisement created the impression that by "switching" to TrustPower the customer would receive a renewable product in the home. The Minority concluded that by so doing, the Advertiser exploited the consumer's lack of knowledge and, further, its explanation of the electricity process under the heading, "Will I actually receive renewable energy if I switch to TrustPower?" only added to the confusion.

In the Panel's view, the Advertiser's statements relating to the comparison costs between Genesis and TrustPower were not only confusing by virtue of the discrepancy in the claims made in the advertisement but they could not be justified by the information obtained from the revised "Table".

Decision 18/103 concerned a television advertisement for Purex toilet paper which says: "if you want to make toilet paper that's not only soft, but soft on the environment, Kawerau's a pretty good place to do it."

The Complaints Board agreed the advertisement was making an environmental claim but said the Advertiser had provided sufficient substantiation for the general claim being made in the advertisement by demonstrating it had met the Regional Council requirements together with the voluntary ECNZ manufacturing standards.

PANEL DISCUSSION

Preliminary Matters

Signed Waiver

In response to a question raised by Meridian in their written submission, Electric Kiwi confirmed it has no intention of referring this complaint to any other forum, including the Commerce Commission, as agreed in the Waiver which they signed on 7 September 2020.

The Chair of the Panel confirmed the advertisements to be considered and the relevant codes.

RELEVANT CODES OF PRACTICE

The Chair directed the Panel to consider the advertisement 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(h) Environmental Claims: Environmental claims must be accurate and able to be substantiated by evidence that reflects scientific and technological developments.

Advertising self-regulation

The Chair noted that the ASA was a self-regulatory organisation funded by industry to set standards and support responsible advertising. This included codes of practice which set out standards in addition to the requirements set out in relevant legislation. The ASA Codes of Practice contain the basic principles by which advertisements are judged. In interpreting the Codes, emphasis will be placed on the spirit and intention of the Codes.

In the spirit of self-regulation, where suitable changes to advertisements have been agreed by the Advertiser, after taking into consideration the views of the Complainant, the Panel can regard complaints as Settled, that is the Advertiser has taken the equivalent action the Panel could require, if the complaint was upheld.

Role of the Panel

The Chair said the Panel had read all the relevant correspondence regarding the complaint and viewed copies of the advertisements. The Chair noted the Complainant's view that the Advertiser had made misleading and unsubstantiated claims in its advertising, which is prohibited by the Code.

The Chair confirmed the Panel's role was to consider the advertisements, and the claims made, from the perspective of their likely audience. It then had to consider whether the information provided to it, when taken at face value, went far enough to substantiate the claims made in the advertisement. The Panel noted the onus to substantiate the claims in the advertisement fell on the Advertiser.

Oral submissions

At the hearing both the Complainant and the Advertiser both presented oral submissions.

The Complainant:

- Introduced and summarised the main aspects of the complaint, as outlined in their complaint document.

The Advertiser

- Introduced and summarised the main aspects of their response to the complaint, as outlined in their response document.
- The Advertiser confirmed the advertisements were targeted to retail customers.

PANEL DECISION

The Panel considered both of the advertisements, according to the relevant Codes, and made the following ruling:

What is the consumer takeout?

The Panel said the likely consumer takeout of both advertisements was: Switch to Meridian for electricity that is competitively priced and better for the environment. The Panel agreed the advertisements were targeted to retail customers.

The Panel referred to the text in both advertisements: "...Doing your bit for the environment just got easier. Switch to Meridian for power that doesn't cost the earth".

The Panel said the term "power that doesn't cost the earth" has a double meaning - power that isn't expensive and power that isn't bad for the environment. The Panel noted only the environmental aspect of the claim was the subject of the complaint.

Did the advertisements make any environmental claims?

The Panel agreed the advertisements did make environmental claims. This is because they link the idea about "doing your bit for the environment" with switching to Meridian, in order to buy electricity that will be better for the environment. The advertisements therefore made implied environmental claims that the electricity supplied by Meridian would be better for the environment than the electricity supplied by another electricity retailer.

If so, are the environmental claims accurate and able to be substantiated by evidence that reflects scientific and technological developments?

The Panel agreed the environmental claims made in the advertisements had not been substantiated. The Panel said that the electricity customers buy from Meridian, or any other retailer, is all sourced from a "pool", generated by both renewable and non-renewable methods. Therefore Meridian cannot make an environmental claim about its retail electricity product.

The Panel referred to a precedent decision 08/065 AWAP 08/003, and said it was directly relevant to the complaint currently being considered. In that decision the Panel ruled that "to imply that power supplied by any one generator would reach any particular retailer was simply incorrect". It was therefore misleading for TrustPower to say "Switch to TrustPower and you will be supplied by a company that produces its power supply from wind and water."

The following is an excerpt from that decision:

"The electricity pool was a "buyer to all sellers and a seller to all buyers", the energy

supplied to customers was derived from a combination of all generation supplied to the pool at any given time and on any given day. The Panel concurred with the Complainant that to imply that power supplied by any one generator would reach any particular retailer was simply incorrect.”

The Panel noted that the same “pool” supply arrangement that existed in 2008 still exists today, and the above reasoning still applies.

The Panel noted that the distinction between Meridian as a power generator and a power retailer was important here. Unlike some other electricity retailers, Meridian is also involved in the generation of electricity.

The Panel referred to the statement from Meridian that “All of Meridian’s energy is generated from renewable sources via its wind farms, hydro stations and solar arrays located throughout the country”. The Panel also noted that Meridian is involved in a number of environmental projects, as outlined in its submission, and it was recognised in a 2020 Colmar Brunton survey for its inclusion in a group of companies “working hard to be leaders in sustainability”.

However, the Panel agreed the focus of the advertisements was a promotion for power supply to retail consumers. The consumer takeout of the advertisement relates to the nature and attributes of the electricity service delivered to retail customers, not Meridian’s credentials as a company that generates energy from renewable sources.

Were the advertisements misleading?

The Panel agreed the advertisements were misleading because they made environmental claims about the nature and attributes of the electricity service delivered to retail customers that had not been substantiated.

The Panel agreed both advertisements were in breach of Principle 2, Rule 2(b) and Rule 2(h) of the Advertising Standards Code.

Decision: Complaint: Upheld - Advertisements to be removed

APPENDICES

1. Description of the Advertisements
 2. Complaint from Electric Kiwi
 3. Response from the Advertiser, Meridian Energy Limited
 4. Affidavit from Dr Richard Granville Starr Junior
 5. Response from the Commercial Approvals Bureau
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Appendix 1

DESCRIPTION OF THE ADVERTISEMENTS

There were two versions of a television advertisement for Meridian Energy Limited (Meridian) titled "For Power that Doesn't Cost the Earth", a 30 second version and a 15 second version. The 15 second version was an abbreviated version of the 30 second version. The advertisements were also on YouTube and Facebook.

The 30 second version of the advertisement featured an "eco warrior" called Nigel as he engages in a range of eco-friendly activities. These activities include refusing plastic straws and refraining from using plastic bags. The voiceover says: "Nigel is always doing his bit for the planet. Doing your bit for the environment just got easier. Switch to Meridian for power that doesn't cost the earth."

Both advertisements end with the text "**Switch now** for a great welcome credit*", Meridian's name and logo, and the text "The Power to Make a Difference" and, in small print "*T&C's apply. For more info on the credit see meridian.co.nz".

Appendix 2

COMPLAINT FROM ELECTRIC KIWI

COMPETITOR COMPLAINT REGARDING MERIDIAN ENERGY LIMITED – "FOR POWER THAT DOESN'T COST THE EARTH"

Introduction

1. Electric Kiwi is an electricity retailer in New Zealand.
2. Electric Kiwi is writing to make a complaint to the Advertisement Standards Authority regarding misleading and unsubstantiated environmental claims made by Meridian in its advertising.

The advertisement

3. This complaint relates to Meridian's advertisement titled "For Power that Doesn't Cost the Earth".
4. The advertisement is a television commercial featuring a character called Nigel featured in a range of environmentally conscious activities, including refusing plastic straws and refraining from using plastic bags. The advertisement ends with a graphic of Meridian's name and logo, accompanied by the words "The Power to Make a Difference". A voiceover accompanying the video makes the following statements:

Nigel is always doing his bit for the planet.

Doing your bit for the environment just got easier. Switch to Meridian for power that doesn't cost the earth.

5. The advertisement was published on YouTube on 26 July 2020 and can be viewed at <https://www.youtube.com/watch?v=N4YPVOMNPg>. It was posted to Meridian's Facebook page on 27 July 2020 and various cuts of the advertisement have been screened on multiple television channels during August 2020.
6. The advertisement is targeted towards retail consumers, encouraging them to switch to Meridian for the supply of household power.
7. A shorter 15-second version of the advertisement has also been screened during August. This 15-second version references a 'welcome credit' which highlights that the message is targeted at retail consumers.

Summary of the complaint

8. Electric Kiwi considers the advertisement contains the following environmental claims:
 - a. The advertisement creates an impression in the consumers' mind that by switching to Meridian, consumers will receive and support renewable power. This is misleading and unsubstantiated – there is no connection between the renewable power that Meridian generates, and the retail power that it sells to its consumers.

Consumer perspective: *as a consumer, you would think that switching to Meridian means your household will now receive renewable power. You would not realise you will continue to receive the same mix of renewable and non-renewable power as your current electricity company provides. You would not realise that switching to Meridian will have no impact on the environment.*

- b. By making the assertion that their 'power doesn't cost the earth', the advertisement creates an impression in the consumers' mind that Meridian's power and business practices are adherent to an environmentally sustainable model. This is misleading and unsubstantiated – Meridian's business practices include regularly purchasing coal-generated electricity and Meridian's own generation practices have been found in a preliminary decision by the Electricity Authority to have caused harm to the environment by increasing demand for non-renewable energy.

Consumer perspective: *as a consumer, you would think that all of Meridian's power is environmentally friendly. You would not realise that Meridian contributes to and supports the generation of non-renewable electricity, thereby harming the environment.*

9. The environmental claims made in the advertisement are in breach of the following advertising standards:
 - a. Rule 2(b) of the Advertising Standards Code, which requires that:

“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.”
 - b. Rule 2(h) of the Advertising Standards Code, which requires that:

“Environmental claims must be accurate and able to be substantiated by evidence that reflects scientific and technological developments.”

10. We address each of these misleading representations in more detail below.

Misleading representation: by switching to Meridian, consumers will receive and support renewable power.

11. The advertisement creates an impression in the consumers’ mind that by switching to Meridian, consumers will receive and support renewable power, thereby making a meaningful contribution to the environment. Electric Kiwi considers this environmental claim to be misleading and unsubstantiated.

Meridian’s generation activities are irrelevant to its retail customers

12. In making this environmental claim, Meridian is relying on its credentials as a generator of renewable energy to sell its retail offering.

13. At the outset, it is important to understand that Meridian’s electricity generation activities are separate from its retail activities. While some customers may appreciate that “power companies” can be generators only, retailers only, or both (“gentailers”), the majority of customers are not aware of this distinction. It is a complex business and supply chain that is not well understood by the average household consumer.

14. The electricity that Meridian retails to its customers, and the renewable status of the source of that electricity, is no different from the renewable status of the source of other retailers’ electricity. Generators such as Meridian have no control over the percentage of renewable sources of electricity that Transpower selects for the generation mix at any given time.¹

15. Meridian retail customers get the same mix of electricity as all other customers.

16. Therefore, claims by Meridian in the advertisement that its power “doesn’t cost the earth”, and implicit messaging that Meridian retail electricity is more environmentally friendly than other retailers, is a false and misleading differentiation in breach of rules 2(b) and 2(h) of the Advertising Standards Code.

Switching to Meridian will have no impact on the environment

17. The advertisement leads consumers to believe they can have a positive effect on the environment by switching power companies. The message is that by switching to Meridian consumers will be ‘doing their bit’ for the environment. Meridian relies on its environmentally sustainable generation activities to substantiate this claim, and the act of switching must therefore be taken to have a positive effect on the environment in itself.

18. In making this claim, Meridian is essentially misleading by omission. Meridian is leading retail customers to believe that choosing Meridian will mean that their household electricity consumption is somehow only from renewable sources. However, because Meridian retail customers get the same mix of electricity as all other customers, switching to Meridian will have no impact on the environment. The only difference for a consumer is that they will receive a power bill from a different company.

¹ Transpower, *System Operator: Renewable Generation*, <https://www.transpower.co.nz/system-operator/operational-information/renewable-generation>.

19. At most, Meridian might argue that by buying their electricity, a percentage of their retail profits may be invested in investing in and developing renewable generation sources. However, the development of greater renewable generation capacity by Meridian does not affect the renewable percentage generation for retail customers at any given time. There are few, if any, electricity generators in New Zealand that are planning to develop material non-renewable electricity generation plants. Even if Meridian's argument could be sustained, the nuances of this argument are not supported by the clear impression left in a consumer's mind by the advertisement that the simple act of switching to Meridian can make a difference to the environment.

Misleading representation: Meridian's power and business practices are adherent to an environmentally sustainable model

20. By making the assertion that their "power doesn't cost the earth", the advertisement aligns Meridian with the target consumers' values of protecting the environment. It creates a strong impression in the consumers' mind that Meridian's power and business practices are adherent to an environmentally sustainable model. Electric Kiwi considers this environmental claim to be misleading and unsubstantiated.
21. When assessing the accuracy of environmental claims, it is relevant to take into account effects on the environment caused at any stage of the overall life-cycle of the product.² Meridian therefore cannot rely solely on its environmentally sustainable generation practices to support the claim that its "power doesn't cost the earth" – its wider business practices are relevant. Taking into account the overall lifecycle of Meridian's power and business practices, Meridian is causing more harm to the environment than the advertisement implies.

Meridian regularly purchases coal-generated electricity

22. Not all of Meridian's power comes from renewable sources. While Meridian generates renewable energy, Meridian also has a swaption with Genesis Energy that effectively enables it to purchase electricity generated by Genesis Energy's coal and gas generation plant at Huntly. Meridian has entered into this arrangement to cover periods where its renewable generation drops below expected amounts.³

Meridian increased demand for non-renewable power by spilling excess water from its hydro dams

23. Moreover, the environmentally sustainable nature of Meridian's businesses practices have been recently called into question.
24. A preliminary decision from the Electricity Authority found that Meridian engaged in an undesirable trading scenario by spilling excessive amounts of water from its hydro dams during December 2019, rather than using that water for generating renewable power.⁴ This resulted increased demand for non-renewable power at a time when there should have been plenty of water available to generate cheaper renewable

² See guidance at rule 2(h) of the Advertising Standards Code, <https://www.asa.co.nz/codes/codes/advertising-standards-code/>.

³ Gavin Evans, Scoop.co.nz *Meridian buys power from rival Genesis amid strong demand* 14 February 2019, <http://www.scoop.co.nz/stories/BU1902/S00338/meridian-buys-power-from-rival-genesis-amid-strong-demand.htm> "Meridian has a "swaption" contract with Genesis which it uses to cover its production when its lakes are low or there are other shortages in the market. It can draw up to 100 MW at any time, and up to 150 MW during the winter months." See also Meridian Energy monthly operating report from June 2020: "June Highlights: ... Meridian made calls under the Genesis Swaption during June 2020 and July 2020.", <https://www.meridianenergy.co.nz/assets/Investors/Reports-and-presentations/Monthly-operating-reports/2020/June-2020-operating-report.pdf>.

⁴ Electricity Authority, *The Authority's preliminary decision on claim of an undesirable trading situation* (preliminary decision released 30 June 2020) at iv.

power. We refer to the following comments from Electricity Authority chief executive James Stevenson-Wallace:

"Meridian's activities led to more expensive generation running in the North Island at a time when there was excess fuel in the south...By our calculation a total of about 41 gigawatts-hours of additional energy could have been produced during December. North island generation – including more expensive thermal generation – was dispatched despite excess 'spill' and abundant hydro fuel."⁵

25. By increasing demand for non-renewable power, an estimated 6,000 tonnes of greenhouse gas emissions were unnecessarily produced and released into the atmosphere.⁶ We refer to comments from James Shaw, Minister for Climate Change regarding the spilling:

"I'd be concerned if companies are doing things that lead to an increase in our emissions when they don't need to, particularly for companies that are trading on a zero emissions brand...If what the EA is saying is correct and they're deliberately causing [the] Huntly [Power Station] to burn more than they otherwise would, that's obviously a bad outcome for the climate."⁷

26. Therefore, while the power Meridian generates may be renewable, Meridian's overall business practices cannot be said to be as good for the environment. To broadly claim otherwise as Meridian does in the advertisement is misleading, and exploits the average consumer's lack of knowledge as to the wider effect Meridian's business practices are having on the environment. Meridian should not make such broad environmental claims without being able to substantiate them.
27. It also further serves to demonstrate the inherent disconnection between Meridian's generation and retail activities, and the care that must be taken when using its generation credentials to promote its retail offering.

Conclusion

28. We consider that consumers are at a high risk of being misled by the environment claims made by Meridian in the advertisement. Meridian is using its generation credentials to create environmental claims that suggest an artificial point of difference between Meridian and its competitors. Such claims cannot be substantiated and overly simplify the true nature of Meridian's environmental impact.
29. We refer to recent comments from the Commerce Commission regarding the care advertisers must take when making environment claims:

"When making purchasing decisions based on environmental claims, consumers trust that these claims are reliable and accurate. Often consumers are unable to access the kind of technical information they would need to second-guess claims."

"Environmental claims can be a powerful marketing tool and traders are using environmental claims as a point of difference from their competitors. All

⁵ Hamish Rutherford, nzherald.co.nz *Meridian found in wrong in market abuse investigation* 30 June 2020, https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12344140.

⁶ Amanda Larssen, Greenpeace.org *Why the Meridian Energy hydro dam spilling scandal shows it's time to democratise our energy* 3 July 2020, <https://www.greenpeace.org/new-zealand/story/why-the-meridian-energy-hydro-spilling-scandal-shows-its-time-to-democratise-our-energy/>.

⁷ Tom Pullar-Strecker, Stuff.co.nz *Meridian involved in 'undesirable trading situation' says Electricity Authority in preliminary decision* 30 June 2020, <https://www.stuff.co.nz/business/121980237/meridian-involved-in-undesirable-trading-situation-says-electricity-authority-in-preliminary-decision>.

traders, large and small, need to make sure their environmental claims are substantiated, truthful, and not misleading to avoid breaching the Fair Trading Act.”

30. We look forward to the ASA’s confirmation that it intends to investigate this complaint.
31. Electric Kiwi waives the right to take or continue proceedings in connection with the Advertisement against Meridian or any publisher or broadcaster of the Advertisement. It reserves the right to notify the Commerce Commission of the complaint set out in this letter.
32. Electric Kiwi undertakes to pay the Advertising Standards Authority’s costs in connection with this complaint. We understand that if this complaint is upheld, Meridian will be asked to refund such costs to Electric Kiwi.

Appendix 3

RESPONSE FROM THE ADVERTISER, MERIDIAN ENERGY LIMITED

COMPLAINT 20/396 AWAP 20/003 – MERIDIAN ENERGY TELEVISION ADVERTISEMENT ("COMPLAINT")

1. Thank you for the opportunity to respond to Electric Kiwi Limited's ("**Electric Kiwi**") complaint in relation to Meridian's television advertisement that is the subject of the Complaint ("**Advertisement**").
2. Meridian takes its obligations under the Advertising Standards Authority's Advertising Codes ("**Codes**") and the Fair Trading Act 1986 ("**FTA**") seriously. Meridian's advertisements go through thorough vetting before they are published, including legal review. In responding to the Complaint, Meridian has sought the views of Dr Richard Starr. Dr Starr is a leading expert on New Zealand consumers' behaviour and understanding of advertisements. Dr Starr's affidavit is annexed in support of Meridian's response to the Complaint.
3. There are a number of important preliminary matters that are addressed below before we turn to Meridian's substantive response to the Complaint. It is necessary to address the preliminary matters as they have not been adequately explained in the Complaint and there is therefore a risk of the Complaints Board being misled.

Waiver by Electric Kiwi

4. Electric Kiwi purports to reserve its rights to make complaints about the Advertisement to the Commerce Commission ("**Commission**").
5. Meridian's understanding is that the Advertising Standards Authority's ("**ASA**") rules and approach is that complainants should waive their rights to what, in effect, amounts to forum shopping. In our experience, the Commission takes a similar view for the same reasons.
6. Electric Kiwi is aware of this given the complaint it made in relation to Meridian's activities last year, which it subsequently elected to have heard with the Commission.
7. We trust the ASA will deal with this procedural matter in due course.

Background and context to the Complaint

8. All of Meridian's energy is generated from renewable sources via its wind farms, hydro stations and solar arrays located throughout the country.
9. Meridian is proud of its renewable energy generation and it considers it something that is both a key point of difference from some of its "gentailer" competitors and something that consumers are more conscious about than ever before. As consumer demand for greater information has increased, Meridian has engaged in educating consumers about its

renewable energy generation capabilities. In doing so, Meridian has always been careful to distinguish generation from the electricity that is directly received by consumers.

10. Notwithstanding the steps taken by Meridian to ensure its advertising is compliant with the Codes and FTA, Electric Kiwi has made a number of complaints in relation to Meridian's renewable energy generation, its swaption arrangement with Genesis and its advertising. For example, last year, Electric Kiwi complained about Meridian's "Wind. Water. Sun." campaign, where it raised Meridian's and Genesis' swaption arrangement and alleged that Meridian falsely represented itself as being environmentally friendly. The Commission ultimately took no action in relation to that complaint.
11. Given Electric Kiwi persists in raising Meridian's and Genesis' swaption arrangement, it is necessary to explain this in more detail. Interestingly, Electric Kiwi covers this in one paragraph, and it is another attempt by Electric Kiwi to use "smoke and mirrors" in order to detract from the key issue of whether reasonable consumers would be misled by the Advertisement.
12. As the Complaints Board may know, the operation of the electricity market is highly regulated by the Government and Electricity Authority under the Electricity Industry Act 2010. Every generator in New Zealand that is connected to the national grid must sell its generation into the "gross pool" of the wholesale market. Similarly, all electricity purchasers (retailers and grid-connected industrial consumers) must purchase electricity from this same gross pool of energy on the national grid at market prices set by the marginal generator nationally. It is physically impossible for any grid-connected generator to sell its generation directly to another party, as electrons on the national grid cannot be tracked from generators to purchasers and the operations of the regulated electricity market cannot be bypassed. Therefore, any allegation that Meridian buys electricity from Genesis or from a specific power station is simply not true.
13. It has long been public knowledge that Meridian has a "swaption" agreement with Genesis. This swaption is one of many financial hedge contracts that Meridian has signed with different counterparties to insure itself against volatility in electricity prices and smooth its revenue across each year. Meridian pays Genesis a premium throughout the year and in return Genesis pays Meridian in the event electricity prices exceed an agreed price point. The swaption contract, like all of Meridian's hedge contracts, is revenue insurance and there is no physical supply of electricity as a result of these contracts.

Electricity Authority preliminary decision

14. In addition to the swaption issue, Electric Kiwi has raised the preliminary decision of the Electricity Authority in relation to allegations that Meridian spilt excess water from its South Island hydro dams. Electric Kiwi has also raised this with a number of other parties prior to the Complaint.
15. Electric Kiwi appears to allege that the Electricity Authority's preliminary decision calls into question the environmentally sustainable nature of Meridian's business practices. With respect, this is another somewhat desperate attempt to detract from the reasonable consumer's understanding of the Advertisement that Meridian generates 100% renewable energy.

16. The following points need to be taken into account in relation to the Electricity Authority's decision:

- (a) It is a preliminary decision only. Meridian has opposed this decision and filed further information. Once the Electricity Authority considers the additional information, then a final decision will be issued. Meridian is confident that the preliminary decision will be amended.
- (b) Meridian believes the Electricity Authority's preliminary decision is wrong as it overstates the amount of spill that could have been avoided. The preliminary decision is problematic in that it fails to take into account planned generation outages and uses the wrong timeframe for spill modelling. After correcting these errors in the Authority's modelling, the total volume of spill that might with hindsight have been collectively avoided by the three main South Island hydro generators had they been permitted to operate in a coordinated fashion (which they are not) is less than 0.3% of the water that South Island generators were collectively dealing with in December. The volume of spill in question was therefore less than the margin of error on spill reporting.
- (c) The events being investigated by the Electricity Authority are related to exceptional weather conditions that created significant safety risks. Meridian took a conservative approach to manage the flood safely and mitigate the risks to communities, property and structures in its catchments. Managing the flood was Meridian's priority at the time and it did not adopt novel trading tactics in the midst of this event. Meridian sought safe and simple operations that would manage downstream flows. Meridian behaved in the same way as Meridian and other hydro generators have done, consistently, for the last nine years.
- (d) The inflows into Meridian's catchments were amongst the highest, if not the highest, since records began. Over December 2019, Meridian generated 1150 GWh from its hydro stations and spilled the equivalent of 1300 GWh of water of which the amount which might have been avoided based on the Authority's problematic modelling is 12 GWh. Because of the scale of the inflows in this event and the limited storage in Meridian's hydro schemes, spill was inevitable and unavoidable. The volume of hydro generation Meridian produced in the month of December 2019 was the highest ever in Meridian's history, even more than when Meridian also operated the two Tekapo stations. Allegations that Meridian should have generated slightly more should be seen in this context.
- (e) Importantly Meridian does not own any emissions-producing thermal generation (i.e. coal or gas) and does not control the actions of those generators who do. Decisions to generate or not generate are made independently by the owners of different generation plant interacting with dispatch instructions from the System Operator based on generators' offers to the wholesale market. Any claim that Meridian's spilling (or the spilling of other South Island hydro operators who were spilling at the same time) caused one or more of the thermal generation owners to generate more than they would otherwise have done and thereby increase greenhouse gas emissions is pulling a long bow in any ordinary sense of "cause and effect" – it might just as validly (i.e. invalidly in Meridian's view) be attributed to the collective decisions of consumers to consume more electricity than they might otherwise have done over the relevant period. Put simply the emissions produced by the electricity system as a whole are too remote a consequence

to be properly considered as attributable to a single renewable generator like Meridian and for this reason the Authority's preliminary decision was careful not to refer to hypothetical environmental outcomes.

- (f) Electric Kiwi's sister company (Haast Energy Trading) also complained to Environment Southland about the environmental impacts of Meridian's handling of the same events. In particular they complained that Meridian failed to maximise generation from some of its hydro stations over the relevant period. That complaint was rejected by Environment Southland.

17. Our substantive response to the Complaint is set out below.

Alleged grounds for the Complaint

18. Electric Kiwi alleges that the Advertisement breaches rule 2(b) and rule 2(h) of the Advertising Standards Code ("Code"). The Complaints Board has also raised Principle 2 of the Code.

19. Principle 2 requires advertisements to be truthful, balanced and not misleading. Rule 2(b) provides:

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 misleading.

20. In order to satisfy principle 2 and rule 2(b), advertisers must hold evidence to substantiate all claims made in the advertisement.⁸ Absolute claims require scientific evidence to substantiate whereas implied or indirect claims require Meridian to have a reasonable basis for making its claims.

21. Rule 2(h) provides:

Environmental claims must be accurate and able to be substantiated by evidence that reflects scientific and technological developments.

22. There are a number of factors that need to be taken into account when assessing the Complaint, including previous decisions, the consumer take-out from the Advertisement, the context, medium, intended audience and the product or service being advertised.⁹

23. In addition, FTA case law provides relevant, helpful guidance for assessing the consumer take-out given that the Code incorporates its key provisions. Key principles from leading FTA case law provide:

⁸ Advertising Standards Code, guidelines for rule 2(b).

⁹ Advertising Standards Code, "interpreting the code" section.

- (a) Advertisements must be looked at as a whole – it is the overall impression that is important.
- (b) The relevant audience is all "reasonable" consumers who see the advertisement. "Outliers", being the unusually stupid/ill equipped or those whose reactions are extreme or fanciful, are not included.¹⁰
- (c) Reasonable consumers" are not lacking in perception, are expected to have a reasonable degree of common sense and must exercise a degree of care reasonable in the circumstances.
- (d) There needs to be more than mere confusion and "a degree of robust realism is necessary".¹¹
- (e) A significant section of the relevant purchasing public must be likely to be misled.¹²

The Advertisement

- 24. The purpose of the Advertisement was to continue Meridian's marketing campaign highlighting its renewable energy generation.
- 25. The Advertisement is approximately 30 seconds long and, in a humorous way, shows "Nigel" (the hero character) making a number of eco-conscious choices, such as going plastic free, refusing a plastic straw and using re-usable cups at a café.¹³ This is shown in a light hearted way and it clearly demonstrates that it is important to Nigel that he does things that could benefit the environment. The clear take-out for the audience at this stage is a green consumer making choices that he considers show he is doing things to benefit the environment.
- 26. The Advertisement ends with a continuation of this theme, and the humour used in the Advertisement, with the voiceover stating:

Doing your bit for the environment just got easier. Switch to Meridian for power that doesn't cost the Earth.
- 27. It is this voiceover that Electric Kiwi has highlighted in its Complaint, however, Electric Kiwi fails to consider the voiceover in the context of the Advertisement. The voiceover is a clever play on words that reasonable consumers are likely to understand in the following two ways:
 - (a) Meridian's power is not the most expensive. Meridian relies on the expert evidence of Dr Starr in support of this submission. Dr Starr's view is that consumers instinctively consider literal dollar-based meanings where the concept of money is raised in advertising. Older consumer groups are particularly susceptible to perceiving a costs meaning where it is included in advertising.

¹⁰ *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611.

¹¹ *Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) ATPR 40-244 at 43,203.

¹² *Unilever New Zealand Ltd v Cerebos Gregg's Ltd* (1994) 6 TCLR 187 (CA) at 193.

¹³ The Advertisement can be viewed at <https://www.youtube.com/watch?v=N4YPVQmNPg>.

- (b) Meridian is not the most expensive electricity retailer. Evidence can be provided to substantiate this, however, as Electric Kiwi has not raised any concerns in relation to this interpretation, it is not addressed further.
- (c) The energy generated by Meridian is from renewable energy sources (the "Claim"), which is why it does not have the impact on the earth in the same way non-renewable energy does. In Dr Starr's opinion:
 - (i) New Zealand consumers are likely to be aware that renewable energy generation is better for the environment;
 - (ii) The "statement Meridian's power does 'not cost the earth' would be readily understood as implying that the energy generated by Meridian is not environmentally harmful. If consumers were asked to discuss the impression that Meridian power is environmentally beneficial, most would logically assume that Meridian generates using renewable energy sources such as wind, solar and/or water."

28. The Claim is not capable of misleading consumers. This is for the following reasons:

- (a) Meridian is well recognised by consumers as a 100% renewable energy generator.¹⁴ This does not appear to be in dispute but corroborating evidence can be provided to the Complaints Board if that would be helpful.
- (b) Meridian has used an extensive, long-term marketing campaign promoting its renewable energy generation.¹⁵ Further, Meridian had been recognised as one of New Zealand's leading sustainable brands prior to the Advertisement being shown.¹⁶ Dr Starr's opinion is that consumers will understand the Claim as a reference to Meridian's well-documented renewable energy generation capabilities. As established by the New Zealand courts, New Zealand consumers will not be lacking in perception and common sense. Accordingly, consumers' familiarity with Meridian's renewable generation must be taken into account when considering the Complaint. This is particularly important in an advertisement which highlights that choosing a renewable energy generator is easier than picking up dog dirt in a beanie. In this sense, the Advertisement is deliberately tongue in cheek and hyperbolic.
- (c) Consumers want to be perceived as supporting the environment. It is therefore important to a number of consumers that they can choose an electricity generator that generates from renewable energy sources. Meridian should be entitled to provide consumers with that information, including in an amusing 30 second television advertisement.

¹⁴ See, <https://www.meridianenergy.co.nz/#:~:text=All%20the%20energy%20we%20generate,the%20future%20of%20our%20planet,https://www.meridianenergy.co.nz/who-we-are/our-power-stations;https://www.meridianenergy.co.nz/who-we-are/our-power-stations/wind;https://www.meridianenergy.co.nz/who-we-are/our-power-stations/hydro;https://www.meridianenergy.co.nz/who-we-are/our-power-stations/solar> and

¹⁵ See, <https://wetransfer.com/downloads/62a321de95eb751ef3bcb403c6fe01c820200923081816/4196018d119c7d0e61e43e282e9b7bd320200923081838/1aab8f>

¹⁶ See <https://static.colmarbrunton.co.nz/wp-content/uploads/2019/05/Colmar-Brunton-Better-Futures-2020-Presentation.pdf>.

(d) It is not feasible to claim that consumers will consider the electricity they use will come directly from a renewable energy source (and not the national grid). The Advertisement (deliberately) makes no claim (whether express or inferred) in relation to the electricity they receive to their homes. If there are any such consumers who think this, they sit in the realm of outliers and should be discounted. Dr Starr's opinion corroborates this interpretation – he considers there is no link between consumers actually receiving energy directly from renewable energy sources.

29. Even if any consumers were confused (and there needs to be more than "mere confusion" for an advertisement to be misleading), if energy generation is important to them, they will visit Meridian's website to find out more information around how Meridian generates its energy, and therefore why it does not cost the earth.

30. Further, in support of Meridian's position:

(a) Similar claims are made by other electricity providers (one assumes without complaint). By way of example, Ecotricity uses the claim that its pricing "won't cost the earth".¹⁷

(b) The expression "energy that doesn't cost the earth" is used by the Government as part of its "New Zealand Story – Sustainability" when referring to renewable energy and the aim for New Zealand to be 100% renewable energy.¹⁸

Electric Kiwi's allegation that Meridian does not adhere to an environmentally sustainable model from the Advertisement

31. There is no basis for Electric Kiwi's allegation that consumers will be misled into believing Meridian adheres to an environmentally sustainable model in every aspect of its business from the Advertisement. That requires too many leaps for consumers and is not credible based on the Advertisement's limited material. Dr Starr did not see consumers understanding the Advertisement this way either.

32. However, even if some consumers did form that impression, Meridian does adhere to an environmentally sustainable model and is committed to sustainability leadership in areas where it can make a meaningful difference. This is evidenced by:

(a) Meridian has adopted a sustainability framework focused on two of the United Nations Sustainable Development Goals: SDG7 Affordable and Clean Energy; and SDG13 Climate Action.

(b) All of the electricity Meridian generates is from 100% renewable energy sources – wind, water and sun. As New Zealand's largest renewable generator, Meridian is the most significant contributor to the Government's aspiration of a 100% renewable electricity grid.

¹⁷ See <https://ecotricity.co.nz/for-business/>.

¹⁸ See <https://www.nzstory.govt.nz/stories/renewable-electricity/>.

- (c) Meridian has set a bold target to halve Meridian Group operational emissions by 2030 based on a 2019 carbon footprint.¹⁹ Meridian launched a Climate Action Plan in support of this target, outlining how, as a renewable electricity generator, it would transition to a low carbon business.²⁰
- (d) Meridian launched a supplier engagement plan in late 2019 aligning with the “half by 2030” reduction goal. The bulk of Meridian’s carbon footprint is in its supply chain (97% of our operational footprint for the 2020 financial year). Meridian’s work to engage suppliers is crucial if it is to achieve emissions reduction targets. Meridian has identified high impact suppliers and has commenced a plan to engage and collaborate to measure and actively reduce their carbon footprint. It is also creating workshops on carbon and sustainability for lower impact suppliers with the objective to gain accurate carbon reporting and inspire reduction initiatives. This aligns with its commitment to climate action, and also as a member of New Zealand’s Climate Leader’s Coalition.
- (e) From 30 June 2019, Meridian is net Zero Carbon across the operations of the Meridian Group (for all scope 1, 2 and 3 emissions). This has been achieved through the purchase of certified carbon offsets. Meridian has also gone one step further and begun its own “Forever Forests” programme to sequester carbon in the medium to long term.²¹ Meridian will plant 1.5 million trees across the country, a mixture of natives and exotics. Work has begun and 70,000 trees have been planted near Meridian’s hydro stations and wind farms.
- (f) In July 2019, Meridian was the first New Zealand-listed issuer to publish a climate risk disclosures report, prepared in line with the recommendations of the Task Force on Climate-related Financial Disclosures (“TCFD”). Meridian is committed to understanding and disclosing climate risks and opportunities associated with its business. Meridian has undertaken analysis of how climate change affects Meridian out to 2050, as this is the horizon used for making decisions on new investments.
- (g) Meridian rates highly in the MSCI Sustainability Impact Index, and is also listed on the Dow Jones Sustainability Asia Pacific Index and submits to the environmental disclosure system CDP. These are all tools that investors use to positively screen their investment portfolio. Investors are increasingly looking to demonstrate a “green” investment portfolio as evidence of their commitment to sustainability, and many use frameworks, standards, rating agencies and others to find investments that meet their criteria. In addition, in the 2020 financial year, Meridian has developed a Green Finance Programme which covers both existing and future issuances of debt instruments. This Programme recognises Meridian’s commitment, leadership and investment in renewable energy and will be used to finance or refinance sustainable projects and assets such as new or existing renewable energy projects or assets.
- (h) Meridian has committed to achieving 100% conversion of its light passenger fleet to electric vehicles by 2030. Meridian is already very close to reaching this target and expects to do so by the end of the 2020 calendar year. Meridian also has a dedicated electric vehicle plan and offers customers who sign up to this plan credit to offset the cost of charging for a year. Meridian has a dedicated website that provides people with

¹⁹ See <https://www.meridianenergy.co.nz/who-we-are/sustainability/greenhouse-gas-emissions>.

²⁰ See <https://www.meridianenergy.co.nz/assets/Sustainability/b4dd2e5e04/Meridian-Climate-Action-Plan.pdf>.

²¹ See <https://www.meridianenergy.co.nz/who-we-are/community-support/forever-forests>.

information about electric vehicles and supports businesses to convert their fleets to electric through case studies, tours and speaking engagements.

- (i) Meridian has teamed up with the Department of Conservation to support the Kākāpō Recovery Programme, which aims to get kākāpō off the endangered list and back to their former natural range.²² Meridian's involvement helps fund research and initiatives relating to genetics, nutrition, disease management and finding new sites. It also helps raise awareness of the plight of kākāpō.
- (j) Meridian complies with all statutory requirements, resource consent conditions and agreements that relate to its asset operation and development. This includes special environmental legislation that applies to the operation of the Manapōuri hydro scheme.²³ The Complaints Board has previously accepted that a claim that toilet paper was "soft on the environment" was substantiated and not misleading where the manufacturer demonstrated that it had met Regional Council requirements together with a voluntary Environmental Choice New Zealand standard.²⁴

Electric Kiwi's allegation that consumers do not support renewable energy generation by becoming Meridian customers

33. As noted above, there is no basis for Electric Kiwi's fanciful allegation that consumers will believe they will receive renewable energy. Electric Kiwi also alleges that consumers will believe they may be supporting renewable energy by switching to Meridian. Meridian's response is that:

- (a) If it is important to customers that they wish to be seen to be choosing an energy generator that generates 100% renewable energy, then they should be entitled to make that decision, and Meridian should be entitled to promote this. Media reports suggests this is an important factor for business customers.²⁵
- (b) As the Complaint Board has found previously, switching to Trustpower would support renewable energy generation.²⁶ One reason for this was because increased revenues and revenue certainty enable further investment in renewable energy. This is matter of common sense. It is also evidenced by:
 - (i) Reports that major electricity users recently went to market with "a project to stimulate the development of new renewable electricity generation in New Zealand".²⁷

²² See <https://www.meridianenergy.co.nz/who-we-are/community-support/kakapo-recovery-programme>

²³ See for example, <https://www.meridianenergy.co.nz/assets/Investors/Governance/Policies/Commitment-to-environmental-management-and-biodiversity2020.pdf>.

²⁴ See *Asaleo Care Limited* [2018] NZASA 103 (24 April 2018).

²⁵ See <https://www.scoop.co.nz/stories/BU2008/S00535/100-renewable-energy-goals-within-reach-for-new-zealand-businesses.htm>.

²⁶ See *TrustPower Limited* [2008] ASA 238 (11 June 2008).

²⁷ See <https://news.fuseworksmmedia.com/03fa7932-3eda-41fe-9d71-0d3229d1367a>.

- (ii) The Government's response to the recent Productivity Commission report to "develop a policy package as part of a renewable energy strategy, which aims to accelerate the deployment of renewable electricity generation".²⁸
- (iii) Meridian's business model keeps (its renewable) generation and load balanced.
- (iv) Meridian has a portfolio of renewable energy generation options that are either consented to or being investigated further. In particular, Meridian has approximately 1,250 GWh of consents, options on 1,250 GWh and investigations underway for a further 500 GWh.²⁹ One of its prospective renewable energy generation sites is Harapaki which already has consent.³⁰ This portfolio represents a significant opportunity to increase renewable generation in New Zealand.
- (v) Meridian operates a commercial solar power purchase initiative where commercial customers sign up and work with Meridian to install solar arrays at their properties to increase renewable energy generated resources. By way of example, Meridian partnered with Lincoln University, which installed a 102 kWp solar array in late 2019 with its second solar array being installed in July 2020.³¹ This demonstrates a tangible increase in renewable energy generation when customers choose to work with Meridian.

34. For the reasons noted above, Meridian does not consider that its swaption arrangement with Genesis or the Electricity Authority's preliminary decision mean that consumers will be misled.

Conclusion

35. In light of the above, Meridian requests that the Complaint Board determine that:

- (a) the Meridian Advertisement complies with principle 2 of the Code;
- (b) rule 2(b) and rule 2(h) of the Code have not been breached; and
- (c) the Complaint is not upheld.

36. Meridian welcomes the opportunity to respond to any further comments or queries that the Complaints Board may have at the hearing.

²⁸ See https://www.productivity.govt.nz/assets/Documents/c3bc644f30/Government-response_Transitioning-to-a-low-emissions-future-v2.pdf; and <https://www.beehive.govt.nz/release/nz-embracing-renewable-electricity-future>.

²⁹ See <https://www.meridianenergy.co.nz/who-we-are/our-power-stations>.

³⁰ See <https://www.meridianenergy.co.nz/who-we-are/our-power-stations/wind/harapaki>.

³¹ See <https://www.meridianenergy.co.nz/business/sustainability/commercial-solar> and <https://www.meridianenergy.co.nz/news-and-events/lincoln-university-further-expands-its-commercial-scale-solar-energy-generating-capability>.

Appendix 4

AFFIDAVIT FROM DR RICHARD GRANVILLE STARR JUNIOR

AFFIDAVIT OF DOCTOR RICHARD GRANVILLE STARR JUNIOR-

DATED 24 SEPTEMBER 2020

My full name and title is Doctor Richard Granville Starr Junior. I am the Director of the Master of Business Administration programme and a Senior Lecturer in Marketing at the Graduate School of Management of The University of Auckland Business School where I have taught Marketing, Branding, Consumer Behaviour, Marketing Research and Strategic Pricing since 1995.

2. Meridian Energy Limited ("**Meridian**") has asked me to provide my opinion on consumers' understanding of the advertisement that is the subject of Complaint 20/396 AWAP 20/003 ("**the Meridian Advertisement**").
3. My qualifications to comment on this matter include my 1981 MBA in Marketing from Colombia University, postgraduate studies in marketing from the University of North Carolina Kenan-Flager Business School and a 2011 marketing PhD from The University of Auckland and more than 30 years of teaching, consulting and writing about marketing issues from the consumer's perspective.
4. I have also worked in and around the energy sector for many years, including researching and coauthoring works on certification and authenticity (which form the basis of many "green" claims), marketing sustainable cars, research into the peak oil paradigm including biofuel development. I was also engaged in significant work with the Institute for Earth Science and Engineering, a subsidiary of The University of Auckland UniServices on the development of new technology for engineered geothermal systems for renewable electricity generation.
5. My managerial experience also includes seven years as a consumer products brand manager in the United States working for Procter & Gamble and SC Johnson, which are considered leading competitors in consumer products. Among my responsibilities in these positions was working with advertising agencies to develop television and print advertising, to work with internal legal departments to assess the legality of proposed advertising claims, to supervise filming of advertisements to assure collection and preservation of evidence supporting the claims being made, and to engage in consumer testing of completed advertisements to understand consumers' reactions.
6. In New Zealand, I conducted an ongoing advertising tracking study for Bell South, and later for Vodafone, that measured and assessed consumer reactions to all cell phone advertising over a period of six years. In this position, I had the opportunity to see a range of advertisements that were being aired, and then subsequently to assess what consumers understood, remembered, and recounted from those advertisements. This has provided me with perspective on the large differences between what is transmitted by advertisers and what is subsequently understood and retained by consumers. In particular, consumers tend to make a holistic impression of an advertisement, with strong recall of visual elements and storylines, far less recall of any voiced over copy, and modest to minimal recall of print on screen.

7. It is important to realise that consumer processes of perception, memorization, and subsequent recall are extremely variable, and can be manipulated. For example, it is extremely common for advertisements to make parity performance claims that can pass legal scrutiny when judged on a literal or verbatim basis, but nonetheless leave a misleading consumer impression of superiority. Products claiming "unsurpassed" or "unbeatable" performance literally mean they perform at a level equal to competition, but most consumers will view this language as meaning that the product is superior or the best available. In judging this Meridian advertisement, I have carefully considered whether any of the elements might leave such a misleading impression, and I present my conclusions below.
8. To assist with my opinion, I have reviewed a copy of Electric Kiwi's complaint and advertisements from other New Zealand energy retailers. I have also undertaken my own research into the renewable energy industry, New Zealand renewable energy retailer advertising practices and key internet searches of "cost the earth" style claims.

Consumer understanding of the Meridian Advertisement

9. I understand that one of Electric Kiwi's overarching complaints is that the Meridian Advertisement is misleading. Based on my studies and my experience appearing as an expert witness in a number of cases relating to allegations of misleading advertising under the Fair Trading Act, I understand that the overall impression of the Meridian Advertisement is important for assessing whether it is misleading. This is consistent with my comments at paragraph 6 above.
10. In my opinion, different groups of New Zealand consumers will have different "take outs" from the Meridian Advertisement. As a general rule, environmental claims can be polarizing, and are particularly likely to evoke different consumer reactions. There is clearly a segment of "green" consumers who are highly attracted to products and services that make environmental claims. These consumers are likely to be younger than average and with above average educational levels. Conversely, there is another segment of consumers who respond negatively to environmental claims. These negative consumers are likely to be older and have lower incomes and educational levels. While the exact proportion of the segments varies by locale and time, it is probably similar to the range identified by do Paco et al (2009), who found 35% of consumers fell into the green segment, and another 29% fell into the resistance segment.
11. As noted above in paragraphs 5-7, the overall impression of an advertisement that is developed and retained by consumers may be different (and typically much simpler) than the impression gained in a literal legal review. It is my opinion that it is essential that advertising copy, as written, must conform to all appropriate legal standards. Furthermore, I believe that the impression retained by consumers — which typically differs from the detailed message which is transmitted — must also be accurate and defensible.
12. In assessing the impression left by consumers, it is important to consider what and how is communicated in the end itself. Meridian has devoted nearly all of the advertisement (approximately 26 seconds of the 30 second) to depicting "Nigel" as an attractive green-oriented consumer who is willing to undertake inconvenient behaviours to uphold his environmental values. This character is used to create consumer involvement, in the hopes that consumers will identify with the spokesperson. The link to Meridian is created in the final four seconds of the advertisement with the inclusion of

three elements: a Meridian logo, a written slogan on screen ("The Power to Make a Difference") and a voiceover stating "Switch to Meridian for power that doesn't cost the earth."

13. I note that the advertisement does not mention renewable electricity, nor does it explicitly mention any renewable generation sources such as hydro, wind, or solar. Consumers are likely to retain some, but far from all, of the elements included in this advertisement. They may also, with prior knowledge, graft together an impression that include elements which were not communicated in the advertisement.
14. In my opinion, the overall impressions that the Meridian Advertisement creates for New Zealand consumers are:
 - (a) A belief that Meridian is one of the best power generators for green-oriented consumers.
 - (b) An understanding that Meridian's power is not the most expensive in the market. Consumers instinctively consider literal dollar-based meanings when the word "cost" is mentioned. However, I understand this is not the focus of Electric Kiwi's complaint, so I do not address this further.
 - (c) An impression that the power generated by Meridian is environmentally beneficial or, alternately, that it is not environmentally harmful. The statement Meridian's power does "not cost the earth" would be readily understood as implying that the energy generated by Meridian is not environmentally harmful. If consumers were asked to discuss the impression that Meridian power is environmentally beneficial, most would logically assume that Meridian generates using renewable energy sources such as wind, solar and/or water. A smaller portion of consumers might mention that Meridian is a 100% renewable generation company, or suggest a low carbon footprint. These conclusions would be correct, but are based on inference or prior knowledge outside this advertisement.
15. My opinion is consistent with searches I have undertaken on Google. When I searched for "cost the Earth" in the Google search engine, the Google search returned these two themes. The Google results returned price related representations only on the first page, with the second page having 60% environmental related and 40% pricing related representations and the third page having 50% environment related, 40% pricing related and 10% other ideas.
16. I understand from its complaint that Electric Kiwi claims that:
 - (a) Consumers will believe they are receiving energy directly from Meridian's renewable energy sources when they actually receive their electricity from the national grid. I disagree with this claim. The New Zealand electricity market structure including generators, lines companies, and retailers is very complex and poorly understood by consumers. Very few will be aware of, or interested in the complexities of the national electricity grid. Most would be satisfied with the knowledge that they had patronized an environmentally sustainable generator, and would not deeply consider the intermingled nature of electricity within the grid. The Meridian Advertisement does not draw a link between consumers actually receiving energy directly from renewable energy sources. In the context of a humorous, light hearted advertisement, there is no basis to Electric Kiwi's claims in this regard.
 - (b) Consumers will believe Meridian's power and business practices adhere to a wholly environmentally sustainable model. The concept

of sustainability is complex and multidimensional, and I cannot comment on whether Meridian's practices adhere to such a model. However, this is not the impression given by the Meridian Advertisement. In my opinion, the tagline "for power that doesn't cost the earth" does not rise to the level of an assessable claim. It has, in the form of a double entendre, two gentle implications: that Meridian power is environmentally beneficial, and that it is not exorbitantly expensive. I believe both of these implications are easily supportable, and neither implies anything about business practices or a "wholly sustainable business model".

17. In summary, renewable energy generators should be able to promote the fact that they are environmentally beneficial. This confers competitive advantages as it offers an important point of difference from non-renewable energy generators. Even more important are marketplace and actual environmental outcomes from truthful environmental claims. If renewable electricity generators are able to increase their market share by making truthful claims, actual environmental benefit occurs because less fossil-based power will be generated. The Meridian Advertisement is clearly humorous and builds a friendly image for the company. It will appeal to consumers who wish to purchase energy from renewable energy generators. This is an important decision for a significant number of consumers.
18. It is possible some consumers will be unaware that Meridian generates its energy from renewable sources and they may be curious why Meridian's power does not cost the earth. For those consumers, clearly protecting the environment will be important and I would expect a portion of those consumers to seek further information. For example, it would be common for such consumers to visit Meridian's website.



Dr Richard Granville Starr Jr

A solicitor of the High Court of New Zealand

Appendix 5

RESPONSE FROM THE COMMERCIAL APPROVALS BUREAU

Re: Complaint 20/396 AWAP 20/003 – Meridian Energy television advertisement

Thank you for the opportunity to comment on the complaint by Electric Kiwi that the Meridian Energy advertisement is in breach of Rules 2(b) and 2(h) of the ASA's Advertising Standard's Code.

In general, CAB will accept an advertiser's statements regarding the nature or attributes of their products or services in good faith. That is, if an advertiser claims that their product "does not contain ingredient Y", we do not audit the claim but remind the advertiser of their obligations under the Fair Trading Act.

We therefore defer to Meridian Energy to substantiate the product claim made in this advertisement.