

COMPLAINT NUMBER	21/523
APPEAL NUMBER	21/018
APPLICANT	Complainant
ADVERTISER	Department of Prime Minister and Cabinet
ADVERTISEMENT	Unite Against COVID-19, Radio
DATE	10 February 2022
OUTCOME	Declined

SUMMARY

The Complaints Board ruled on 7 December 2021 that four complaints about a Department of Prime Minister and Cabinet radio advertisement for the Unite-Against COVID-19 campaign were Not Upheld.

One of the Complainants, Complainant 2, appealed the Decision. The appeal application was considered by the Chairperson of the Appeal Board.

The Chairperson said the appeal application had not met any of the grounds for appeal.

The Chairperson ruled that the appeal application be declined.

CHAIRPERSON'S RULING

The Chairperson viewed the application for appeal. She noted that there were five grounds upon which an appeal was able to proceed. These were listed at Clause 6(c) of the Second Schedule of the Advertising Standards Complaints Board Complaints Procedures and were as follows:

- (a) The proper procedures have not been followed.
- (b) There is new evidence of sufficient substance to affect the decision.
- (c) Evidence provided to the Complaints Board has been misinterpreted to the extent that it has affected the decision.
- (d) The decision is against the weight of evidence.
- (e) It is in the interests of natural justice that the matter be reheard.

The Applicant appealed the Complaints Board Decision which was Not Upheld to Proceed. (A full copy of the appeal is in Appendix 2 and a summary of the Complaints Board decision is in Appendix 3).

The Chairperson noted the Applicant had identified the four grounds on which to appeal the decision as (b), there is new evidence of sufficient substance to affect the decision, (c), the evidence provided had been misinterpreted to the extent that it affected the decision, (d), the decision is against the weight of evidence and (e), it is in the interests of natural justice that the matter be reheard.

Role of the ASA

The Chairperson confirmed the ASA's position regarding assessing advertisements from expert bodies. The Chairperson noted the agencies supporting the Government's COVID-19 health response included the Ministry of Health, an expert body with regard to its statutory role relating to public health matters.

The Chairperson also noted the ASA's role and jurisdiction in assessing advertising from expert bodies is addressed in *Electoral Commission v Cameron* [1997] 2 NZLR 421. In accordance with the findings of the Court of Appeal, the ASA was required to "tread carefully" and ensure that it did not substitute its opinion for that of the expert body.

Chairperson's Role

The Chairperson reviewed the complaints, the advertisement, the Advertiser's response, the Complaints Board decision, and the appeal application from the Applicant.

Consumer takeout

The Chairperson agreed the likely consumer takeout of the advertisement was the Government was encouraging people to get both doses of the COVID-19 vaccine in time to enjoy the freedoms of summer. She took into account that some members of the Complaints Board had noted that some consumers could interpret the term "fully protected" to refer to the efficacy of the vaccine.

Was the advertisement advocacy advertising?

The Chairperson agreed with the Complaints Board that the advertisement fell into the category of advocacy advertising, and, as the identity and position of the Advertiser was clear, a more liberal interpretation of the Advertising Standards Code was allowed.

The Chairperson considered the Applicant's view that the advertisement was misleading given new evidence, was against the weight of evidence, that evidence had been misinterpreted and that it was in the interest of natural justice for the matter to be reheard. She addressed each of these grounds in turn:

Is there new evidence of sufficient substance to affect the decision?

The Chairperson noted the Applicant was quoting a new advertisement which used the term "better protected" as evidence the advertisement they complained about was misleading. The Chairperson said she could not accept a new advertisement as evidence, given that each advertisement would have its own context which was an important element of the overall takeout. The Chairperson noted the advertisement before her had a specific focus on the timeframe required in order to provide the greatest protection rather than the efficacy of the vaccination itself.

Has the evidence provided been misinterpreted to the extent that it affected the decision?

The Chairperson noted the Applicant stated the Complaints Board had misinterpreted the meaning of “fully protected” as used in the advertisement. The Chairperson acknowledged the term “fully protected” could be interpreted by some consumers to be a claim about the efficacy of the vaccine. The Chairperson also considered the context within which the statement was made with references to first and second doses and encouraging consumers to complete the vaccine course in order to be ready for the freedoms of summer. The Chairperson said in this context, the term “fully protected” meant the full protection available from the two doses of the vaccine being offered.

In considering whether the Complaints Board had misinterpreted the evidence, the Chairperson of the Appeal Board confirmed the role of the Complaints Board, which has nine members with a public member majority, is to consider the likely consumer takeout of an advertisement in determining whether it is likely to mislead or confuse consumers.

The Chairperson noted the Complaints Board had acknowledged a level of ambiguity in the term “fully protected” in its decision. The Chairperson also noted advocacy advertising was looked at differently from other advertisements.

The Chairperson referred to the Advertising Standards Code and the Advocacy Principles under which the Complaints Board had considered the complaints. In particular she noted that

“Complaints about advocacy advertising are considered differently to complaints about advertising for products and services.

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. “

The Chairperson said on the basis of the consumer takeout, the context of the advertisement and the nature of advocacy advertising from an expert body, she did not consider the Complaints Board had misinterpreted the evidence.

Does the decision go against the weight of evidence?

The Chairperson of the Appeal Board noted the Applicant considered the advertisement went against the weight of evidence given there were other complainants and decision makers are aware the vaccines do not offer full protection. The Chairperson did not consider that the Complaints Board’s decision had gone against the weight of evidence. She said the Board had unanimously agreed that a significant amount of information about the vaccination is available to consumers, and it was unlikely that the average consumer would be misled by a technical interpretation of wording used in the advertisement.

Is it in the interests of natural justice that the matter be reheard?

The Chairperson of the Appeal Board did not consider there were any natural justice concerns with the process followed or the deliberation by the Complaints Board in reaching the Not Upheld decision.

The Chairperson agreed with the Decision made by the Complaints Board. The Chairperson said that while the Applicant disagreed with the Decision, this was not a ground for appeal. The Chairperson ruled there were no grounds on which the appeal could proceed, and the application was declined.

Chairperson's Ruling: Appeal application **Declined** Complaint **Not Upheld**

APPENDICES

1. Description of Advertisement
 2. Appeal Application from Applicant
 3. Summary of the Complaints Board Decision
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Appendix 1

DESCRIPTION OF ADVERTISEMENT

The Department for Prime Minister and Cabinet radio advertisement promotes vaccination against COVID-19. The advertisement begins with the female voiceover calling "Shot!". She then encourages listeners to get their first vaccination today and their second in three weeks in order to be "fully protected" and "good to go for summer". She provides a website address (covid19.govt.nz) to find a vaccination centre.

Appendix 2

APPEAL APPLICATION FROM COMPLAINANT

Please find below my appeal and grounds for the appeal for the outcome of your boards decision provided in the pdf file that you attached.

Out of the 5 grounds for appeal I produce the following 4;-

- 1) The proper procedures have not been followed – N/A
- 2) There is new evidence of sufficient substance to affect the decision.
 - a) I have noticed on 21st or 22nd on Magic radio, 12.30pm which now clearly states "**to offer you better protection**", it doesn't now state as previous "offering you full protection". So rule 2 (e) now being noticed to be clearer in their advocacy.
 - b) Rule 2(e) is not substantiated to be true and factual when the advertisement states you will be **`fully protected`**.
 - c) Rule 2(e) , the advertisement was NOT clear as a requirement of this rule.
- 3) Evidence provided to the Complaints Board has been misinterpreted to the extent it has affected the decision;-
 - a) Appendix 2 Response from Advertiser;- Even the advertisers comments referred to the meaning of **`fully`**.
(can also be included in Ground 2 above).
So the meaning of **`fully`** comes into question of misinterpretation by the board.

So regardless of the wording 'fully', (and varying definitions surrounding it e.g. one common definition of 'fully' is '**complete**'), the resulting comment from the advertiser was "that it will give you the greater degree of protection",.....therefore should this not have been the wording in the advertisement in the first place? Rather than the advertiser misleading stating '**fully protected**' where this has clearly been misinterpreted by the board where many understand that to mean '**Complete**'?

The advertisement stating that you will be '**fully protected**' is misleading and disingenuous to a point where the board has misinterpreted the true meaning. The true meaning for consumers of the advertisement to understand truth, without bias(natural justice).

e.g. another way of thinking about this is for instance,....if there was a vaccine to '**fully protect**' you from cancer and if an advertisement stating such, the understanding from consumers of that advertisement of such a vaccine would be to believe that in its entirety that you would be '**fully protected from cancer**',....and not partially believe the advert., alternatively and additionally as another example if a vaccine was offered to '**fully protect**' you from getting 'Aids',...the understanding from the consumer hearing such an advertisement would be to believe that in its entirety, and not to partially believe the advert.

E.G. Do you, the board, want the receivers(consumers) of such important adverts to fully believe what the advertiser is promoting to be truth or partially believe what they are advertising?

Because I believe this advertisement of my complaint wanted those who heard this to '**fully**' believe what they were **partially** offering.

Principle 2

Therefore I believe the advertisement was untrue and misleading.

Rule 2(b)

This has definitely caused misguided understanding of truth, as many vaccinated and unvaccinated whom I have spoken to have agreed have all agreed 'that this is misguided truth and disingenuous information.

This style of advertising is in my opinion offering ambiguity, untruth, deception, and above all unfactual.

Sec 14 of the Bill of Rights Act 1990 that you referred to, denotes that the information should be,....and as in Rule 2(e) '**clearly distinguishable**' which in this case of the advertisement I believe it was **NOT clearly distinguishable** but rather misleading and deceiving causing people to totally believe you will be **fully protected**.

- You say the Role of the ASA when considering an advocacy advertisement is to consider the likely consumer takeout of an advertisement and complaints about advocacy advertising are considered differently to complaints about advertising for products and services,.....so once again I would like to re-iterate that the take out is that there is misrepresentation to the consumer.

4) A) The decision is against Weight of evidence;-

Even our Prime Minister and Mr Bloomfield know this does NOT offer full protection as they continue to offer further vaccines, continue to ask us to still remain socially distanced, and continue to wear masks. **FACT.**

- B)** Such was the misinterpretation that I see there were other complaints for the exact same wording.
C) All the grounds mentioned herewith in my appeal.

5) It is in the interest of Natural Justice that the matter be reheard;-

a) Wikipedia definition below

In English law, natural justice is technical terminology for the rule against bias and the right to a fair hearing. While the term natural justice is often retained as a general concept, it has largely been replaced and extended by the general "duty to act fairly". Wikipedia

*The Three Principles of Natural Justice = 'Essentially, natural justice requires that a person receive a fair and unbiased hearing before a decision is made that will negatively affect them. The three main requirements of natural justice that must be met in every case are: **adequate notice, fair hearing and no bias**'.*

- b) Statingtherefore I believe there is a bias to the real meaning of your decision favouring the word '**fully**' as meaning to be understood as '**the greater degree of protection**', when this is simply not so as per Ground 2, 3 and 4 above.
- c) That this case be reheard on moral grounds (chairperson should accept for reasons not specifically listed in the other grounds for appeal and based on the justice of the case), based on the honesty , integrity, of proposed real truth when advertising without perception of any alternative meaning or understanding from the consumer.

I look forward to your response accordingly, and hope that my appeal is favourable.

Appendix 3

SUMMARY OF THE COMPLAINTS BOARD DECISION

Summary of the Complaints Board Decision

The Complaints Board did not uphold complaints about the New Zealand Government's radio advertisement advocating for eligible people to get vaccinated for summer. In the context of advocacy advertising from the New Zealand Government in support of a high rate of vaccination, the advertisement was not misleading.

Advertisement

The Department for Prime Minister and Cabinet radio advertisement promotes vaccination against COVID-19. The advertisement begins with the female voiceover calling "Shot!". She then encourages listeners to get their first vaccination today and their second in three weeks in order to be "fully protected" and "good to go for summer". She provides a website address (covid19.govt.nz) to find a vaccination centre.

Summary of the Complaints

Four Complainants were concerned the advertisement was misleading to use the phrase "fully protected" in relation to receiving two doses of the vaccine. The Complainants said this implies complete protection when in reality fully vaccinated people can still catch the virus, pass it on, suffer symptoms and even die from the illness.

Issues Raised:

- Truthful Presentation
- Advocacy Advertising

Summary of the Advertiser's Response

The Advertiser said the campaign was a series of advertisements reinforcing the importance of getting your first dose in order to be fully immunised for summer. The Advertiser said the reference "fully protected" is about being fully protected by a certain date, meaning when the vaccination will provide the greatest degree of protection. The Advertiser said the advertisements aimed to communicate the timeframe required for vaccination as opposed to the efficacy of the vaccination itself.