

<b>COMPLAINT NUMBER</b>	21/462
<b>APPEAL NUMBER</b>	21/017
<b>APPLICANT</b>	The Advertiser
<b>ADVERTISER</b>	International Coalition to End Transplant Abuse in China
<b>ADVERTISEMENT</b>	International Coalition to End Transplant Abuse in China Billboard
<b>DATE OF MEETING</b>	4 March 2022
<b>OUTCOME</b>	Appeal Allowed in part, Complaint Upheld in part

## SUMMARY

The Complaints Board ruled on 27 October 2021, the complaint about a billboard advertisement for the International Coalition to End Transplant Abuse in China was Upheld.

The Advertiser appealed the Decision. The Advertiser said no evidence was provided that the advertisement was misleading or that consumers in New Zealand might find the advertisement fearsome or distressing.

The Chairperson considered that the Application raised sufficient grounds for the matter to be considered by the Appeal Board.

The Appeal Board agreed with the Complaints Board that the advertisement was misleading.

A majority of the Appeal Board agreed the advertisement did not reach the threshold to cause fear or distress without justification.

The Appeal Board ruled the advertisement was in breach of Principle 1, Principle 2, Rule 2(b) of the Advertising Standards Code and not in breach of Rule 2(e). The Appeal Board ruled the advertisement was not in breach of Rule 1(g) of the Advertising Standards Code.

The Appeal was Allowed in part and the Complaint was Upheld in part.

**Decision:** Complaint **Upheld in part**, Appeal **Allowed in part**

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

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## APPEAL BOARD DECISION

The Complaints Board ruled on 27 October 2021, the complaint about a billboard advertisement for the International Coalition to End Transplant Abuse in China was Upheld.

The Advertiser appealed the Decision. The Chairperson of the Appeal Board held that on balance the Appeal application had met the threshold to establish grounds for appeal under Ground (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 and (e) It is in the interests of natural justice that the matter be reheard.

Accordingly, the Chairperson ruled the Appeal application be accepted, parties be provided the opportunity to comment, and the matter be referred to the Appeal Board.

The Chairperson directed the Appeal Board to consider the advertisement with reference to the following codes:

### ADVERTISING STANDARDS CODE

**Principle 1: Social Responsibility** Advertisements must be prepared and placed with a due sense of social responsibility to consumers and to society.

**Rule 1(g) Fear and distress:** Advertisements must not cause fear or distress without justification.

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

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

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

### Summary of Complaints Board Decision

The Complaints Board upheld a complaint about a billboard advertisement for the International Coalition to End Transplant Abuse in China. The Board said the advocacy advertisement was misleading and could cause fear or distress without justification.

A majority of the Complaints Board said the advocacy advertisement had been adequately identified. The majority said the identity and position of the organisation was sufficiently clear from the name "End Transplant Abuse" and the reference to the website address - EndTransplantAbuse.org, although it would have been clearer if the organisation had included its full name or logo on the advertisement.

A minority disagreed. The minority said the name of the organisation was not clear because the name used in the advertisement "End Transplant Abuse" was different to the name specified on the website, which is "International Coalition to End Transplant Abuse in China".

In accordance with the majority the Complaints Board ruled the identity and position of the Advertiser was sufficiently clear and a more liberal interpretation of the Advertising Standards Code was allowed.

The Complaints Board agreed the advertisement was misleading and caused fear or distress without justification because it was not clear from the advertisement that the Advertiser was concerned the practice of organ harvesting was occurring overseas, in China. The Board said it was possible some consumers might get the impression this practice could be happening in New Zealand, and this was likely to cause fear or distress to some people.

The Complaints Board agreed the advertisement had not been prepared and placed with a due sense of social responsibility to consumers and to society. This is because it was misleading and had caused fear or distress without justification.

### **Summary of Advertiser's Appeal**

The Advertiser appealed the Decision and said in part:

- No evidence was provided that some consumers might find the advertisement fearsome and distressing. To say this denigrates the consumer's intelligence.
- The fear was justified.
- The billboard company wouldn't allow the Advertiser to mention China in the advertisement.
- No evidence was provided that anyone was misled.
- The decision was ultra vires the NZ Bill of Rights Act.
- The Advertiser (ETA) are modern examples of "legal agitators", they are not "Advertisers".
- To restrict their ability to send messages is to restrict legitimate human rights activities.

In addition to the above, the Advertiser raised other concerns, which are summarised as follows:

- The ASA has no statutory authority to make complaints anonymous.
- Not to provide the name of the Complainant is a breach of natural justice.
- The definition of advertisement and ASA's jurisdiction was challenged.
- The methodology for appeal in the ASA rules is confusing.

Full copies of the Advertiser's Appeal Application and Supplementary Submissions are available in Appendices 4 and 5.

### **Summary of Complainant's response to the Appeal**

The Complainant said:

- Several people commented that they were confused and distressed by the advertisement, there is no indication it was referring to China.
- The message in the advertisement had very little context, as a billboard, there is no immediate access to the website, to seek further clarification.
- Many countries have exclusions about what is acceptable, even when applying the freedom of expression principles.
- Causing confusion and distrust in medical procedures is likely to have more negative impact in this era of Covid-19, than at any other time.
- The advertisement did not communicate the messages of either 'mass murder' or 'China' clearly.
- Although the Advertiser may be a 'human rights defender', they should still be held to advertising standards, when purchasing advertising space.

A full copy of the Complainant's response to the Appeal is available in Appendix 6.

### **Response from the billboard company to the Appeal**

When asked for a response to the Appeal, the billboard company declined to comment.

### **APPEAL BOARD DISCUSSION**

The Appeal Board carefully considered the complaint, the advertisement, the Complaints Board decision, the information provided by the Complainant and the Advertiser and relevant precedent decisions.

#### **Preliminary matters**

The Appeal Board noted the Advertiser raised concerns regarding the rules and methodology of the ASA, in particular:

- The definition of advertisement and the jurisdiction of the ASA
- The authority of the ASA to make complaints anonymous
- The methodology for appeal in the ASA Rules and whether it is confusing

#### ***Definition of advertisement and jurisdiction of the ASA***

The Appeal Board confirmed the ASA does have jurisdiction for considering advocacy advertisements and the advertisement for the International Coalition to End Transplant Abuse in China was an advocacy advertisement.

The Appeal Board noted the definition of an advertisement for the purposes of the Advertising Codes of Practice, which is:

“any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed.”

The Appeal Board noted the advertisement was displayed on a site sold by a billboard company and its business is the commercial display of advertising.

The Appeal Board noted the ASA operates a system of voluntary self-regulation and relies on the co-operation of all parties to complaints, including its member organisations, which represent advertisers, agencies and the media.

The Appeal Board referred to the [Cameron](#) decision (Electoral Commission v Cameron [1997] 2 NZLR 421,424) which resulted from a judicial review of a Complaints Board decision about an Electoral Commission advertisement.

The Appeal Board noted the Cameron Decision reinforced the view that the ASA (referred to as “the Board”) has jurisdiction to consider advertising, by virtue of the media agreeing to help enforce its decisions. The following is an excerpt from the Cameron decision:

...Accordingly, whether by contract or by industry practice, the Board exercises a regulatory function by which it determines what advertising is or is not communicated to the public by substantially the whole of the media throughout the country... The regulatory role of the Board has had statutory recognition in the Broadcasting Act 1989 ... The significance of this statutory recognition of the Board is to confirm, if that is necessary, that the Board has a role of a public

nature in regulating advertising equivalent in part to that of the statutory Broadcasting Standards Authority.

### ***Anonymity of complaints and Methodology for appeal in the ASA Rules***

The Appeal Board noted the ASA's [Privacy Policy](#), which was updated in September 2021, does not allow for "anonymous complaints". Complainants must provide personal information to the ASA when lodging a complaint. However, under the policy: "A complainant's personal information will not be released to the advertiser or to any other party to the complaint without the complainant's permission." One of the reasons for this policy change was to manage the risk of Advertisers contacting complainants directly.

The Appeal Board noted that the Complainant in this case did not give their permission for their personal information to be released to the Advertiser.

The Appeal Board said any concerns the Advertiser has raised regarding ASA policies or the [Rules of the Advertising Standards Authority Inc](#), including those concerning the methodology for appeal, will be referred to the ASA Governance Board, via the ASA Secretariat, for consideration.

### **Reviewing the advertisement under the Advertising Standards Code**

#### *Consumer takeout*

The Appeal Board agreed with the Complaints Board's view of the likely consumer takeout of the advertisement which said: "...the likely consumer takeout of the advertisement was it was raising awareness about human rights issues relating to the use of forced organ transplants. For anyone wanting more information a website address was included. The Board agreed that it was not clear from the advertisement whether the human rights abuses were being described as occurring in New Zealand or not...".

#### *Audience*

The Appeal Board said the audience for the advertisement was unrestricted because the billboard was highly visible, being located facing a major traffic artery in central Wellington. It was intended to be viewed by the general public.

#### *Is the Advertiser adequately identified and does the Advocacy Rule apply?*

The Appeal Board agreed the Advertiser had been adequately identified as the identity and position of the organisation was sufficiently clear from the inclusion of the name "End Transplant Abuse". The Board noted the website address "EndTransplantAbuse.org" was in large font, making it easy for motorists and other consumers to read.

The Appeal Board agreed it was an advocacy advertisement and a more liberal interpretation of the Advertising Standards Code was therefore allowed.

#### *Was the advertisement misleading?*

The Appeal Board agreed with the Complaints Board that the advertisement was misleading. The Appeal Board said the use of the word "your" in the phrase "They take *your* freedom - They take *your* organs - Then they take *your* life" suggests that the message about the practice of organ harvesting is referring to consumers reading the billboard in New Zealand.

The Appeal Board said it was not clear from the billboard advertisement that the statements related to concerns about this practice occurring overseas.

The Appeal Board noted the advertisement included the address for the Advertiser's website, which contains further details about organ harvesting, including where it might be occurring. The Appeal Board said however the location of the human rights abuses being described

was not clear on the face of the advertisement itself. Referring a consumer to a website where additional information could be obtained did not save the advertisement from being misleading.

The Appeal Board said in the case of a public billboard the information on the billboard is all many consumers are likely to read, and, as such, it is important that the message is able to stand on its own.

The Appeal Board said the risk of a code breach would have been mitigated if it was clear from the advertisement that the Advertiser was concerned about organ harvesting occurring outside New Zealand.

*Did the advertisement cause fear or distress without justification?*

A majority of the Appeal Board agreed the advertisement did not reach the threshold to cause fear or distress without justification.

The majority said while the advertisement may cause fear or distress to some people the Advertiser had provided justification for this response of fear or distress. The majority said the advertisement was designed to raise awareness about a human rights issue, organ harvesting.

A minority disagreed. The minority said the advertisement did cause fear or distress without justification. The minority said the billboard was located in a public place, with an unrestricted audience, which would include children and vulnerable people. The minority said as there is no mention on the billboard that the advertisement is referring to a practice happening overseas some consumers might believe it is happening in New Zealand. In such cases this was likely to cause fear or distress.

*Was the advertisement prepared and placed with a due sense of social responsibility to consumers and to society?*

The Appeal Board agreed the advertisement had not been prepared and placed with a due sense of social responsibility to consumers and to society because it was misleading.

The Appeal Board ruled the advertisement was in breach of Principle 1, Principle 2, Rule 2(b) of the Advertising Standards Code and not in breach of Rule 2(e).

A majority of the Appeal Board ruled the advertisement was not in breach of Rule 1(g) of the Advertising Standards Code.

The Appeal was Allowed in part and the Complaint was Upheld in part.

**Decision:** Complaint **Upheld in part**, Appeal **Allowed in part**

## APPENDICES

1. **Description of Advertisement**
  2. **Original Complaint**
  3. **Summary of the Complaints Board Decision**
  4. **Appeal Application from the Advertiser**
  5. **Supplementary Submissions from the Advertiser**
  6. **Response to the Appeal Application from the Complainant**
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### Appendix 1

#### DESCRIPTION OF ADVERTISEMENT

The billboard advertisement for the International Coalition to End Transplant Abuse in China had a photo of two masked people in an operating theatre and the text: "They take your freedom - They take your organs - Then they take your life. EndTransplantAbuse.org". It was located in Ghuznee St in central Wellington.

### Appendix 2

#### ORIGINAL COMPLAINT

Hello, This billboard has appeared on Ghuznee Street opposite my office. As you can see in the image it reasa: "They take your freedom They take your organs They take your life" The messaging is extreme, and given there is no further information provided leads the reader to believe this is happening in NZ.

Based on this I believe it is breaking Rule 1(g) of the Advertising Code. as it is distressing and using unnecessary shock tactics for attention. Several of my colleagues have commented that they find this billboard distressing. I also believe it is breaking Rule 2(b) as it is not presenting an accurate and truthful view. It's clearly trying to mislead or confuse.

### Appendix 3

#### SUMMARY OF COMPLAINTS BOARD DECISION

##### Summary of the Complaints Board Decision

The Complaints Board upheld a complaint about a billboard advertisement for the International Coalition to End Transplant Abuse in China. The Board said the advocacy advertisement was misleading and could cause fear or distress without justification.

##### Summary of the Complaint

The Complainant was concerned the advertisement was misleading because it gives the impression the practice referred to in the advertisement could be happening in New Zealand. As a result, this advertisement could cause fear or distress, without justification, particularly to young or vulnerable people.

##### Issues Raised:

- Social responsibility
- Fear and distress
- Truthful presentation
- Advocacy advertising

**Summary of the Advertiser's Response**

The Advertiser defended the advertisement and said they have taken great care to choose words that educate but do not offend. The message is supposed to encourage people to think, and to go to their website to find out more. The website will confirm that this is not an issue in New Zealand, but it is happening in China.



**Appendix 4**

**APPEAL APPLICATION FROM THE ADVERTISER**

**IN THE ADVERTISING STANDARDS COMPLAINTS APPEAL BOARD**

<b>UNDER THE</b>	<b>ASA RULES 4<sup>TH</sup> SCHEDULE</b>
<b>IN THE MATTER</b>	of an appeal against a decision of the decision 21462 of the Advertising Standards Authority Complaints Board
<b>BETWEEN</b>	<b>INTERNATIONAL COALITION TO END TRANSPLANT ABUSE IN CHINA</b> <b>Proposed Appellant</b>
<b>AND</b>	<b>ADVERTISING STANDARDS AUTHORITY</b> <b>Respondent</b>

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**SUBMISSIONS OF THE PROPOSED APPELLANT**

**15 November 2021**

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**Counsel for Proposed Appellant:**

Dr Tony Ellis

## PROPOSED APPELLANT'S/APPELLANT'S SUBMISSIONS

### May it please the appeal board

1. The proposed appellant, the International Coalition to End Transplant Abuse in China hereafter ("ETA") seeks that the Chairperson exercise under rule 1.1 his/her authority to hear the proposed appeal of Decision 21462.

1.1. The Chairperson of the ASCAB shall determine if an appeal is to be heard by the ASCAB.

2. If the Chair exercises that authority, the proposed appellant will become the appellant, and will be referred to hereafter to in that capacity.
3. The Board says:

#### Summary of the Complaints Board Decision

The Complaints Board upheld a complaint about a billboard advertisement for the International Coalition to End Transplant Abuse in China. The Board said the advocacy advertisement was misleading and could cause fear or distress without justification...

The Complaints Board agreed the advertisement had not been prepared and placed with a due sense of social responsibility to consumers and to society. This is because it was misleading, had caused fear or distress without justification, and had the potential to cause mistrust in the medical profession.

The Complaints Board said the advertisement was not socially responsible, taking into account context, medium, audience and product and was in breach of Principle 1, Rule 1(g), Principle 2 or Rule 2(b) of the Advertising Standards Code.

4. The appellant says this decision was wrong.
5. The methodology of appeal is somewhat confusing. According to the Board's Second Schedule, which applies rules to the Complaints Board, not the Appeal Board, see rule 6.4 says:

6.4. The appeal application may be accepted on any of the following grounds:

- 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 ASCB 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.

6. However, rule 8 provides:

8. Procedures of the ASCAB

8.1. The ASCAB shall conduct appeals in accordance with procedures approved by the Authority and set out in the Fourth Schedule to the Rules of the Advertising Standards Authority Inc.

7. Whereas, Schedule 4 the Appeal Board Procedures, requires the Appeal Board to:

2.1. In meeting the ASCAB should rehear the complaint and give due consideration to all material before it.

8. Given a liberal interpretation, which should apply given the rights at stake, that appears to give the Appeal Board a general power to consider any ground of appeal. This is bolstered by Schedule 4 which is expressed to be the Appeal Board Procedures, whereas Schedule 2 is the Complaints Board Procedures, and not applicable.

9. The Rules would benefit from some clarification, especially as any consideration of Freedom of Expression requires consideration of:

Was the interference “prescribed by law” and;

Whether it was “pursued one of the legitimate aims”

Whether the interference was “necessary in a democratic society”;

10. Prescribed by law means can the appellant understand the law applicable, which is unlikely here, without legal advice.
11. Not wishing to be side-tracked, the appellant attempts to fit the Second Schedule test, despite believing it unnecessary.
12. The appeal invokes;
  - (c) Evidence misinterpreted;
  - (d) Against the weight of evidence; and
  - (e) Natural justice.

#### The Appeal

13. The Board found:

*Was the advertisement misleading and did it cause fear or distress without justification?*

The Complaints Board agreed the advertisement was misleading and did cause fear or distress without justification. This is because it is not clear from the advertisement that the Advertiser is concerned the practice of organ harvesting is occurring overseas, in China. The Board said it is possible some consumers may get the impression this practice could be happening in New Zealand, and this was likely to cause fear or distress to some people.

The Complaints Board said the billboard was located in a public place with an unrestricted audience, which would include children and vulnerable people.

The Complaints Board referred to the text in the advertisement “They take your freedom - They take your organs - Then they take your life”. The Board said while this text was addressed directly to the consumer with the use of the pronouns “they” and “your” implied that this was something that could happen to the consumer reading the advertisement. The Board said the idea that undergoing surgery could potentially result in the loss of organs, or one’s life, could be

extremely distressing for some people, especially if they believe this could be happening in New Zealand. The Board said there is no wider context provided in the advertisement, and this could be confusing for some consumers. The Board noted that within certain sectors of society there is a level of mistrust of medical procedures.

*Was the advertisement prepared and placed with a due sense of social responsibility to consumers and to society?*

The Complaints Board agreed the advertisement had not been prepared and placed with a due sense of social responsibility to consumers and to society. This is because it was misleading, had caused fear or distress without justification, and had the potential to cause mistrust in the medical profession.

The Complaints Board said the advertisement was not socially responsible, taking into account context, medium, audience and product and was in breach of Principle 1, Rule 1(g), Principle 2 or Rule 2(b) of the Advertising Standards Code.

Misleading causing fear and distress

14. The Board's view that the advertisement was misleading because some consumers might consider this is occurring in New Zealand, and be fearsome and distressing, is against the weight of the evidence, and misinterpreting evidence.
15. Consumers to form that view must have been particularly ill-informed, or be plain stupid, and have a very poor view of human rights in New Zealand to believe this.
16. There was **no** evidence that consumers believed this, it is nothing beyond pure speculation, that it is a belief in a New Zealand occurrence, and denigrates the consumer's intelligence, and knowledge of local and international affairs.
17. If you watch the national news, and see a bomb blast killing 50 or 100 people and should you turn on the news in the middle of that story, it is not likely to confuse viewers that this is happening in New Zealand, because they did not see the whole story, and it was Iraq, Afghanistan, or Paris.

18. New Zealand consumers are not the undistinguishing ignorant the Board inadvertently makes them out to be.

19. For example, in the context of determining guilt or innocence LorRodger in the UK Supreme Court said: that the public is:<sup>1</sup>

‘more than capable of drawing the distinction between mere suspicion and sufficient evidence to prove guilt’,

Children and Vulnerable People

20. Whilst the Complaints Board said the billboard was located in a public place with an unrestricted audience, which would include children and vulnerable people.

21. The Board do not, responsibly, make any link with those groups by saying they are disproportionately affected.

Causes Fear and distress-So What?

22. Even if it did cause fear, and distress, so what?

23. The Board fails to understand the parameters of Freedom of Expression and that shock, horror and offence are perfectly permissible. In the Context of the same right in the European Convention on Human Rights, the European Court of Human Rights has said that:

freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man” (*Handyside v. the United Kingdom*,§49).

24. The Court has emphasised on several occasions the importance of Article 10, (equivalent to s 14 NZBOA) which is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive, or as a matter of indifference, but also to those that **offend, shock or disturb**; such are the demands of that pluralism, tolerance

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<sup>1</sup> *Re Guardian News and Media Ltd* [2010] UKSC 1.

and broadmindedness without which there is no “democratic society”.

(*Handyside v. the United Kingdom*, § 49; *Observer and Guardian v. the United Kingdom*, § 59).

25. As Sedley LJ noted in *Redmond-Bate v Director of Public Prosecutions*:<sup>2</sup>

Free speech **includes not only the inoffensive but also irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not provoke violence.** Freedom only to speak inoffensively is not worth having. What Speakers’ Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of state control of unofficial ideas. ...

[**Bold** added]

26. The Board misdirected itself in respect of fear and distress.
27. ETA are modern example of legal agitators. The Hon Justice M H McHugh a Judge of the High Court of Australia commenting on agitators, says he uses the term in the sense Oscar Wilde did:<sup>3</sup>

P1 I use it in the sense described by Oscar Wilde in *The Soul of Man under Socialism* in a passage cited by Murphy J in *Neal v The Queen*. Oscar Wilde said:

“Agitators are a set of interfering, meddling people, who come down to some perfectly contented class of the community and sow

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<sup>2</sup> 163 JP 789, [1999] Crim LR 998, 7 BHRC 375, [2000] HRLR 249. Referred to in *Andrew Lyall Pointon v New Zealand Police* [2012] NZHC 3208, *Siemer v Solicitor-General* [2013] 3 NZLR 441 (SC).

<sup>3</sup> Hon Justice M H McHugh AC “The Need for Agitators – the Risk of Stagnation” Paper delivered to Sydney University Law Society Public Forum (12 October 2005)  
[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj\\_12oct05.pdf](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_12oct05.pdf).

the seeds of discontent amongst them. That is the reason why agitators are so absolutely necessary. Without them, in our incomplete state, there would be no advance towards civilisation.”

Like Oscar Wilde, I believe that developed societies need agitators for the reason he gives. Without agitators, societies stagnate and, as the communist dictatorships of Eastern Europe demonstrated, implode. Societies need “interfering, meddling people” that question the rules and practices that most of the community accepts without question...

**The agitator succeeds by raising the consciousness of the community concerning the issue that he or she agitates. Raising consciousness about the issue is almost invariably a necessary condition of successful agitation. Resentment and dismissal are ordinarily the initial reactions to the agitator’s challenge. People do not like to have their deeply held beliefs – what Justice Holmes called their “can’t helps” – challenged. But it is only by raising the issue – usually again and again – that people become conscious of that issue and are forced to address it... There is a need for agitators, in the sense I have explained, even in legal practice.**

[**Bold** and emphasis added]

28. A billboard is an insignificant piece of advertising in the scheme of what the Chinese engage in.
29. What the Chinese engagement in organ harvesting is, was commented upon in *Kim v Minister of Justice* when Mallon J observed the submissions included:<sup>4</sup>

China is a ‘terror regime’ operating a system where ‘human life is cheap, and many behave as terrorists, barbarians, and mass murderers on a scale rarely seen in human history’.\* It is said that, under such a regime, it is wrong to rely on diplomatic assurances because China’s word cannot be relied on.

\* The submissions describe in some detail and draw parallels with some of the historical regimes involving atrocious abuse of human rights.”



30. Bearing in mind that context, if a few people are momentarily fearful, and distressed (which there is no evidence of) so what? As said just above—

People do not like to have their deeply held beliefs – what Justice Holmes called their “can’t helps” – challenged. But it is only by raising the issue – usually again and again – that people become conscious of that issue and are forced to address it...

31. Notably the submission was made that the advertising board owners, would not allow any mention of China.
32. Which does make it hard to say the organ transplants are occurring in China.
33. The Complaints Board fail to consider rule 1(g)

#### **Guidelines**

**Advertisements must not cause fear or distress without justification.**

If it can be justified, for example on educational grounds, the fear or distress must not be excessive.

34. The Complaints Board fail to consider the rule, it is laudable to educate on mass murder, a major human rights abuse, rather than to be commended. That is the justification if any is needed.

#### Social Responsibility

*Was the advertisement prepared and placed with a due sense of social responsibility to consumers and to society?*

The Complaints Board agreed the advertisement had not been prepared and placed with a due sense of social responsibility to consumers and to society. This is because it was misleading, had caused fear or distress without justification, and had the potential to cause mistrust in the medical profession.

The Complaints Board said the advertisement was not socially responsible, taking into account context, medium, audience and product and was in breach of

Principle 1, Rule 1(g), Principle 2 or Rule 2(b) of the Advertising Standards Code.

35. The Board finding here lacks reality, and is not based on the ASA understanding of natural justice.
36. How does one socially responsibly advise Kiwi's of mass murder? There is something unreal about the Board's approach.
37. Imagine, trying to advise Kiwi's in 1944 of Nazi concentration camps. It is inherently difficult, and in breach of the New Zealand Bill of Rights Act for the Board to limit agitation on such a freedom of speech topic as mass murder.
38. The legal test here is, whether the restriction, is a necessary and justifiable limit in a free and democratic society. The ASA guideline must be read subject to that. No reason is advanced why the advertisement is not socially responsible, other than misleading, which it is not, no evidence was provided that anyone was misled.
39. Socially responsible might for example logically apply to a hate speech concept, or where violence was advocated, but to control protest in this fashion, is ultra vires the NZBORA, and frankly plainly ridiculous.
40. This form of nanny statehood reaction, is not justified in a free and democratic society, it not for the appellant to prove that the restriction imposed, but for the Board to show in terms that are also a proportionate response to the alleged wrong, which they do not, even embark upon that the advert is not justified in a free and democratic society.
41. Indeed, it is hard not to consider the advert a very low form of agitation, and protest, and to be anything other than socially responsible.

42. It is not the Complaints Board role to reconstitute itself in the role as part of the nanny state.
43. What is socially irresponsible about a poster advert essentially condemning mass murder in China?
44. The proposition of the Board, that the ad had the potential to cause mistrust in the medical profession, is laughable.
45. There is no evidence to support this, and why would anyone think that organ harvesting was a medical initiative, rather than a political one. No one suggested the Chinese medical profession are organising the killing of up to 100,000 Falun Dafa each year. The Complaints Board do not explain this.
46. Their finding is not just without any reasoning, it has no evidential foundation, and again relegates the consumer to a gullible idiot status, such a finding is without reason, evidence, and natural justice. and is offensive.
47. The finding that the advert was:
- not socially responsible, taking into account context, medium, audience and product and was in breach of Principle 1, Rule 1(g), Principle 2 or Rule 2(b) of the Advertising Standards Code.
48. In respect of Rule 2(b) is somewhat unreasoned and vague and is covered by the above submissions as well, and is to any event "truthful".
49. The Appeals Board will understand the importance of the issues raised. and no doubt provide a reasoned decision, in case this goes further.



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**DR TONY ELLIS**

**COUNSEL FOR APPELLANT**

**15 November 2021**

TO:           The Secretary ASA

**Appendix 5**

**SUPPLEMENTARY SUBMISSIONS FROM THE ADVERTISER**

**IN THE ADVERTISING STANDARDS COMPLAINTS APPEAL BOARD**

**UNDER THE**

**ASA RULES 4<sup>TH</sup> SCHEDULE**

**IN THE MATTER**

of an appeal against a decision of the  
decision 21462 of the Advertising  
Standards Authority Complaints Board

**BETWEEN**

**INTERNATIONAL COALITION TO END  
TRANSPLANT ABUSE IN CHINA**

**Proposed Appellant**

**AND**

**ADVERTISING STANDARDS AUTHORITY**

**Respondent**

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**SUPPLEMENTARY SUBMISSIONS OF**

**THE PROPOSED APPELLANT**

**17 November 2021**

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**Counsel for Proposed Appellant:**

Dr Tony Ellis

## PROPOSED APPELLANT'S SUPPLEMENTARY SUBMISSIONS

### May it please the appeal board

50. The proposed appellant, sought the identity of the complainant, and was advised the Authority would seek the complainant's views in accordance with its privacy policy.
51. Whilst it is laudable the Authority has such a policy its operation must be lawful. No policy can be applied to everyone, each complaint needs to be individually considered, to avoid what the law describes as a fetter on discretion.<sup>5</sup>
52. As the Authority has no statutory authority to make complaints anonymous, and has done so, the original hearing was unlawful. See *Lawson*<sup>6</sup> where Ms Lawson was subject to anonymous committee members hearing her complaint process. Justice Collins decided:

[10] The answer to the first question posed by the Authority is that it was correct to conclude the Committees required express legislative authority in order to lawfully use fictitious names and signatures when they issued the six decisions in question.

This is because the use of fictitious names and signatures by the Committees prevented Ms L from challenging the appointment of Committee members on the grounds of bias or being otherwise ineligible to consider her application. This in turn breached her right to natural justice affirmed by s 27(1) of the New Zealand Bill of Rights Act 1990 (NZBORA).

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<sup>5</sup> The topic of fettering discretion is essentially one of charting the principles that identify the line between legally acceptable limits on the exercise of discretion and those which are not legally acceptable. Those which cross the line into unacceptability are said to "fetter" the discretion; those that do not cross the line also in a real sense fetter the discretion, but the pejorative adjective is not used.

<sup>6</sup> *Chief Executive of the Ministry of Social Development v L* [2018] NZHC 2528; [2019] 2 NZLR 135 (26 September 2018)

53. Analogously, to not provide the names of the complaint prevents the appellant challenging the bona fides of the complainant, and is a breach of natural justice and section 27(1) NZBORA by not identifying the complainant.
54. Secondly, in *Electoral Commission v Cameron*<sup>7</sup> the Court of Appeal determined the ASA was judicially reviewable, and a lower test applied than in other public law case. i.e., it is easier to sue the Authority than other public authorities. Andrew Butler observed:<sup>8</sup>

### **The New Zealand approach: Electoral Commission v Cameron**

In New Zealand, a similar focus on function rather than character or identity was apparent in *Electoral Commission v Cameron*. There, the Court of Appeal had to determine whether a ruling of the Advertising Standards Complaints Board was subject to judicial review. The Advertising Standards Authority Inc, a body corporate, had established under its rules the Complaints Board as an unincorporated body. The purpose of the Board was to adjudicate upon complaints that advertisements prepared or published by member organisations breached the Advertising Codes of Practice which had been adopted by the Society. In the instant case, the Board had found that advertisements published on behalf of the Electoral Commission breached the Codes of Practice. The Commission disputed this finding and sought to review the Board's decision.

The Court of Appeal speaking through Gault J readily concluded that section 4 of the JAA was triggered: the Board (a "person" for the purposes of section 3 JAA) was established under rules of an incorporated body (that is had a "statutory power" in terms of section 3 JAA). Thus, the Court did not need to rely on its common law jurisdiction to subject the Board to review as the English Court in *Datafin* had had to do.

But what type of review should the Board be subject to? Gault J — in terms redolent of *Datafin* — emphasised the fact that "whether by contract or by industry practice, the Board exercises a regulatory function by which it determines what advertising is or is not communicated to the public by substantially the whole of the media throughout the country".<sup>106</sup> Later, His Honour remarked:<sup>107</sup>

The board in carrying out its public regulatory role, though in accordance with powers conferred ... by a private organisation, must be regarded as exercising public power. That will be *reviewable on public law principles*.

Indeed, earlier he had noted that it would have been unfortunate if judicial review of the Board were not available, in light of the fact that non-member broadcasting organisations were subject to the jurisdiction of the

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<sup>7</sup> [1997] 2 NZLR 421|[1997] NZAR 450|(1997) 10 PRNZ 440.

<sup>8</sup> Is this a Public Law Case? 2000 21 VUWLR, 747

Broadcasting Standards Authority — established by statute — the jurisdiction of which was undoubtedly subject to judicial review.

Having determined the threshold application of the JAA, Gault J cautioned that,

Finding that decisions of the board are amenable to review still leaves for consideration the grounds upon which review may be granted. Decisions of unincorporated bodies exercising public regulatory functions may not easily fall for examination on conventional grounds of illegality, irrationality and procedural impropriety. In appropriate cases a more flexible approach may be called for.

His Honour went on to hold that a set of standards could be exacted of the Board different from that applicable to other bodies subject to public law review. His Honour indicated a greater willingness to intervene on reasonableness grounds (by application of a standard lower than the *Wednesbury* test) and on grounds of encroachment upon statutory functions or powers conferred on public authorities.

"For the purposes of the Codes:

\* the word 'advertisement' is to be taken in its broadest sense to embrace any form of advertising to promote the interest of any person, product or service."

So far as the commission is communicating educational information to the public its advertisements would not be promoting the interest of any person, product or service so as to fall within that definition. That is not surprising since the history, constitution and constituency of the board are related to the regulation of those engaged in advertising of a commercial nature to consumers. Therefore, on the codes as presently formulated, the exercise of jurisdiction by the board in relation to the commission's functions so far as they involve purely public education would be beyond its powers. The commission is entitled to a declaration to that effect.

55. As now formulated in somewhat wider language:

"Advertising and Advertisement(s)" means any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed.

56. Nevertheless, is ETA engaged in advertising? It is not a commercial operator, and as the Court of Appeal said:

since the history, constitution and constituency of the board are related to the regulation of those engaged in advertising of a commercial nature to consumers.



57. In short, ETA is not an advertiser, but a human rights defender educating the public, The objectives of ETA include as its principal objective to advance and promote the education of human rights, it does this by raising awareness, and educating the public:<sup>9</sup>

#### 6. Object

The company's objects is to pursue the following charitable purpose(s):

The principal object for which the Company is established is to advance and promote the education of human rights and values with a goal to end human rights violations with respect to the cessation of forced organ harvesting of prisoners of conscience in China and seeking justice for the victims of forced organ harvesting.

In carrying out the Company's objects, the Company will as part of its Constitution, carry out activities in order to:

- raise public awareness regarding the importance of ending the detainment, torture, and forced organ harvesting of prisoners of conscience in China.
- undertake, publish and disseminate research regarding forced organ harvesting in China;
- educate the public regarding the importance of ending forced organ harvesting through activities including but not limited to public talks, discussion groups, film screenings, Q&A forums, the publication of papers and articles, the creation of films, multimedia presentations, printed materials and any other legal means.
- promote public debate regarding human tissue and organ trafficking laws and policy in Australia and internationally, to ensure that the Australian and other governments/ jurisdictions globally adopt laws in order to protect their citizens from unknowingly becoming complicit in organ trafficking crimes.

58. ETA is in modern international law terms a "human rights defender", and the ASA on the strength of a single complaint from an unidentified source during a three-month campaign, closed down the advert. Thereby restricting the advancement of educative human rights, without any semblance of considering the purpose of what ETA were doing.

59. For example, the UN Secretary-General said on the occasion of the adoption by the United Nations of the Declaration on Human Rights Defenders on

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<sup>9</sup> Constitution annexed.

December 9, 1998 that this marks a historic achievement in the struggle toward better protection of those at risk for carrying out legitimate human rights activities. The need for more effective protection of human rights defenders has been amply proven. Too often, human rights defenders find themselves at the front line of repression and harassment by their own governments for exposing human rights abuses and failures in legal systems.

60. The repression here was from the Board, it would have been socially responsible of the Board to consider the role of human rights defenders.
61. Article 6 of that Declaration provides:<sup>10</sup>

**The right to receive and disseminate human rights information, and to draw public attention to human rights issues**

Article 6

Unhindered access to, and dissemination of, human rights information is of crucial importance to human rights defenders. This includes the ability to collect and maintain data on human rights violations, to publish reports on human rights laws and practices, and to obtain relevant government documents on human rights protection. However, in practice human rights publications are often confiscated or prohibited, and access to vital information hampered.

...

According to the Declaration, everyone is also entitled to publish or make known to others "views, information and knowledge" about human rights, a right that builds on provisions in international instruments providing for freedom of opinion and expression. The Declaration particularly provides that "public attention" may be drawn to one's views on the observance of human rights in law and in practice. Earlier versions of this provision in the Declaration elaborated on this by including "by such means as the encouragement of public discussion, the use of the media, peaceful demonstrations and other forms of free and peaceful expression...." The final text did not include this degree of specificity.

62. Whilst this submission was not advanced originally, it should be considered now due to its fundamental international importance.

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<sup>10</sup><https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

63. The Appeal Board cannot embark on a course of hindering the advancement of human rights without even considering the issue.

64. The appeal should be upheld.



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**DR TONY ELLIS**

**COUNSEL FOR APPELLANT**

**17 November 2021**

TO: The Secretary ASA

## Appendix 6

### RESPONSE TO THE APPEAL APPLICATION FROM THE COMPLAINANT

I will add some comments below in response to certain points raised by the appellant in the document attached.

#### Misleading causing fear and distress (points 14 to 18)

- The advertiser says that the public would have to be 'plain stupid' to not know the ad was referring to China instead of New Zealand. The main reason I reported the ad in the 1st place is that I had several people remarked about it to me who were confused and distressed by the ad. There was no reference to it occurring in China so it is not 'plain stupid' to not be clear where it is claimed to be occurring.
- Point 17, comparing the ad to watching part of a news story is not a sensible comparison as there was no more information on the ad. It is not the case that if the whole ad was viewed it was clear, as it would be if you watched a whole news story about a bombing as per the comparison made by the advertiser. In fact, due to the location of the billboard most people seeing it would be driving and therefore would not be in a position to safely visit the website for more information as I did.

#### Causes fear and distress - so what? (points 21 - 26)

- The fact that advertisers should not cause fear of distress without justification is clearly laid out in Advertising Standards Code.
- I don't see the relevance of the European convention on human rights, or judgements from other countries, to an advertising decision in New Zealand. If considering other countries legislation it is worth noting that many countries (including the UK and those in the EU as mentioned) still have many exclusions in what is acceptable under freedom of expression and also have advertising agencies reviewing and banning inappropriate adverts. See this comparable example from a charity in the UK <https://tfn.scot/news/gruesome-charity-advert-featuring-heart-ripped-out-of-someones-chest-is-ban>
- Additionally, in the era of Covid-19 and the strong anti-vaccination sentiment which was prevalent when this advert was live and the need to encourage the public to trust mainstream medicine to get vaccinated, the advertiser seems not to understand that causing confusion and distrust in medical procedures would have had more negative impact than at any other time.

#### Chinese organ harvesting (points 27-28)

- I am not knowledgeable in the area of organ harvesting and to what extent this is an issue in China. I wish the organisation all the best in tackling this issue, however that is not the matter at hand. Whether the advertiser's purpose is valid does not affect whether or not their billboard meets the ASA's standards. There are more socially responsible ways for this advertiser to communicate their message.

#### Advertising board owners (points 29-30)

- The rules of the advertising board owners do not make this advert more permissible or less inflammatory. The advertising board owners rules do not replace the ASA's rules.

- The fact that the advertiser was asked to make amendments to their advert and not to mention China should have alerted the advertiser to the fact that their advert was inflammatory and given them cause to reconsider.

#### Social responsibility (points 34 onwards)

- There would have been plenty of ways to communicate a similar message on the same billboard to advise the public about this issue. The language and imagery chosen was purposely distressing and misleading.
- Point 42, referring to condemning mass murder in China does not seem to grasp that the advert did not communicate the messages of either 'mass murder' or 'China' clearly.
- Points 43-44, referring to this being politically rather than medically motivated and there being no evidence to support a link to the medical profession, conveniently ignores that the advert captured an image of surgeons, wearing scrubs and face masks pictured in a medical facility. Plus it's safe to assume most of the public would naturally associate organ transplants with the medical field rather than politicians.

Regarding the supplementary submissions which refer to trying to reveal my identity as a complainant, I am very confused as to why this is an issue at all? I did my civic duty in reporting to ASA an advert which I believe breached your rules. I did not expect to be further involved, nor do I have any personal motivation in this at all. I do not wish for my identity to be revealed to the advertiser at any stage, nor do I understand any sensible reason why who the complainant is would impact the advertiser.

Finally, in the points raised in the supplementary submission regarding the term 'human rights defender'- I do not disagree that they appear to be a 'human rights defender', but when purchasing advertising space they should still be held to advertising standards. This still gives the advertiser opportunity to redesign their advert and run it in future to communicate their messages and educate the public if that is their wish (though based on previous advert it is hard to believe that education is truly their goal). If the ASA lets any advertiser with 'human rights defender' label run any advert they wish then that would lead us down a concerning path. Would you allow the anti-vaccination community to advertise misleading, distressing and shocking messages about Covid 19 vaccination simply because they are claiming to be defending human rights?

I hope this covers off what you require to proceed and uphold the original decisions.