

<b>COMPLAINT NUMBER</b>	21/568
<b>APPEAL NUMBER</b>	22/008
<b>APPLICANT</b>	Complainant
<b>ADVERTISER</b>	Stuff Limited
<b>ADVERTISEMENT</b>	Stuff Digital Marketing
<b>DATE</b>	8 June 2022
<b>OUTCOME</b>	Declined

### **SUMMARY**

The Chair of the Complaints Board ruled on 31 January 2022 that a complaint about three advertisements on the Stuff website had No Grounds to Proceed.

The Complainant appealed the Decision. The appeal application was considered by the Chairperson of the Appeal Board (“the Chairperson”). The Chairperson noted the Complainant’s view that the information supplied in the Chair’s ruling relied on inference as to what and how evidence was considered.

The Complainant put forward their view of the likely consumer takeout of the claims and other precedent decisions as part of their application.

The Chairperson reviewed the complaint, the advertisement, the Chair’s Ruling, and the Appeal Application, along with the precedent Decisions. The Chairperson confirmed the likely consumer takeout of the advertisements was more general than the Complainant’s view and they promoted the intent of the publisher to apply professional standards. She said the role of the Complaints and Appeal Boards was confined to the content and placement of advertising, not the efficacy of a product or service (in this case, news articles).

The Chairperson ruled there were no grounds on which the appeal could proceed, and the application was declined.

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

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### **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 Complainant appealed the Decision from the Chair of the Complaints Board, which ruled the complaint had No Grounds to Proceed. (A full copy of the Chair's ruling is in Appendix 1).

The Chairperson noted the Applicant had identified four grounds on which to appeal the decision, specifically: (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.

### **Chairperson's Role**

The Chairperson reviewed the complaint, the advertisements, the Ruling from the Chair of the Complaints Board, and the Complainant's appeal application, to assess whether any of the grounds for appeal had been met.

The Chairperson noted the original complaint concerned three Stuff advertisements, each inviting readers to make a financial contribution to Stuff. The first advertisement included the text "...Stuff's professional standards of accuracy, fairness and balance are more vital than ever", the second advertisement said: "Stuff's ethical reporting is built on accuracy, fairness and balance..." and the third advertisement said "Trustworthy, accurate and reliable news stories are more important than ever..."

The Chairperson noted the Complainant was concerned that these advertisements were misleading because "Stuff's news editorial practices do not meet its advertised claims" and "It is difficult for the average reader or consumer to verify these claims". The Chairperson noted the Complainant referred to an article published on the Stuff website on 12/11/2021 headed "Were Wellington's new buses made with forced Uyghur labour?".

The Chairperson confirmed her approach focused on the likely consumer takeout of the advertisements. She also took into account the advertisements were regularly placed next to a range of editorial content delivered via the Stuff website.

### **Chairperson's Ruling**

The Chairperson ruled there were no grounds on which the appeal could proceed, and the appeal application was declined.

#### *Consumer takeout*

The Chairperson noted the Complainant had provided their takeout of the advertising as part of their appeal submission.

The Chairperson confirmed her takeout of the advertisements was more general. In her view, it was that Stuff is a large New Zealand-owned news organisation with professional standards for accuracy, fairness and balance and it is seeking financial support from readers.

She did not consider that most consumers would see the statements in the advertisements as an absolute guarantee of accuracy, fairness and balance in every article, rather that the organisation applies professional standards with the aim of supporting this outcome.

*Precedent Decisions*

The Chairperson noted the Chair referred to a precedent decision in her ruling – 19/427, about an advertisement promoting the New Zealand Herald.

The Complainant referred to three better possible precedent decisions. The first was 17/012 regarding Ubers process for checking drivers and was upheld. Two other decisions related to claims from energy companies. Decision 20/396 about a Meridian Energy advertisement which claimed switching to Meridian for more sustainable power was found to breach the Advertising Standards Code, as was Decision 21/194 for a claim from First Gas that its products were going carbon zero.

The Chairperson noted the Complainant's view these decisions were more relevant precedents and aligned with their view the claims made by Stuff were misleading and unsubstantiated.

The Chairperson considered the precedents referred to by the Complainant were distinguishable from the complaint before her. In this case, the product or service being promoted was the content of the Stuff website and in particular, news content. Unlike the services promoted by the companies in Decisions 17/012, 20/396 and 21/194, news content on Stuff is subject to an independent regulatory process through the New Zealand Media Council.

The Chairperson also re-iterated the likely consumer takeout, that Stuff considers it has an ethical approach to content and applies professional standards to achieve this.

*Role of the Complaints and Appeal Boards and jurisdiction*

The Chairperson noted that when a complaint is received by the ASA the Chair of the Complaints Board initially decides whether to accept the complaint for consideration by the Complaints Board.

The Chairperson said in this case the Chair of the Complaints Board decided not to accept the complaint. This is because, in her view, the content of the advertisements was not misleading.

The Chairperson agreed with the Chair of the Complaints Board that the references to Stuff's professional standards such as "accuracy, fairness and balance" were aspirational statements from the Advertiser, promoting its commitment to good journalism.

The Chairperson noted the Complainant's underlying concern that Stuff's news editorial practices had not met the advertised claims, with reference to a particular example.

The Chairperson agreed with the Chair of the Complaints Board that the ASA's jurisdiction is limited to the content and placement of the advertisements and the New Zealand Media Council has jurisdiction over editorial content.

The Chairperson referred to the following excerpt from the New Zealand Media Council website:

The main objective of the New Zealand Media Council, established as an industry self-regulatory body in 1972, is to provide the public with an independent forum for resolving complaints involving the newspapers, magazines and the websites of such publications and other digital media. The Council is also concerned with promoting media freedom and maintaining the press in accordance with the highest professional standards.

*Summary*

Following a review of the complaint, the advertisement, the Chair's Ruling, and the Appeal Application, along with the precedent Decisions, the Chairperson ruled there were no grounds on which the appeal could proceed, and the application was declined.

The Chairperson confirmed the likely consumer takeout of the advertisements was more general than the Complainant's view and they promoted the intent of the publisher to apply professional standards. She said the role of the Complaints and Appeal Boards was confined to the content and placement of advertising, not the efficacy of a product or service (in this case, news articles).

**Chairperson's Ruling:** Appeal application **Declined** Complaint **No Grounds to Proceed**

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## APPENDICES

1. Chair of the Complaints Board Decision - No Grounds to Proceed
  2. Appeal Application from Applicant
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### Appendix 1

#### Chair of the Complaints Board Decision - No Grounds to Proceed

**Advertisement:** There were three advertisements referred to in this complaint. Each advertisement appeared below news articles on the Stuff website. The advertisements invite readers to "make a contribution" and "become a supporter" of Stuff's journalism and their newsrooms. The advertisements emphasise the importance of reliable news within the current environment and refer to "Stuff's professional standards of accuracy, fairness and balance".

**The Chair ruled there were no grounds for the complaint to proceed.**

#### **Complaint:**

The Complainant was concerned Stuff's advertisements claiming 'accuracy, fairness and balance' are misleading and should not be allowed given Stuff's current editorial settings for its news reporting.

The Complainant put forward the rationale and evidence in support of their complaint.

#### **The relevant provisions were Advertising Standards Code - Principle 2, Rule 2(b);**

**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.

**The Chair** noted the Complainant was concerned the statements about Stuff's professional standards of accuracy, fairness and balance, in the advertisements encouraging financial contributions from readers, were misleading.

The Chair confirmed the ASA's jurisdiction is the content of the advertisements referred to by the Complainant. The New Zealand Media Council has jurisdiction over the editorial content published in print and via Stuff's digital platform.

The Chair considered the information provided by the Complainant, to show that editorial content published by Stuff was inaccurate, in support of their view the claims in the advertisements were misleading.

The Chair referred to a precedent decision [19/427](#), which was also ruled No Grounds to Proceed. That decision concerned a complaint about a New Zealand Herald advertisement which said “We don’t agree with everything we publish. See Every Perspective in New Zealand’s Herald.”

The Decision said in part:

“The Chair noted the Complainant’s concern the advertisement was misleading to claim the New Zealand Herald delivers its readers “every perspective”, when, in the Complainant’s view the publication often only presents one perspective and there is a lack of contrary opinions published.

The Chair considered the statements “See Every Perspective” and “Your Devil’s Advocate” were aspirational sentiments from the Advertiser. The Chair said the likely consumer takeout of these statements would be the New Zealand Herald publishes views from different perspectives – including those it does not agree with.”

The Chair said the precedent was relevant to the case before her. The reference to Stuff’s professional standards of “accuracy, fairness and balance” is also an aspirational statement from the Advertiser promoting its commitment to good journalism.

The Chair said the advertisements did not reach the threshold to be considered misleading and there was no breach of Principle 2 or Rule 2(b) of the Advertising Standards Code.

The Chair ruled there were no grounds for the complaint to proceed.

**Chair’s Ruling:** Complaint **No Grounds to Proceed**

**Appendix 2**

**APPEAL APPLICATION FROM COMPLAINANT**

TO: Chairperson of the Advertising Standards Complaints Appeal Board (“ASCAB”)

Subject: Appeal Ruling 21/568

Dear Chair,

I made a complaint as directed according to the ASA complaints process via the webform provided on the ASA website. The Chair’s ruled (Ruling 21/568) on this complaint in accordance with step three of the ASA’s published process (complaint-process webpage). The matter was ruled by the Chair alone. She ruled there was No Grounds to Proceed.

I seek to appeal this ruling in line with the appeals process.

*Basis for appeal*

1. The information supplied in the writing ruling is scant, and it is therefore difficult to ascertain the Chair’s consideration and decisions on important points relating to the original complaint. On that basis, without detail on key aspects of the Chair’s

consideration, this appeal necessarily relies on inference as to what and how evidence was considered.

2. Considering this situation, I am appealing the Chair's ruling under the following categories:
  - a. Evidence provided to the Complaints Board has been misinterpreted to the extent it has affected the decision.
  - b. The decision is against the weight of evidence.
  - c. There is new evidence of sufficient substance to affect the decision.
  - d. It is in the interests of natural justice that the matter be reheard.

The remainder of this note covers an assessment of the ruling, arguments relating to points either raised by the Chair or omitted by the Chair in her ruling and suggestions relating to alternate approaches and outcomes.

### *Assessment of the ruling*

This section reviews the ruling for background and highlights areas which relate to the grounds for appeal.

1. The Chair ruled there was no breach of Principle 2 or Rule 2(b) of the Advertising Standards Code.
2. The information provided in the writing ruling was brief. It contained three statements which gave some insight into the Chair's considerations:
  - a. Suitability of precedent decision 19/427
  - b. Determination advertisements were aspirational
  - c. Determination advertisements did not meet the threshold
3. The exclusive selection of 19/427 as precedence aligns with the organisation type (media organisation) and advertisement type (ascribing value to media product). There is little indication in the ruling how the Chair considered the alignment of the complaints or how the evidence was interpreted given the differences between the advertisements and the complaints. Further, the Chair does not address the differences between the complaints or evidence.
4. There is no indication in the ruling that the Chair considered any other evidence available beyond complaint 19/427. This raises the question if the claim was ruled summarily based on the cited precedent without considering the broader weight of evidence.
5. The ruling does not provide any indication that Chair considered other potentially relevant precedence such as that provided in rulings such as 17/012, 20/396, and 21/194. These decisions can be considered existing evidence as they were available to the Chair.
6. Citing 19/427, the Chair finds the advertisements were aspirational. She mentions some of the claims in the ruling, but not the context or the additional claims submitted in the evidence which may or may not have found aspirational.
7. The Chair found the advertisement 'did not meet the threshold.' There is no information provided in the ruling on consideration of 'thresholds' as it applies to the evidence provided. As such it is difficult to determine if she properly considered the evidence provided, if it was mis-interpreted, or if there is new or existing evidence that could have been interpreted that would have aided with the determination with regard to threshold.
8. The written ruling shows no evidence the Chair considered tests applied in other similar rulings and decisions which involve aspirational claims: "likely consumer takeout".

9. The Chair does not address the dual nature of the advertising which featured in the complaint and is shown in the evidence. This may result from a misinterpretation of the evidence. Beyond the general claim in the advertisement, the complaint cited the specific placement of these advertisements embedded within articles which the complaint claims do not meet the advertised claims. This aspect is not addressed. This aspect was also not a feature of the 19/427 decision, but a similar thread is present in other potential precedent decisions which were available to the Chair.
10. The Chair did not consider the advertisement with reference to Basic Principle 4 and Rule 2 of the Code of Ethics as has been done for potentially pertinent precedent complaints (17/012). This required the Complaints Board to consider whether the advertisement contained anything which, either directly or by implication, was likely to deceive or mislead the consumer and if it had been prepared with a due sense of social responsibility to consumers and to society.
11. Given the limited nature of the treatment of the claim in the ruling, the question arises if consistent standards are applied to advertising by media outlets than are applied to other advertisers, based on comparable evidence. A gap can indicate either a misinterpretation of evidence or a decision against the weight of evidence.

#### *Basis for appeal*

Disagreement with a ruling is not grounds for appeal. At the same time, the limited information provided in the ruling makes it difficult to ascertain whether information was mis-interpreted or not considered (weight of evidence). It is also possible that new evidence would be material in aiding consideration of the 'threshold' questions. It is extremely difficult to respond to this part of the decision as it is not described in any detail.

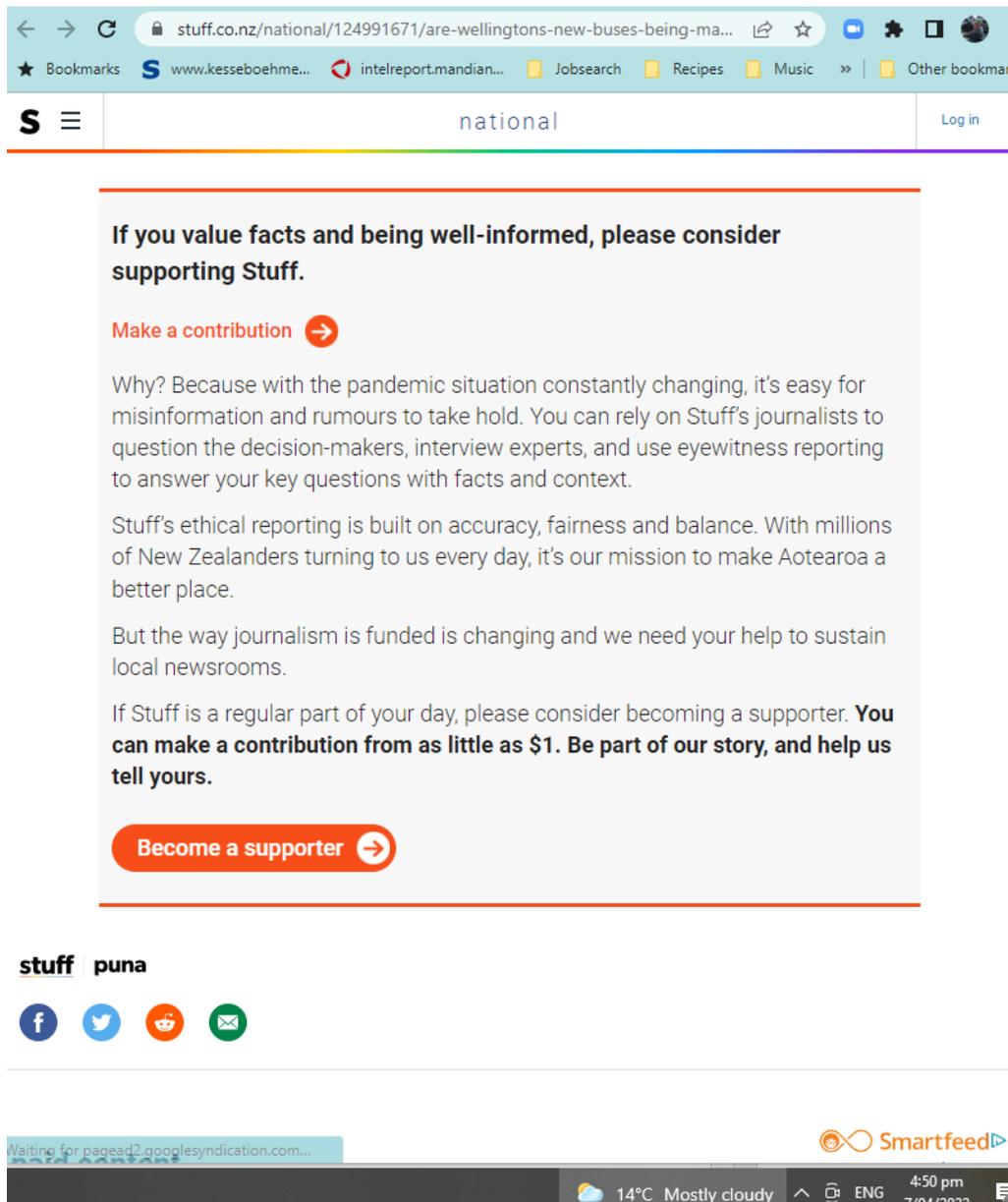
The statements in the section below are made for the ASCAB to consider each of the appeal criteria stated above as the Appeal Board may have more information relating to the basis of the initial ruling. The statements should be taken in conjunction with my previously supplied information.

#### *Further comments*

The complaint provides evidence that Stuff's editorial practices do not match its advertised messaging. This messaging, in the evidence provided encourages the consumer/reader to trust Stuff as a news source and to support it financially.

The evidence available shows that Stuff publishes non-factual information that meets the definition of disinformation alongside factual information. It shows that Stuff continues to publish this content digitally on a daily basis, and that it does so embedded with advertising purporting to dispel disinformation with fact (see illustration below). It shows that Stuff does this knowingly.

There was no indication in the ruling as to if the supplied evidence was accepted or not, but for now we will assume that it was accepted that Stuff has published and continues to digitally publish articles that it now knows include untruthful statements. If this is not the case, then further evidence can be provided.



The Chair relied on Decision 19/417 as precedent in her ruling. This is a relevant starting point in that it is a complaint against a media organisation based on a claim “We don’t agree with everything we publish. See Every Perspective in New Zealand’s Herald.” The complaint argued that media bias was present and there was a lack of balance. The ruling and subsequent appeal found that the claim was aspirational and did not literally mean every viewpoint would be present on every article. Furthermore, a ‘likely consumer takeout would be the New Zealand Herald publishes views from different perspectives – including those it does not agree with.’

It is useful to assess the differences in the complaint and the advertising claim against the evidence to evaluate the extent to which the precedent applies to the current complaint.

First, the 19/417 advertisement was a full page add. As with the current complaint, the advertising applies generally to the body of news reporting by the media organisation. But in the case of the current complaint, the complaint also addresses claims that are embedded in specific articles. This has the added effect of leading the reader to attribute the advertised values to the article displayed—despite the fact that the publisher is aware the article does not meet those standards.

Second, the nature of the evidence is different. The 19/417 complaint showed an imbalance of views over time. This was judged to be consistent with normally expected imbalances (simplification). The current complaint alleges that Stuff is claiming set of aspirations but is actively choosing to defy those aspirations, at least in some areas. This merits its own test. I am not suggesting the test equate to the partner that is faithful, except when they are not. (However I am alleging that Stuff is claiming to be trustworthy, except when it is not.)

Other tests have been applied by the ASA which are more relevant than 19/417.

The following commentary relates to advertising claims in other sectors which are made in respect to somewhat intangible value of products.

A potentially relevant decision is 17/012. In this decision upheld a complaint that Uber NZ's process for background checks was overstated in its advertisements. This could be considered pertinent as safe transport is an important service, similar to a trustworthy media. Uber made claims about the robustness of its background checks as does Stuff about its reporting. The Board assessed the merits of the claim and the complaint in detail. While Uber does vet its drivers, the in the decision the Board evaluated the quality of this vetting.

Other organisations have promoted what can be considered aspirational claims. Decisions 20/396 (Meridian Energy) and 21/194 (Firstgas) relate to energy claims.

In the case of 21/194, the Firstgas defence related to in part to the promotion of its aspiration to reduce environmental impacts from the use of gas (paraphrasing). The decision upheld the complaint after consideration that it was misleading and considering the customer takeout.

#### *“Consumer Takeout*

The Complaints Board agreed the likely consumer takeout of the advertisement was Firstgas products are going zero carbon so consumers can continue to enjoy using gas, without adding any carbon to the atmosphere. Although no particular time frame for the change to zero carbon was indicated, the Board considered that the likely overall impression was this will happen imminently.

The Complaints Board noted the comment from the Advertiser that the advertisement was part of a brand awareness campaign “that arose from the Climate Change Commission draft advice”.

The electricity industry in New Zealand is highly renewable by global standards...approximately 80% renewable....and is generally trending up. Meridian participates in the electricity industry where, due to government regulated industry structure,

it must buy all of its electricity from the spot market, and sell all of its generation to the spot market. Despite this, it has long sought to market itself as environmentally friendly by exclusively building renewable generation. In its defence, Meridian highlighted the environmentally friendly and aspirational aspects of its business. It also provided analysis on the likely ‘consumer takeout’ from the claim. The complaint was upheld.

The above decisions were raised to highlight that the ASA has considered aspirational claims before, and considered them in depth, and that consideration should be broader than the single claim in the initial ruling.

In my view, the above decisions are useful to consider in relation to the current complaint. To not consider the consumer takeout considering the evidence would seem to indicate that Media is a special case and not subject to the same rules as other industries. This would be a mistake given the importance of the media and its current pressures.

This is important. Media influences public opinion, votes, what businesses we support, and it can affect our views and treatment of each other. It influences public officials. It has drummed up support for war. Advertising about media is likely to affect the consumers’ view of how credible of a source it is—how much due diligence needs to be done.

The advertisement may be worth interpreting in accordance with reference to Basic Principle 4 and Rule 2 of the Code of Ethics as has been done for potentially pertinent precedent complaints (17/012). This required the Complaints Board to consider whether the advertisement contained anything which, either directly or by implication, was likely to deceive or mislead the consumer and if it had been prepared with a due sense of social responsibility to consumers and to society.

*Sample consumer takeout*

Consumers are not uniform, however as a media consumer, I can give you my take outs.

Stuff claim	Takeout
Stuff’s ethical reporting is built on accuracy, fairness, and balance	Generally, try to be balanced, accurate and fair. If a mistake is made, it is corrected to protect the integrity of the brand.
Trustworthy	Able to be relied on to make decisions, can be believed. If there is a mistake, it will be fixed to remain trustworthy.
Trustworthy, accurate and reliable news stories	The news story you are reading is Trustworthy, accurate and reliable to the best of our ability.
In a fastmoving world where misinformation spreads on social media, the need for trustworthy journalism has never been better.	We don’t spread disinformation, others do. You won’t find misinformation printed on our site unless presented with balance and challenge. We are more focused on journalistic integrity than clicks.

*Recap of evidence that Stuff does not meet its claims*

Stuff has stated aspiration with respect to its journalistic integrity. But there is evidence, supplied, that its reports and editors are not uniformly up to the task. Furthermore, when mistakes are found, they are not consistently corrected. This is not consistent with the stated aspirations.

My view is that the wording many of the statements, in a consumer's view, imply that the aspirations have already been achieved. This was considered by the board in Decision 21/194.

Whatever the typical consumer takeout is, I doubt that the advertising stands up to the management practices evidenced in the original complaint.

I don't think the reasonable consumer would expect, based on the advertising, that they would be served articles which Stuff know are inaccurate and has disinformation sourced from Stuff's own journalists? Would they expect to find the same Stuff contributor had previously been censured by the Media Council for violations of industry standards? Would they expect that quotes within the articles are disputed by those quoted? Would they expect the editor to admit that Stuff deliberately included information articles to discredit the testimony and diminish the reputations of local businesspeople—information which would later be proven to be fabricated by Stuff. Would they expect that, once editorial management was aware of these deficiencies, that Stuff would continue to publish the disinformation allowing new readers to 'trust' in the disinformation presented? Would they expect that Stuff, if pressed, would present further information crafted to mislead the reader and minimise the appearance of fault, while still publishing misinformation?

Or would they expect that mistakes can be made, even serious ones...but that according to the aspirational goals exposed, they would be corrected to the best of their ability once known and restore the organisation to the distribution of facts over the broadcast of fiction.

One defence could be that all of Stuff's work is excellent, there are just one or two black spots. My argument is that it is not the errors made, but the demonstrated indifference to them that is inconsistent with the aspirations advertised.

In terms of threshold, consider a spectrum of performance. We can consider an organisation to be perfectly in adherence with their standards, mostly in adherence, sometimes there but trying, not there but looking to improve, or not adhering to their stated standards and not trying. If we had to choose one for Stuff, I am not qualified to judge. But we can also have organisations which are uneven. Some parts of the organisation are doing well, and some that are not. In such a case, when management becomes aware of an issue, its resolution is guided by values. The nature of the resolution of such matters is illuminating as to the values of the organisation. In the case of Stuff, the evidence that has been presented has shown they don't hold the journalistic integrity as high on the agenda as they advertise they do.

Thank you for your time and consideration.