

COMPLAINT NUMBER	22/107
APPEAL NUMBER	22/010
APPLICANT	The Advertiser
ADVERTISER	Voices for Freedom
ADVERTISEMENT	Pandemic of the Unvaccinated, Billboard
DATE OF MEETING	18 August 2022
OUTCOME	Appeal Declined, Complaint Upheld

SUMMARY

On 10 May 2022, the Complaints Board upheld four complaints about a billboard advertisement for Voices for Freedom challenging that COVID-19 was a pandemic of the unvaccinated.

The Advertiser appealed Decision 22/107.

The Chairperson considered the Application raised sufficient grounds for the matter to be considered by the Appeal Board and the appeal was accepted and parties were invited to provide responses on the matters raised.

The Appeal Board met to consider Appeal 22/010. The majority of the Appeal Board said the advertisement was likely to mislead or confuse consumers. The majority said the lack of context in the advertisement about when and why the statements were made meant it misrepresented the words from the three experts. The majority said, in the context of a global pandemic, the advertisement was not socially responsible.

A minority of the Appeal Board said the advertisement was an expression of opinion and the Advertiser had provided sources for the statements and data to show that the statements were no longer accurate. For the minority of the Appeal Board, the advertisement did not reach the threshold to breach the Advertising Standards Code in the context of advocacy advertising.

In accordance with the majority, the Appeal Board ruled the advertisement was in breach Principle 1 and Principle 2 of the Advertising Standards Code.

The Appeal was Declined and the Complaint was Upheld.

Decision: Complaint **Upheld**, Appeal **Declined**

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

APPEAL BOARD DECISION

On 10 May, the Complaints Board upheld four complaints about a billboard advertisement from Voices for Freedom.

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

Responses to the appeal were requested from parties to the complaints, the complainants and the media company.

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

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.

Principle 2: Truthful Presentation: Advertisements must be truthful, balanced and not 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 majority of the Complaints Board said the advertisement was making an unsubstantiated factual claim which was likely to mislead or confuse some consumers. The majority of the Board said there was a clear disconnect in the timeline between when the quoted statements were made in September and October of 2021 and the data provided as substantiation by the Advertiser which contained statistics dated May and April 2022.

A minority of the Complaint Board disagreed and said the advertisement was making a general claim using public statements from senior officials and a scientist. The minority of the Board said the use of the idiom "Yeah, Nah" in the advertisement meant the tone of the advertisement shifted to opinion, and consumers were likely to interpret it as the Advertiser's view that the Government's strategy had not prevented a large number of vaccinated people getting the COVID-19 virus.

Summary of Advertiser's Appeal

The Advertiser appealed the Decision and said:

- The majority of the Board erred in finding that the Advertiser's words were not opinion.
- The majority of the Board erred in making a distinction between the time the Public Servant Statements were made and when the Advertiser's substantiation of its counter statement was made.
- Further or new evidence.
- The precedent decisions applied and relied upon are inconsistent and/or have been wrongly applied to the Decision.

- The proper procedures have not been followed as the Board has based the Decision on a new selectively higher-level approach specifically to COVID-19 advocacy advertising that it introduced on or about 1 February 2022.

A full copy of the Advertiser's Appeal Application is available in Appendix 4.

Procedural Matters

Higher-level approach

The Appeal Board discussed the changes made to the way the Complaints Board adjudicated on complaints about COVID-19 related advertisements to balance rights and responsibilities in the context of a global pandemic.

The Appeal Board noted the Applicant had questioned the higher-level approach being applied to COVID-19 advocacy advertising. It noted the Applicant said:

“In introducing this new standard, the Board has created the situation whereby any advertising related to COVID-19 that goes against the government narrative is unlikely to ever meet the ASA standards of advertising.”

The Appeal Board noted the Applicant's concern related to a change in the Complaints Board approach to COVID-19 advertising. The new approach was set out in Decisions 21/539 and 21/540, published in February 2022. In these decisions, the Complaints Board noted in the unprecedented environment of a global pandemic, it would use a higher-level approach through the application of the Advertising Standards Codes principles to balance rights and responsibilities for advertisers and consumers.

The Appeal Board confirmed that Board decisions and rulings on COVID-19 related advertising since February 2022 show each advertisement has been assessed on its own merits. It noted that since then some complaints have been upheld, some not upheld, and some have been found to have no grounds to proceed.

Incorrect summary of precedent Decision 22/041

The Appeal Board noted the Applicant had highlighted an error in the summary of Decision 22/041 which appeared in Decision 22/107. The Board acknowledged the decision drafting error. The Appeal Board confirmed the Complaints Board had been provided with a full copy of the Decision 22/041 as part of its deliberation and the error had occurred when drafting Decision 22/107. The Appeal Board confirmed this was not material to the Complaints Board's decision and did not affect the Appeal Board decision.

APPEAL BOARD DISCUSSION

The Appeal Board carefully considered the complaints, the advertisement, the information provided by the Applicant, precedent decisions and the Complaints Board Decision. The Appeal Board noted the Complainants and the media company had been given the opportunity to comment on the Appeal application.

Is the identity and position of the Advertiser clear?

The Appeal Board unanimously agreed the identity and position of the Advertiser was sufficiently clear for the advertisement to be considered as advocacy advertising.

Is the advertisement stating fact or opinion?

The Appeal Board said the advertisement used words from statements made by Dr Bloomfield, Hon Chris Hipkins and Dr Siouxsie Wiles alongside the Advertiser's view that the statistics in New Zealand do not support the statement that COVID-19 is a "pandemic of the unvaccinated." The Appeal Board confirmed the Advertiser had provided sources for the statements from the three representatives.

Consumer takeout

The Appeal Board accepted there was likely to be more than one consumer takeout of the advertisement.

One takeout was that despite quotes from experts stating it is the unvaccinated who will be affected by the virus, statistics show that vaccinated people are also catching COVID-19.

For other Appeal Board members, the likely consumer takeout was a broader message which implied the vaccination was unnecessary and offered no advantage over those who had not been vaccinated.

Is the advertisement misleading?

The majority of the Appeal Board said the advertisement was likely to mislead or confuse consumers. The majority of the Board said the lack of context in the advertisement about when and why the statements were made meant it misrepresented the words from the three experts. The majority of the Board considered each of the quotes in relation to the time and context in which they were made, based on the source information provided in the Applicant's appeal submission (Footnote 2):

"...It's really clear though that the majority of cases, especially those hospitalised, are people who are not vaccinated. So, as we're seeing around the world, this is becoming a pandemic of the unvaccinated."

Dr Siouxsie Wiles 26/10/21

"...What we are seeing from overseas is that COVID-19 is morphing into a pandemic of the unvaccinated. So yes, vaccinated people are affected by it but nowhere near as badly as unvaccinated people are..."

Hon Chris Hipkins 15/09/21

"...It's increasingly clear from overseas that vaccination is highly protective of people getting unwell and dying from COVID-19. The evidence could not be clearer, in countries with high vaccination rates, COVID-19 has become a pandemic, or an epidemic, of the unvaccinated"

Dr Ashley Bloomfield 16/09/21

The majority of the Board noted that the quotes in context refer to what was being seen during September/October 2021 from international experiences dealing with the more severe symptoms of the Delta variant. The majority of the Board said these quotes also made it clear the experts were saying that the severity of symptoms from the Delta variant were greater for the unvaccinated than the vaccinated. The majority said the statements as presented in the advertisement did not provide the context, that the experts were talking about harm reduction from catching the virus, not just transmission rates and therefore out of this context, the use of the statements in the billboard about vaccination statistics was misleading.

A minority of the Appeal Board disagreed. The minority confirmed a group opposed to the Government's approach to the COVID-19 pandemic was highlighting that unvaccinated people still caught COVID-19. For the minority, the advertisement made a general claim based on historical statements made by experts, which had later proved to be inaccurate given that vaccinated people have also caught COVID-19. The minority said this was provided for in advocacy advertising when the identity of the Advertiser was clear.

Weight of evidence

The Appeal Board noted the Applicant had provided additional substantiation with regard to the Complaints Board's concern about the disconnect in the timeline between when the quoted statements were made in September and October of 2021 and the data initially provided as substantiation by the Advertiser which contained statistics dated May and April 2022, when the billboard appeared.

The majority of the Appeal Board said timing was only one element of why it considered the advertisement to be misleading to consumers. For the majority of the Board, those with the consumer takeout that vaccination has had little or no impact on COVID-19 and harm, would be misled. Statistics provided by the Advertiser as substantiation show that vaccines have had a significant impact on the severity of the disease as measured by the rate of hospital admissions between unvaccinated and other people. The majority of the Board said these figures supported the original statements in context by the speakers.

A minority of the Appeal Board said the original substantiation and the additional information provided supported a general takeout that vaccinated people were still contracting COVID-19.

Use of precedent decisions

In addition to the decision drafting error for 22/041 acknowledged above, the Appeal Board noted the Applicant had raised the issue of inconsistency in the application of Precedent Decision 22/045 about creating two classes of people. The majority of the Appeal Board said it agreed with the Chair of the Complaints Board's ruling that the complaint had no grounds to proceed.

However, the majority of the Appeal Board saw a clear distinction between that decision and the advertisement before it. The majority of the Board said that while quotes had been used in both decisions to support the Advertiser's view, the quote by the Prime Minister, Rt Hon Jacinda Ardern in Decision 22/045, "That is what it is – so, yep, yep", was an accurate reflection of her response to a question about whether the traffic light system created two different classes of people in New Zealand. The majority of the Appeal Board said the Prime Minister's comment had been used in the correct context and was therefore unlikely to mislead or confuse consumers.

The Appeal Board acknowledged the important role of and ability to question the Government handling of the pandemic, however, the context and relevance of quotes and statistics used in the advertising was an important consideration in the deliberation for both the Complaints Board and the Appeal Board.

Is the advertisement socially responsible within the context of a global pandemic?

The majority of the Appeal Board said the advertisement had not been prepared and placed with the requisite level of social responsibility. This is because the use of the quoted phrases from health experts, which were dated and lacked the context of the original statements, was misleading and the advertisement was not saved by the more liberal code interpretation provided for under the Advocacy Principles.

A minority of the Appeal Board disagreed and said it the advocacy advertisement had met the requisite level of social responsibility.

However, in accordance with the majority, the Appeal Board ruled the advertisement was in breach of Principle 1 and Principle 2 of the Advertising Standards Code.

The Appeal was Declined and the Complaints were Upheld.

Decision: Complaints **Upheld**, Appeal **Declined**

APPENDICES

1. Description of Advertisement
 2. Original Complaints
 3. Summary of the Complaints Board Ruling
 4. Appeal Application from the Advertiser
 5. Responses from Parties
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Appendix 1

DESCRIPTION OF ADVERTISEMENT

The Voices for Freedom billboard states: "Ashley, Chris & Siouxsie: "A pandemic of the unvaccinated." The stats: Yeah, nah.". Images of Ashley Bloomfield, Hon. Chris Hipkins and Siouxsie Wiles are shown to the right of the text. The Voices for Freedom logo is visible in the bottom-right corner and voicesforfreedom.co.nz is shown on the bottom-left side.

Appendix 2

ORIGINAL COMPLAINTS

COMPLAINT 1

I think the Advertisement speaks for itself. It is presenting misinformation on Vaccine efficacy and the public health response in New Zealand including images of Siouxsie Wiles, Chris Hipkins and Ashley Bloomfield. Current statistics from the MOH do present the fact that unvaccinated people are overrepresented in hospitalisations. If nothing else it is completely contrary to current advice from the Ministry of Health.

COMPLAINT 2

Is I believe this billboard is misleading and is meant to spread misinformation about the COVID pandemic and response. It's also a cheap shot at three dedicated public servants.

COMPLAINT 3

Saw this on Shakespeare and Waltham Rd's in Christchurch. Not impressed with this misinformation on a gigantic scale.

COMPLAINT 4

Promoting fake news - against science based information

Appendix 3

SUMMARY OF COMPLAINTS BOARD DECISION

The Complaints Board upheld four complaints about a COVID-19 billboard advertisement from Voices For Freedom. The Complaints Board said the advertisement was not socially responsible and was likely to mislead consumers.

Summary of the Complaints

Four Complainants were concerned the advertisement was presenting misinformation about the COVID-19 pandemic and vaccine efficacy. One Complainant was also concerned the advertisement denigrates three dedicated public servants.

Issues Raised:

- Social Responsibility
- Truthful Presentation
- Advocacy Advertising

Summary of the Advertiser's Response

The Advertiser said the three individuals featured in the advertisement have all described COVID-19 as representing a "pandemic of the unvaccinated."

The Advertiser said that despite attempts to obfuscate the data, there is clear evidence such claims are unfounded. The Advertiser provided links to two examples of this data; A Ministry of Health Case demographic report which shows the number of vaccinated people with COVID-19 and an RNZ report on COVID-19 data visualisations: NZ in numbers.

The full decision can be found at:

<https://www.asa.co.nz/backend/documents/2022/05/10/22107%20.pdf>

Appendix 4

APPEAL APPLICATION FROM THE ADVERTISER, VOICES FOR FREEDOM

Appeal of Board Decision 22/107

PANDEMIC OF THE UNVACCINATED: YEAH NAH

INTRODUCTION:

1. We are in receipt of the Complaint Board's Decision dated 10 May 2022 ("**the Decision**").
2. The Decision follows:
 - a. receipt of four complaints; and
 - b. delivery of the Advertiser's response on 4 May 2022 ("**the Response**").
3. Written notice of the Decision was received by email on 23 May 2022.
4. On 30 May 2022, Voices For Freedom ("**the Advertiser**") informed the ASA of its intention to appeal, this was within the 14 day timeframe for such notice.
5. The substance of the appeal is set out in this letter, and is filed on the ASA within an agreed timeframe of the Decision.

STRUCTURE OF APPEAL:

6. The appeal is set out with the following structure:
 - a. **The Billboard:**
Overview of the advertising in question.
 - b. **The Decision:**
Summary of the Decision.

c. Grounds Of The Appeal:

Outline of Advertiser's position with summary of Grounds of Appeal.

d. Submissions Of The Advertiser:

- **Ground One:** the majority of the Board erred in finding that the Advertiser's words were not opinion.
- **Ground Two:** the majority of the Board erred in making a distinction between the time the Public Servant Statements were made and when the Advertiser's substantiation of its counter statement was made.
- **Ground Three:** further or new evidence.
- **Ground Four:** the precedent decisions applied and relied upon are inconsistent and/or have been wrongly applied to the Decision.
- **Ground Five:** the proper procedures have not been followed as the Board has based the Decision on a new selectively higher-level approach specifically to COVID-19 advocacy advertising that it introduced on or about 1 February 2022.

e. Conclusion:

THE BILLBOARD:

7. The Decision relates to the Advertiser's billboard¹ which features images of three public servants; Ashley Bloomfield, Chris Hipkins and Siouxsie Wiles with the words: Ashley, Chris & Siouxsie: "A pandemic of the unvaccinated." followed by the words The Stats: "Yeah, nah" ("**the Billboard**").



¹ <https://www.voicesforfreedom.co.nz/pandemic-unvaccinated>

8. On the Billboard, the words *Ashley, Chris & Siouxsie: "A pandemic of the unvaccinated"* are clearly attributable to those pictured. Each of the public servants at one time or another in or about September and October 2021 stated that this is, was or would be "a pandemic of the unvaccinated"² (**the Public Servant Statements**).
9. These statements and their attribution are not disputed. The words "Yeah, nah" (**the Advertiser's words**) are the part of the Billboard that the majority of the Complaints Board ("**the Board**") has taken issue with.
10. The Billboard, the Public Servant Statements and various videos and links relevant to the issues are set out on [the Voices For Freedom website](https://www.voicesforfreedom.co.nz/pandemic-unvaccinated)³.

THE DECISION:

11. The Decision considers whether the Billboard breaches any of the following advertising standards as per the Advertising Standards Code:
 - a. Social Responsibility (Principle 1)
 - b. Truthful Presentation (Principle 2)
 - c. Advocacy Advertising (Rule 2(e))
12. The Board was not unanimous in finding that the Billboard was in breach of the Code.
Social Responsibility - Principle 1
13. On "**socially responsible** advertising", the majority considered:
 - a. that the Advertiser's words were "*not presented in context*"; and
 - b. that there was "*a severe disconnect in the timeline between the experts making the statements and the current state of the pandemic represented in the statistics provided by the Advertiser*".

² Chris Hipkins - 15 September 2021: [https://www.beehive.govt.nz/sites/default/files/2021-09/Press_Conference_15_September_2021_\(Te_Reo_included\)_0.pdf](https://www.beehive.govt.nz/sites/default/files/2021-09/Press_Conference_15_September_2021_(Te_Reo_included)_0.pdf) at page 11: "What we're also seeing from overseas is that COVID-19 is morphing into a pandemic of the unvaccinated. So, yes, vaccinated people are affected by it but nowhere near as badly as unvaccinated people are."

Ashley Bloomfield – 16 September 2021: <https://www.newshub.co.nz/home/new-zealand/2021/09/covid-19-health-chief-ashley-bloomfield-reveals-vaccine-rollout-target.html> at 32 minutes 15 seconds: "It's increasingly clear, from overseas, that vaccination is highly protective, of people getting unwell and dying from Covid19. The evidence could not be clearer: in countries with high vaccination rates Covid-19 is a pandemic, or an epidemic, of the unvaccinated."

Siouxsie Wiles – 21 October 2021: <https://www.1news.co.nz/2021/10/25/level-3-not-enough-to-contain-delta-says-siouxsie-wiles/> <https://www.newshub.co.nz/home/new-zealand/2021/09/covid-19-health-chief-ashley-bloomfield-reveals-vaccine-rollout-target.html> at 1 hour 30 minutes. "It's really clear though that the majority of cases, especially those hospitalised, are people who not vaccinated. So, as we're seeing around the world, this is becoming a pandemic of the unvaccinated."

³ <https://www.voicesforfreedom.co.nz/pandemic-unvaccinated>

14. The majority found that the Billboard, as a result, was not socially responsible and was therefore in breach of Principle 1.
15. A minority of the Board disagreed and said that the advertisement was:
 - a. “making a general claim”;
 - b. “challenging the messaging from experts about the projected path of the pandemic, which most consumers would see as an expression of opinion”, and
16. The minority therefore found that the Billboard was socially responsible and not a breach of Principle 1.

Truthful Representation – Principle 2

17. On **truthful representation**, the majority of the Board considered that the Advertiser’s words:
 - a. constituted a factual claim;
 - b. were not substantiated by the Advertiser;
 - c. were likely to mislead or confuse some consumers;
18. Of note in respect to the finding that there was an “unsubstantiated” claim is that the Board clearly accepted that the claim had been shown to be true *but* that it considered the evidence establishing claim’s truth to have occurred in a timeframe unacceptable to the Board being that:
 - a. the evidence was in the form of data provided by the Advertiser in the Response dating from the time of filing the Response (ie from April and May 2022) which was some six to seven months after the Public Servant Statements had been made; and
 - b. the Public Servant Statements were made “around the COVID-19 Delta variant” whereas the statistics put forward by the Advertiser were “reflecting the impact of the Omicron variant”; and
 - c. moreover, that the majority were at pains to note: “the rapidly evolving nature of the COVID-19 pandemic over the past two years meant information and statements made could quickly become out-of-date.”
19. The result of all of the above is that the majority found that the Billboard was “misleading and confusing” and therefore in breach of Principle 2.
20. On the other hand, the minority of the Board took a different view:
 - a. first, in interpreting the “use of the idiom ‘Yeah, nah’” to mean “the tone of advertisement shifted to opinion”; and

- b. second, in holding that consumers were likely to interpret the Billboard as simply expressing *“the Advertiser’s view that the Government public health strategy had not prevented a large number of vaccinated people getting the COVID-19 virus.”*
21. The minority therefore did not find the Advertiser’s words to have met the threshold to breach Principle 2.

Advocacy Advertising – Rule 2(e)

22. On 1 February 2022, the Board introduced a new higher level advocacy advertising approach with respect to COVID-19 related advertising.
23. In the case in question, the majority of the Board held there was a breach of ‘advocacy advertising’ because:
- a. *“the likely consumer takeout of the advertisement was that Government Ministers, public health experts and advisers who informed the public that COVID-19 is a “pandemic of the unvaccinated” were not correct given that statistics show many vaccinated people have caught COVID-19”; and*
 - b. *“there was also an underlying message that the vaccination campaign was unnecessary in light of the widespread cases”.*
24. As a result the majority found there was therefore a breach of Rule 2(e).
25. The minority of the Board disagreed. They considered that the consumer takeout was *“a more general message from the Advertiser challenging the messaging of experts during the pandemic, saying the statistics on those who have caught the COVID-19 virus do not match what officials told the public would happen”.*
26. Accordingly, the minority found this was an example of advocacy advertising and not a breach of Rule 2(e).

GROUNDS OF THE APPEAL:

27. The use of the idiom “yeah nah” in New Zealand is a very well-known and accepted way of saying “no”. The “yeah” represents a person has heard you, and the “nah” shows that they are replying with a negative or disapproving response.
28. Because the idiom represents a consideration of a statement (“yeah”) followed by the Advertiser’s view (“nah”) the Advertiser’s words clearly convey its *opinion*, namely that this pandemic has not been one of the unvaccinated. The Billboard is clearly and undoubtedly advocacy advertising: it is the opinion of the Advertiser. The majority of the Board erred in finding that the Advertiser’s words were factual. As opinion, the Advertiser’s words clearly meet the threshold and do not breach either Principle 1 or 2, or Rule 2(e). **[Ground One]**

29. If the Appeal Board finds the Advertiser's words to be a factual claim rather than opinion then any such claim need only be substantiated, full stop. Any passage of time is between the original Public Servant Statements and evidence substantiating that such statements are not true is irrelevant. As such, the majority of the Board erred in finding that there was relevance to the passage of time between when the Public Servant Statements were made and the data provided by the Advertiser. **[Ground Two]**
30. If the Appeal Board holds that the Advertiser's words are a claim of fact and that the time between when the Public Servant Statements and substantiation is of relevance then such evidence is available and indeed has existed from *before* the Public Service Statements were made – see our website and below for examples.⁴ This is evidence that was previously available but not specifically provided to the Board in the Response. Such evidence shows that in highly vaccinated countries with high rates of COVID-19 infection, those vaccinated were still being infected with COVID-19 and that it was not a pandemic of the unvaccinated. **[Ground Three]**
31. The precedent decisions relied upon by the majority of the Board have been inconsistently and wrongly applied to the Decision, furthermore decision 22/041 has been incorrectly summarised in parts. **[Ground Four]**
32. On 1 February 2022, the Board introduced a new selectively higher-level approach to COVID-19 advocacy advertising. In introducing this new standard, the Board has created a situation whereby any advertising related to COVID-19 that goes against the government narrative is unlikely to ever be considered socially responsible. **[Ground Five]**

SUBMISSIONS OF THE ADVERTISER:

First Ground of Appeal - the majority of the Board erred in finding that the Advertiser's words were not opinion:

33. The First Ground of Appeal falls within the first (the proper procedures have not been followed) and fifth grounds (it is in the interests of natural justice that the matter be reheard) of appeal listed by the ASA.⁵
34. The Board were not in unanimous agreement as to the classification of the Advertiser's words "yeah, nah" and whether it constituted a factual claim requiring substantiation (majority position) or was an expression of an opinion, and therefore not requiring to be substantiated (minority position).
35. The use of the words "yeah, nah" in New Zealand is a very well-known and accepted way of saying "no". The "yeah" represents a person has heard you, and the "nah" shows that they are replying with a negative or disapproving response. Indeed the idiom is used frequently as a slang phrase across many areas. It is frequently a phrase used by All Blacks, comedians and the like. These people are asked a question and/or are asked to comment on

⁴ <https://www.voicesforfreedom.co.nz/pandemic-unvaccinated>

⁵ <https://www.asa.co.nz/complaints/the-appeals-process/>

something, to which they offer their opinion by using “yeah, nah”. It is simply wrong to hold that as a statement of fact.

36. The Advertiser’s words are classic advocacy advertising and opinion and communicate that the Advertiser challenges the messaging that the pandemic has been one of the unvaccinated, calling into question that the statistics on those who have caught the COVID-19 virus do not match what officials told the public would happen.
37. The majority of the Board considered that the Advertiser’s words would be interpreted as a factual statement, which it says has not been substantiated by the Advertiser with information available at the time the Public Servant Statements were made.
38. The minority of the Board interpreted the Advertiser’s words to be the opinion of the Advertiser that the Government’s public health strategy had not prevented a large number of vaccinated people getting the COVID-19 virus.
39. The Advertiser submits that the minority is/was correct. The Advertiser’s words are clearly a statement of opinion designed to remind consumers of the statements made by public officials and have them challenge the government’s strategy and messaging around the COVID-19 response, particularly in light of available statistics⁶.

Second Ground of Appeal – the majority of the Board erred in making a distinction between the time the Public Servant Statements were made and when the Advertiser’s substantiation of its counter statement was made:

40. The Second Ground of Appeal falls within the first (the proper procedures have not been followed) and fifth grounds (it is in the interests of natural justice that the matter be reheard) of appeal listed by the ASA.⁷
41. If the Appeal Board finds the Advertiser’s words to be a factual claim rather than opinion then any such claim need only be substantiated, full stop. Any passage of time is between the original Public Servant Statements and evidence substantiating that such statements are not true is irrelevant. As such, the majority of the Board erred in finding that there was relevance to the passage of time between when the Public Servant Statements were made and the data provided by the Advertiser. (The Board also erred in finding that the date of substantiation was confined to the May/April 2022 evidence – we revisit this point under the Third Ground Of Appeal below.)
42. The majority of the Board placed great weight on the point in time when the Public Servant Statements were made and the time when the evidence substantiating the same was dated (namely 6-7 months apart). This distinction in time was central to the majority’s finding that the Billboard was both misleading and socially irresponsible and should be taken down.

⁶ Placement of “THE STATS:” before “Yeah, nah” references that the Advertiser is expressing its opinion. The opinion is that “nah” or “no this is not correct” on data available.

⁷ <https://www.asa.co.nz/complaints/the-appeals-process/>

43. The Public Servant Statements referred simply to “the Pandemic”. The Pandemic includes all variants, and the Board was wrong to conclude that the statements applied to one variant when clearly they applied to the entire Pandemic.
44. The Advertiser submits that it does not matter at which point in time the Public Servant Statements were established to be incorrect. The fact is, they were and are incorrect on the government’s very own data provided by way of example with the Response.⁸
45. Further, the Board is implying that had the Billboard been erected at the very time of the Public Servant Statements that the Advertiser’s words may have been acceptable. But they were not simply due to the passage of time!
46. If the Advertiser’s words are considered to be a statement of fact then their timing is irrelevant because the Pandemic is the Pandemic. It does not start and stop and then start and stop again. The Public Servant Statements were about the Pandemic. It is submitted that the Advertiser could therefore use its words at any time from the commencement of the Pandemic, until it is officially concluded, and the Board was wrong to conclude that that Public Servant Statements related to variants: they did not. What matters is whether the statement “Yeah, nah” is a true and accurate comment on the Public Servant Statements.
47. The majority made the following observation with respect to the statements noting:
- “...the rapidly evolving nature of the COVID-19 pandemic over the past two years meant information and statements made could quickly become out-of-date and this was an example of the use of a statement made around the COVID-19 Delta variant and the use of statistics reflecting the impact of the Omicron variant.”*
48. The irony is that this comment implicitly acknowledges that the Public Servant Statements can be misleading or incorrect but apparently nevertheless acceptable in certain circumstances. Such reasoning suggests that the government is immune from untruthful and misleading advertising and will not be held accountable.
49. The disturbing repercussion of the majority reasoning is the chilling effect it has on advertisers who might otherwise have offered an alternative to the government rhetoric.⁹

Third Ground of Appeal – further or new evidence:

⁸ <https://www.health.govt.nz/covid-19-novel-coronavirus/covid-19-data-and-statistics/covid-19-case-demographics> and <https://www.rnz.co.nz/news/in-depth/450874/covid-19-data-visualisations-nz-in-numbers>

⁹ This is particularly egregious in circumstances where the Advertiser already finds itself censored daily:

- De-platformed off Facebook and YouTube.
- Refused service by billboard companies, paper printers, tee shirt suppliers, sign makers etc.
- Cancelled by media companies including in respect of a six-figure free speech advertising campaign.
- Such censorship including by entities represented by industry members on the ASA Board.

50. The Third Ground of Appeal falls within the second, third and fourth grounds of appeal (regarding evidence) listed by the ASA.¹⁰
51. If the Appeal Board finds that the Advertiser's words are a claim of fact and that the time between when the Public Servant Statements were made and the substantiation of the Advertiser's claim is of relevance then such evidence is available and indeed has existed from *before* when the Public Service Statements were made – see our website and below for examples.¹¹
52. This is evidence that was previously available but not specifically provided to the Board in the Response because it was not a consideration under the original complaint and has only become relevant now because of the Decision. The Advertiser submits this “new” evidence can be introduced as a result.
53. Such evidence shows that in highly vaccinated countries with high rates of COVID-19 infection, those vaccinated were still being infected with COVID-19 and that it was not a pandemic of the unvaccinated.
54. The reason that this evidence was not provided specifically to the Board is because the Advertiser was (and remains) of the view that the statement is opinion but if it is not the timing is irrelevant.
55. It is interesting to consider the majority decision making process. The uncomfortable and obvious fact is that the Public Servant Statements do not reflect reality. Simply put they are, at the very least at the time of the Billboard going up, untrue statements.
56. The majority appear to have felt pressured by this reality to such an extent that it was deemed necessary to create a requirement (overlying the usual requirement for truth in advertising) that in order for a statement to be found to be false, it is required that the evidence for the same to be known contemporaneous to the statement.
57. This is an absurdity which creates the ironic situation that a perfectly legitimate statement exposing a falsehood is deemed “misleading” only because it was not found to have been established as a fact at the time of the original misleading statement.
58. The Public Servant Statements were not original. The phrase ‘pandemic of the unvaccinated’ had been coined (irresponsibly) by CDC Director Rochelle Walensky and repeated by US President Joe Biden¹² and then subsequently parroted by other public servants around the world.¹³

¹⁰ <https://www.asa.co.nz/complaints/the-appeals-process/>

¹¹ <https://www.voicesforfreedom.co.nz/pandemic-unvaccinated>

¹² <https://www.theguardian.com/commentisfree/2021/oct/04/no-its-not-a-pandemic-of-the-unvaccinated-it-still-threatens-us-all>

¹³ [Canda: https://dailyhive.com/vancouver/canadians-angry-unvaccinated-prime-minister-trudeau](https://dailyhive.com/vancouver/canadians-angry-unvaccinated-prime-minister-trudeau)
[Melbourne, Australia: https://www.skynews.com.au/australia-news/coronavirus/victoria-experiencing-a-pandemic-of-the-unvaccinated-daniel-andrews/video/d387d781b3fdc7a5ffff6d8acb26e8c0](https://www.skynews.com.au/australia-news/coronavirus/victoria-experiencing-a-pandemic-of-the-unvaccinated-daniel-andrews/video/d387d781b3fdc7a5ffff6d8acb26e8c0)
[Germany: https://www.theguardian.com/world/2021/nov/03/germany-enveloped-in-massive-pandemic-of-the-unvaccinated](https://www.theguardian.com/world/2021/nov/03/germany-enveloped-in-massive-pandemic-of-the-unvaccinated)

59. At the time the Public Servant Statements were made, data was available to the public servants making the statements from other countries that had had both high vaccination rates and high rates of COVID-19 infection. For example, from the United States, Canada, United Kingdom and Israel. This data clearly went against the narrative that COVID-19 was a “pandemic of the unvaccinated”.
60. This evidence is submitted to the Appeal Board now as either new or further evidence to be considered.

United States:

- On 6 August 2021 Rochelle Walensky the Director of *Centers for Disease Control and Prevention (CDC)* told CNN: **“Fully vaccinated people who get a COVID-19 “breakthrough” infection can spread the virus to others even if they are not symptomatic.”** Director Walensky warned that an **autumn/winter surge in the COVID “Delta” variant could again see hundreds of thousands of cases per day.**¹⁴ (emphasis added)
- On 9 August 2021 Director Walensky was asked about vaccinated people catching COVID-19, specifically the Delta variant, and whether they could pass the virus on to older people. Her response: **“And that’s exactly the point that we made in our guidance. So yes they can with the Delta variant. And that was the reason that we changed our guidance last Tuesday. Umm...our vaccines are working exceptionally well, they continue to work well for Delta with regard to severe injury and death. They prevent it. But what they can’t do anymore is prevent transmission.”**¹⁵ (emphasis added)
- And on 30 August 2021 again from Director Walensky (still almost two months prior to the first Public Servants Statements): **“Another piece of data that we have been looking at is our international colleagues who are ahead of us both in the Delta surge as well as ... a few weeks ahead of us in terms of large portions of their population that have been vaccinated... . Data we’ve seen from our international colleagues, specifically and especially Israel, have demonstrated a worsening of infections amongst vaccinated people over time... And so, we remain concerned about that as we see in the context of Delta variant some break throughs that are occurring umm and decrease vaccine effectiveness that is occurring in the context of infection, umm we are watching other countries carefully ... the experience of other countries carefully and concerned that we too will see what Israel is seeing which is worsening infections over time.”**¹⁶ (emphasis added)

Canada

¹⁴ https://www.realclearpolitics.com/video/2021/08/06/cdc_director_vaccines_no_longer_prevent_you_from_spreading_covid.html

¹⁵ <https://www.youtube.com/watch?v=TKFWGvvlVLI>

¹⁶ <https://www.voicesforfreedom.co.nz/pandemic-unvaccinated> at 26 seconds in.

- On 26 August 2021:¹⁷ *“As COVID-19 cases rise through parts of the country, experts expect the number of infections among fully vaccinated people will increase with them.*

United Kingdom

- 20 August 2021:¹⁸ *“Vaccine breakthrough rate for Delta infections still increasing”*

Israel

- 6 September 2021:¹⁹ *“Most Hospitalizations In Israel Are ‘Vaccinated’... Breakthrough Infections Skyrocketing”*
- 9 September 2021:²⁰ *“Israel is struggling with COVID-19, despite high vaccination rates. What lessons can Australia learn?”*

61. Also relevant are the scientific papers which came out as early as July 2021, showing that there was a disproportionate number of vaccinated people contracting COVID-19 when compared with their unvaccinated counterparts.²¹

Fourth Ground of Appeal – the precedent decisions applied and relied upon are inconsistent and have been wrongly applied to the Decision:

62. The Fourth Ground of Appeal falls within the first (the proper procedures have not been followed) and fifth grounds (it is in the interests of natural justice that the matter be reheard) of appeal listed by the ASA.²²
63. The precedent decisions relied upon by the majority of the Board have been inconsistently and wrongly applied to the Decision, furthermore decision 22/041 has been incorrectly summarised in parts.

ASA Decision 22/045 - Billboard in which the Prime Minister is pictured confirming her government is creating two classes of people based on vaccination status

64. Decision 22/045 concerned a billboard advertisement from the Advertiser quoting the Prime Minister replying to the statement that vaccination mandates created two classes of people, saying “That is what it is – so, yep, yep.” (the **“Two Classes Decision”**).²³

¹⁷ <https://www.ctvnews.ca/health/coronavirus/what-do-we-know-about-breakthrough-covid-19-cases-experts-break-down-the-science-1.5561879>

¹⁸ <https://www.coronaheadsup.com/science/vaccine-breakthrough/uk-vaccine-breakthrough-rate-for-delta-infections-still-increasing/>

¹⁹ <https://tsionizm.com/science-technology/2021/09/06/most-hospitalizations-in-israel-are-vaccinated-breakthrough-infections-skyrocketing/>

²⁰ <https://www.abc.net.au/news/health/2021-09-09/covid-19-israel-vaccination-high-case-rates-lessons-australia/100442304>

²¹ <https://www.science.org/doi/10.1126/sciimmunol.abf7550>

²² <https://www.asa.co.nz/complaints/the-appeals-process/>

²³ <https://www.independent.co.uk/tv/editors-picks/new-zealand-jacinda-ardern-coronavirus-vaccines-ve5572e26>

65. The Complaint was concerned the Billboard was promoting “anti-vaccine rhetoric”. The Chair of the Board properly ruled there was no grounds for the complaint to proceed because the advocacy advertisement clearly presented information which supported the Advertiser’s view that the traffic light system had created two classes of people depending on vaccination status.
66. In the Two Classes Decision the Chair found that the advertisement was advocacy advertising, was socially responsible and was a truthful presentation.
67. The Board in the present decision wrongly ignored the Chair’s ruling in the Two Classes Decision being dated 14 February 2022, in which the Chair did consider the new selectively higher-level approach to advocacy advertising that the Board unilaterally introduced on or about 1 February 2022 (see the Fifth Ground of Appeal below).
68. The Advertiser submits that it was incumbent on the Board to follow the same approach as the Chair took in Two Classes Decision, namely: the Billboard should have been found not to meet the threshold to breach the Advertising Standards Code requirements for social responsibility and truthful presentation under Principles 1 and 2.
69. This is because the Billboard clearly presents information that supports the Advertiser’s view. Based on the Ministry of Health’s own reported data, the pandemic has not been one of the unvaccinated. The Public Servant Statements quoted on the Billboard were reported in the media or recorded in Hansard.
70. Accordingly, in line with the Two Classes Decision, the Billboard was clearly advocacy advertising, was socially responsible and was a truthful presentation.
- ASA Decision 22/041 Billboard in which a young person is pictured wearing a face covering and vapour is escaping his mask - The text says: “Masks for kids: Safe? Effective? Yeah, Nah.***
71. The Decision in question today makes an important error in incorrectly stating that the Board’s decision no. 22/041 (“**the Kids Mask Decision**”) did find a breach of Principle 2 (Truthful Presentation).
72. On the contrary, the Board *unanimously* held that the Kids Mask Decision was not misleading and had not breached Principle 2. It found there was an expression of opinion which did not require substantiation. If the Board has incorrectly applied the Kids Mask Decision, which it is submitted it has, then it has applied the wrong “law” and the appeal should therefore be allowed.
73. Two points to note in the Kids Mask Decision on the point of social responsibility:
- a. the decision was not unanimous (the minority held it was clearly opinion advocacy advertising); and

- b. the decision made not a single reference to the extensive and substantial evidence provided in support of the opinion statement that masks are not safe or effective.
74. Instead the Kids Mask Decision turned on the following findings:
- a. the government (public health) advice was to wear masks;
 - b. mask mandates applied to children in some circumstances;
 - c. the advert could discourage consumers, especially children, from wearing face masks; and
 - d. the billboard (with its depiction of masked child with word “safe”) might cause fear in some consumers (including children).
75. The majority of the Board held that, given these findings, the Billboard was misleading.
76. Whilst the decision was clearly flawed, the Advertiser did not appeal because it considered doing so was not a good use of its time or resources. Instead the Advertiser submits that the Board was wrong to compare the two billboards as like-for-like because the Billboard took true statements and added an opinion idiom to them whilst the Kids Mask Decision involved a graphic, many more words and, in the Advertiser’s submission, was considerably different.

Fifth Ground of Appeal - the proper procedures have not been followed as the Board has based its Decision on a new selectively higher-level approach to advocacy advertising that it introduced on or about 1 February 2022 specifically with respect to COVID-19 advertising:

77. The Fifth Ground of Appeal falls within the first (the proper procedures have not been followed) and fifth grounds (it is in the interests of natural justice that the matter be reheard) of appeal listed by the ASA.²⁴
78. On 1 February 2022, the Board introduced a new selectively higher-level approach to COVID-19 advocacy advertising. In introducing this new standard, the Board has created the situation whereby any advertising related to COVID-19 that goes against the government narrative is unlikely to ever meet the ASA standards of advertising.
79. The Billboard is classic advocacy. It is a publication providing a service to the public, assisting them as it does as part of their informed consent decision-making process by getting them to think critically.
80. It has been prepared and placed with a due sense of social responsibility to consumers and to society.

²⁴ <https://www.asa.co.nz/complaints/the-appeals-process/>

81. The Billboard does not mislead, nor is it likely to mislead, deceive or confuse consumers, nor abuse their trust or exploit their lack of knowledge.
82. The selective new higher-level advertising approach to COVID-19 advertising unilaterally introduced by the Board is:
- a. strongly influenced by the prevailing government view as to what constitutes appropriate health advice;
 - b. promotes and exonerates the government's positioning on it being the one source of truth with respect to information about this pandemic and its response; and
 - c. is nothing other than censorship in such a vital area where all public debate and discussion has been quashed.
83. One of the justifications for the new additional standard is *"The Board agreed the rapidly evolving nature of the pandemic also meant information used to support statements for and against the use of masks could quickly become out-of-date."*
84. This is an exceedingly poor excuse for mistaken and incorrect government messaging and is the very reason such advocacy advertising should be allowed and liberally interpreted.
85. The problem for the Board is that with COVID-19, time and time again, the government's response to the pandemic has been wrong. It continues to be wrong and to perpetuate many bad decisions already made by other governments around the world. No one is holding our government to account. The very voices that seek to do so, are being censored with a newly introduced ASA assessment of advocacy advertising in the context of COVID-19. It is for these reasons that natural justice requires the matter to be heard again.
86. The government's health officials and endorsed health 'experts' have made misleading claims in respect of various aspects of the COVID-19 response. The Billboard clearly makes that very point – it has not been a "pandemic of the unvaccinated" as the government's own Ministry of Health data confirms²⁵.
87. Indeed our Prime Minister has openly acknowledged that her government has:
- a. been engaged in "sustained propaganda"²⁶;and
 - b. created two classes of people depending on vaccination status²⁷ (as confirmed in the Chair's Decision 22/045 which dismissed the complaint and discussed under Ground Three above).

²⁵ <https://www.health.govt.nz/covid-19-novel-coronavirus/covid-19-data-and-statistics/covid-19-case-demographics>
<https://www.rnz.co.nz/news/in-depth/450874/covid-19-data-visualisations-nz-in-numbers>

²⁶ <https://odysee.com/@voicesforfreedom:6/jacinda-adern-propaganda:7>

²⁷ <https://www.independent.co.uk/tv/editors-picks/new-zealand-jacinda-ardern-coronavirus-vaccines-ve5572e26>

88. In introducing this new standard, the Board has created the situation whereby any advocacy advertising related to COVID-19 that goes against the government narrative will more than likely be considered a breach of advertising standards.
89. What if the government is wrong? What if the advice it has been promulgating is ineffective? What if, worse than that, it is not only ineffective but unsafe?
90. Now is not the time for those in watch dog positions such as the ASA to shy away from making the right decision. Now indeed *is* the time for a fair and liberal assessment of advocacy advertising.

CONCLUSION

91. The Advertiser is an independent, not-for-profit, grassroots advocacy organisation operating for just over 18 months since December 2020. It is founded by three mothers with backgrounds in corporate commercial law, litigation law, teaching and education and with successful business backgrounds.
92. The Advertiser is supported by an advisory board of distinguished doctors, scientists, lawyers and other professionals and represents well over 100,000 New Zealanders. They are honoured to have interviewed many of the world's leading medical and scientific experts over the past two years. The Advertiser understands the need for truth, for honesty and for transparency and is fastidious in its research and work produced.
93. It is important in a democratic society which claims to uphold the rule of law, and rights to freedom of speech, that billboards like those of the Advertiser be seen and heard.
94. The Decision is wrong for the reasons set out in these grounds of appeal. We look forward to receiving the Appeal Board's decision.

Appendix 5

COMPLAINANTS' RESPONSES

The four Complainants were given the opportunity to respond to the appeal submission.

No responses were received.

MEDIA RESPONSE

The Media, Jolly Billboard, confirmed they were not submitting a response.