

ARTICLE

The Advertising Standards Authority and the Self-Regulation of Misleading Political Advertising on Social Media: The Need for a Stricter Approach to Protect Aotearoa New Zealand's Democracy

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Since its presence in early forms in the late 1990s, social media has become a coordinating tool for nearly all of the world's political movements. Advertising by political parties on social media is now commonplace. Public discourse about misleading political information on social media is growing. So too are concerns about the impact this has on democracy. In Aotearoa New Zealand, the Advertising Standards Authority, through a self-regulation system, has the power to regulate political advertising on social media. However, complaints about misleading political advertisements are upheld at a rate that is almost two-thirds lower than other types of complaints made to the Advertising Standards Authority. This article assesses the reasoning that the Advertising Standards Authority uses to adjudicate claims that a political advertisement on social media is misleading. This article argues that the Advertising Standards Authority's approach is too lenient and that key elements are not congruent with social science evidence. Misleading political advertising can harm democracy, and the information infrastructure of social media exacerbates such harm. In light of this, a stricter approach to misleading political advertising on social media is needed. The approach advocated for in this article includes five additional points of consideration that should be added to the Advertising Standards Authority's Guidance Note on Advocacy Advertising. Despite creating a greater restriction on free speech, such an approach is justified in light of the demonstrable threat of harm.

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I Introduction

The harms of misleading political advertising on social media have manifested themselves across the globe in recent years: protests, demonstrations and even insurrections have resulted. Restraining misleading political advertising on social media is essential given the “critical threat to public life” that it poses.¹ Aotearoa New Zealand is not immune to this threat. Although we are fortunate to have a body—the Advertising Standards Authority (ASA), whose jurisdiction extends to social media—misleading political advertisements continue to occur in Aotearoa New Zealand. With reference to a case study on an advertisement about petrol prices posted to the National Party’s social media channels,² this article demonstrates the reality of the threat by assessing the reasoning used by the ASA to adjudicate complaints about misleading political advertising on social media. Then, a statistical analysis of all complaints made to the ASA about political advertising on social media illustrates that the ASA upholds such complaints at a rate that is nearly two-thirds lower than that of any other type of complaint.³ Once the presence of this threat is established, an analysis of the ASA’s reasoning shows that these conclusions are often inconsistent with social science evidence about what misleads consumers. To address this threat, this article proposes an alternative, stricter approach, which can be realised by adding five additional points of consideration to the ASA’s Guidance Note on Advocacy Advertising.

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- 1 Samantha Bradshaw and Philip Howard “Challenging Truth and Trust: A Global Inventory of Organized Social Media Manipulation” (Working Paper, University of Oxford, 2018) at 3.
 - 2 New Zealand National Party (@NZNATS) “This Government is fleecing New Zealanders through petrol taxes and Jacinda Ardern is the Fleecer-in-Chief.” <<https://www.facebook.com/NZNATS/posts/3277327968949442>>; and NZ National Party (@NZNationalParty) “This Government is fleecing New Zealanders through petrol taxes and Jacinda Ardern is the Fleecer-in-Chief.” <<https://twitter.com/NZNationalParty/status/1202349076336889856>>.
 - 3 See Advertising Standards Authority *Annual Report 2019* (2019) at 4; Advertising Standards Authority *Annual Report 2018* (2018) at 4; Advertising Standards Authority *Annual Report 2017* (2017) at 4; *Sweet v New Zealand National Party* ASCB 17/320, 18 September 2017; *Webb v New Zealand National Party* ASCB 17/303, 7 September 2017; *Thomas v New Zealand National Party* ASCB 17/334, 18 September 2017; *Trlin v New Zealand National Party* ASCB 17/335, 18 September 2017; *Aguilar v Labour Party* ASCB 17/377, 16 October 2017; *Gribben v New Zealand National Party* ASCB 18/208, 24 July 2018; *Theobald v Ghahraman* ASCB 18/015, 2 February 2018; *Ahluwalia v New Zealand National Party* ASCB 17/435, 24 January 2018; *Parry v NZL National Party* ASCB 19/047, 19 February 2019; *Stafford v New Zealand National Party* ASCB 19/071, 9 April 2019; *Stevenson v NZ National Party* ASCB 19/104, 9 April 2019; *Mitchell v NZL National Party* ASCB 19/237, 8 July 2019; *Munro v Hudson* ASCB 19/251, 13 August 2019; *Eakin v New Zealand National Party* ASCB 19/259, 13 August 2019; *Cooper v New Zealand National Party* ASCB 19/261, 22 July 2019; *Lawson v New Zealand National Party* ASCB 19/275, 27 August 2019; *Mellor v New Zealand National Party* ASCB 19/279, 27 August 2019 [*Mellor v New Zealand National Party* (ASCB)]; *Gauld v New Zealand National Party* ASCB 19/293, 12 August 2019; *Sherwood v New Zealand National Party* ASCB 19/314, 14 October 2019; *Martelli v New Zealand National Party* ASCB 19/344, 15 October 2019; *McKenzie v Goff* ASCB 19/356, 24 September 2019; *Gauld v NZL National Party* ASCB 19/373, 30 September 2019; and *Kay v NZ Young Nats* ASCB 19/399, 14 October 2019.

II The Advertising Standards Authority

Before analysing how the ASA applies its codes in response to complaints, it is necessary to summarise the ASA's objectives, codes and complaints process. The ASA is a self-regulatory body.⁴ It is funded by the advertising and media industries.⁵ The system it implements is complementary to the legislative framework.⁶ Broadly, the ASA has three explicit objectives. First, the ASA maintains proper and generally acceptable standards of advertising to ensure that advertising is not misleading or deceptive. Secondly, it promotes effective self-regulation. Finally, the ASA established and funds the Advertising Standards Complaints Board (the Board) and the Advertising Standards Appeal Board (the Appeal Board).⁷ Throughout this article, any reference to "the ASA" means all three of these bodies together.

The ASA's jurisdiction extends to social media.⁸ The ASA's Guidance Note on Identifying Advertising includes a broad definition of advertising, defining it as:⁹

... any message, the content of which is controlled directly or indirectly by the advertiser
... with the intent to influence the choice, opinion or behaviour of those to whom it is addressed.

A *The Complaints process*

Consumers complain to the Board when they believe an advertisement breaches the Advertising Standards Code (the Code).¹⁰ The Board determines whether the advertisement has breached the Code.¹¹ If the Code has been breached, a complaint is upheld and the advertisement must be removed or amended,¹² though decisions can be appealed to the Appeal Board.¹³ The ASA cannot enforce takedown or amendment requests.¹⁴ However, "[t]here is invariably compliance".¹⁵

B *The Advertising Standards Code and Advocacy Principles*

The purpose of the Code is to "ensure that every advertisement is a responsible advertisement".¹⁶ The Code is made up of two principles: "Social Responsibility" and "Truthful Presentation" (the Advocacy Principles).¹⁷ The Advocacy Principles apply to

4 Ursula Cheer *Laws of New Zealand Regulation of Publication by the Media* (online ed) at [193].

5 Advertising Standards Authority *The Case for Advertising Self-regulation* (2008) at 3.

6 Cheer, above n 4, at [193].

7 At [193].

8 Advertising Standards Authority *Guidance Note on Social Media* (October 2012) at 1.

9 Advertising Standards Authority *Guidance Note on Identification of Advertisements* (September 2020) at 1.

10 Rosemary Tobin *New Zealand Media and Entertainment Law* (Thomson Reuters, Wellington, 2017) at 442.

11 Advertising Standards Authority "The Complaint Decision Process" <www.asa.co.nz>.

12 Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (8th ed, LexisNexis, Wellington, 2021) at 906.

13 At 906–907.

14 At 906.

15 Advertising Standards Authority, above n 5, at 5.

16 Advertising Standards Authority *The Advertising Standards Code* (2018) at 2.

17 At 2 and 8.

political advertisements, which the ASA refers to as “advocacy advertising”.¹⁸ Each principle is supported by rules that are “[e]xamples ... of how the principles are to be interpreted and applied”.¹⁹ Each rule is supported by guidelines that further “explain a rule”.²⁰ In addition, the Code is accompanied by guidance notes that “provide interpretation assistance” and are “to be read in conjunction with” specific rules.²¹ Relevant to this article, the “Guidance Note on Advocacy Advertising” captures the Advocacy Principles and “is to be read in conjunction with Rule 2 (e)”, which is explained below.²² The Advocacy Principles include five points:²³

1. That Section 14 of the Bill of Rights Act 1990, in granting the right of freedom of expression, allows advertisers to impart information and opinions but that in exercising that right what was factual information and what was opinion, should be clearly distinguishable.
2. That the right of freedom of expression as stated in Section 14 is not absolute as there could be an infringement of other people’s rights. Care should be taken to ensure that this does not occur.
3. That the Codes fetter the right granted by Section 14 to ensure there is fair play between all parties on controversial issues. Therefore, in advocacy advertising and particularly on political matters the spirit of the Code is more important than technical breaches. People have the right to express their views and this right should not be unduly or unreasonably restricted by Rules.
4. That robust debate in a democratic society is to be encouraged by the media and advertiser and that the Codes should be interpreted liberally to ensure fair play by the contestants.
5. That it is essential in all advocacy advertisements that the identity of the advertiser is clear.

III The ASA’s Decision on the Petrol Advertisement

Now that the ASA’s objectives, codes and complaints process have been traversed, this article will assess how the ASA applies its codes to complaints about misleading political advertising. This analysis will be done by reference to a National Party of New Zealand advertisement posted on its Facebook and Twitter pages.²⁴ The advertisement featured a bar graph. The graph compared the average price of petrol during a nine-year-period when the National Party was in government, with the average price of petrol during a one-month-period when the Labour Party was in government.²⁵ The graph disproportionately displayed the price of petrol and the amount of tax paid on petrol under the Labour

18 At 13.

19 At 1.

20 At 1.

21 Advertising Standards Authority *Guidance Note on Advocacy Advertising* (2018) at 1.

22 At 1.

23 At 1–2 (emphasis omitted).

24 New Zealand National Party, above n 2; and NZ National Party, above n 2.

25 New Zealand National Party, above n 2.

Government:²⁶ it exaggerated the price four-fold.²⁷ However, the correct figures were listed in the advertisement.²⁸

When the Board assessed the advertisement, it applied the Code and Advocacy Principles to find that the petrol advertisement posted by the National Party in December was not misleading.²⁹ The Appeal Board used similar reasoning to dismiss an appeal of that decision.³⁰ First, the Board assessed whether the advertiser's identity was clear, and concluded that it was.³¹ Secondly, the Board concluded that it was an advocacy advertisement—so, r 2(e) applied.³² Broadly, r 2 is concerned with truthful representation. To ensure this, r 2(e) requires that:³³

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.

In the course of this assessment, the ASA identifies a consumer takeout, which is what the consumer would likely perceive when viewing the advertisement.³⁴ The ASA's objective through r 2 is to prevent consumers from being misled.³⁵ Therefore, the consumer takeout is likely to weigh heavily on the Board's decision. The consumer takeout is additionally important as it can affect what is required to substantiate a statement. The ASA will decide whether a consumer would view something as a statement of opinion or fact. Where an advertisement is deemed to state something as a fact, the Board identifies what consumers would perceive the statement of fact to be—not, for example, what the advertiser claims they were trying to portray.³⁶ The Board then assesses whether that fact is substantiated.³⁷ For example, saying a capital gains tax was “on Labour's Agenda” would be interpreted by most people to mean it was on a list of ideas for discussion, “not that [it] would become law”.³⁸ Therefore, to substantiate the statement and demonstrate that it was not misleading, the advertiser only had to show that the Labour Party had indicated it would consider a capital gains tax.³⁹ The advertiser did not have to show that it would at some point come into force.⁴⁰

The Board decided the consumer takeout from the petrol advertisement was that “petrol was considerably more expensive under the current Labour Government and consumers were paying more tax on petrol than when the National Party were in power”.⁴¹

26 Chris Keall “Watchdog blows chance to snuff out misleading election ads on social media” *The New Zealand Herald* (online ed, Auckland, 31 January 2020).

27 Thomas Lumley “Graphical Inflation” (5 December 2019) StatsChat <statschat.org.nz>.

28 *Reeve v New Zealand National Party* ASCB 19/465, 22 January 2020 [*Reeve v New Zealand National Party*(ASCB)] at 4.

29 At 4.

30 *Reeve v NZ National Party* ASCAB 20/002, 19 March 2020 [*Reeve v NZ National Party*(ASCAB)] at 1.

31 *Reeve v New Zealand National Party* (ASCB), above n 28, at 3.

32 At 3.

33 Advertising Standards Authority, above n 16, at 13.

34 *Gribben*, above n 3, at 4; and *Lawson*, above n 3, at 2.

35 Advertising Standards Authority, above n 16, at 10–12.

36 *Mellor v New Zealand National Party*(ASCB), above n 3, at 2.

37 Advertising Standards Authority, above n 16, at 10.

38 *Webb*, above n 3, at 4.

39 At 4.

40 At 4.

41 *Reeve v New Zealand National Party*(ASCB), above n 28, at 2–3.

With petrol being generally more expensive at the time of the advertisement, the ASA's interpretation of the statement from the consumers perspective could be substantiated. However, Thomas Lumley, a Professor of Biostatistics at the University of Auckland, found that the graph specifically portrayed that, under Labour, the price of petrol was 61 per cent more and tax was 92 per cent more.⁴² If the Board had recognised this as the consumer takeout, then it would be impossible to substantiate—because it was not true.

The Board decided that the advertisement was not misleading because the correct figures were featured on the graph.⁴³ A minority of the Board disagreed, arguing “it was reasonable for an audience to assume the visual element of a graphic comparison would match the numerical data it represents”.⁴⁴ The Appeal Board agreed with the majority.⁴⁵ It noted that although “the visual impact of the graphic may have more impact than the quoted figures for some consumers”, it had to consider the advertisement in its entirety, which showed the figures used.⁴⁶

The Board noted the placement of the advertisement on the National Party Facebook and Twitter pages. It said that:⁴⁷

... the placement ... meant the audience was likely to have a political interest in policy and performance comparisons ... and an appreciation of the political stance a party's own Facebook and Twitter platforms were likely to present.

A minority disagreed and said that:⁴⁸

... the medium and political advocacy arena did not save the advertisement from potentially misleading some consumers who did not take the time to examine the data figures which accompanied the graphic representation.

However, the Appeal Board agreed with the majority and went further to say that “the placement limited the advertisement's reach” and “the advertiser had not taken steps to further distribute the advertisement”.⁴⁹ It then stated that the fact the advertisement reached a wider audience through sharing on the social media platform, was outside the advertiser's control and intended audience.⁵⁰ Neither board explained how an interest in policy and performance helped to prevent the advertisement from being misleading, nor did they present evidence to substantiate this view.⁵¹

The Court of Appeal has held that the ASA, “in carrying out its public regulatory role ... must be regarded as exercising public power”.⁵² Therefore, the ASA has a legal obligation to comply with the New Zealand Bill of Rights Act 1990 (the Bill of Rights).⁵³ The ASA's self-regulatory system fetters free speech in its ability to request the amendment or takedown of advertisements that are deemed to breach the Code.⁵⁴ The ASA takes a boilerplate

42 Lumley, above n 27.

43 *Reeve v New Zealand National Party* (ASCB), above n 28, at 4.

44 At 4.

45 *Reeve v NZ National Party* (ASCAB), above n 30, at 5.

46 At 5.

47 *Reeve v New Zealand National Party* (ASCB), above n 28, at 4.

48 At 4.

49 *Reeve v NZ National Party* (ASCAB), above n 30, at 4.

50 At 4.

51 At 4; and *Reeve v New Zealand National Party* (ASCB), above n 28, at 4.

52 *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA) at 433.

53 New Zealand Bill of Rights Act 1990, s 3.

54 Advertising Standards Authority, above n 21, at 1.

approach to the Bill of Rights. Most decisions, including that of the petrol advertisement, state the Board's position on political advertisements in identical terms. They say that these advertisements:⁵⁵

... were not only acceptable but encouraged, as they were an essential and desirable part of the functioning of a democratic society. The Complaints Board also observed that in a free and democratic society, differences of political opinion should be openly debated without undue hindrance or interference from authorities such as the Complaints Board, and in no way should political parties, politicians, lobby groups or advocates be unnecessarily fettered by a technical or unduly strict interpretation of the rules and regulations. Therefore, the Complaints Board considered the rest of the complaint in conjunction with this liberal interpretation under the application of the Advocacy Principles.

IV The ASA's Broader Approach to Adjudicating Misleading Political Advertising on Social Media

Both quantitative and qualitative research conducted in the course of producing this article demonstrate that the reasoning used by the ASA to determine complaints about the petrol advertisement reflects the ASA's broader approach to misleading political advertisements on social media.

Complaints about social media advertisements make up a minority of complaints received by the ASA, but have been increasing since 2012.⁵⁶ All complaints about political advertising on social media claim that the advertisement is misleading, compared to only 45 per cent of all complaints received by the ASA.⁵⁷ Despite this, the ASA upheld complaints about political party advertisements at a rate of only 12.5 per cent between 2017 and 2019,⁵⁸ compared to upholding, on average, 35 per cent of all complaints received during that three-year period.⁵⁹

55 *Reeve v New Zealand National Party* (ASCB), above n 28, at 3; *Gribben*, above n 3, at 3; *Webb*, above n 3, at 3; *Lawson*, above n 3, at 3; and *Mellor v New Zealand National Party* (ASCB), above n 3, at 3.

56 Advertising Standards Authority *Annual Report 2019*, above n 3, at 3; Advertising Standards Authority *Annual Report 2018*, above n 3, at 3; and Advertising Standards Authority *Annual Report 2017*, above n 3, at 3.

57 Advertising Standards Authority *Annual Report 2019*, above n 3, at 3.

58 *Sweet*, above n 3; *Webb*, above n 3; *Thomas*, above n 3; *Trlin*, above n 3; *Aguilar*, above n 3; *Gribben*, above n 3; *Theobald*, above n 3; *Ahluwalia*, above n 3; *Parry*, above n 3; *Stafford*, above n 3; *Stevenson*, above n 3; *Mitchell*, above n 3; *Munro*, above n 3; *Eakin*, above n 3; *Cooper*, above n 3; *Lawson*, above n 3; *Mellor*, above n 3; *Gauld v New Zealand National Party*, above n 3; *Sherwood*, above n 3; *Martelli*, above n 3; *McKenzie*, above n 3; *Gauld v NZL National Party*, above n 3; and *Kay*, above n 3. The 12.5 per cent rate cited in this text was calculated by the author by determining the number of complaints that were upheld in relation to the total number of cases heard (and listed in this footnote).

59 Advertising Standards Authority *Annual Report 2019*, above n 3 at 3; Advertising Standards Authority *Annual Report 2018*, above n 3, at 3; and Advertising Standards Authority *Annual Report 2017*, above n 3, at 4. The relevant pages of each report note how many advertisements it has changed or removed because of complaints received about them (representing these statistics as either percentages of total complaints received or as integers). For an advertisement to be removed, a complaint must be upheld. So, these figures have been treated as analogous with complaints being upheld. The 35 per cent rate cited in this text was calculated

The ASA's other decisions use similar reasoning to the petrol decision.⁶⁰ For example, in 2019, the National Party posted an advertisement on social media claiming that Labour had put "75 times more money to the Provincial Growth Fund than it has into Pharmac".⁶¹ There had been 75 times more new funding allocated to the Provincial Growth Fund, but there had not been, overall, 75 times more money given to the Provincial Growth Fund.⁶² The Appeal Board found it was not misleading.⁶³ It noted the placement of the advertisement on the National Party Facebook page.⁶⁴ The Board said consumers would likely have a "political interest in budget allocations and an appreciation of the political stance a party's own Facebook page was likely to present".⁶⁵ This affected the consumer takeout of the advertisement, and in turn affected the level of substantiation required.⁶⁶ The Appeal Board found:⁶⁷

... the substantiation provided by the Advertiser, particularly within the context of an advocacy advertisement, could support the view that in the 2019 budget the Provincial Growth Fund continued to [receive] its budgeted allocation of \$1 billion ... while Pharmac was only allocated an "extra" or "new" \$40 million over 4 years. ... [L]ooking at the appropriations in a wider context ... helped to justify the "75 x more" statement made in the advertisement.

Similarly, in 2017, the National Party posted a video to its Twitter that outlined "Labour's Tax Agenda".⁶⁸ The advertisement used the Labour Party logo and the colour red.⁶⁹ The advertisement attracted several complaints that it would lead consumers to think that these taxes were the Labour Party's official stance.⁷⁰ Such a statement could not be substantiated.⁷¹ Like other decisions referenced, the Board said that the context, including public debate and placement on the Twitter page, was crucial to its decision.⁷² Relying on that context, the Board held that the consumer takeout from this advertisement would be that the statements are the National Party's opinion on the Labour Party's tax policy, not the Labour Party's official stance.⁷³ The advertiser, therefore, did not have to substantiate its comments and the complaint was not upheld.⁷⁴

by the author by averaging the rate at which the Advertising Standards Authority changed or removed advertisements as a result of complaints received during this three-year period.

60 A significant majority of the complaints about social media advertisements by political parties during this period concerned advertisements posted by the National Party. The examples used throughout this paper, logically, reflect that trend.

61 *Mellor v New Zealand National Party* (ASCAB), above n 3, at 2.

62 At 2-3.

63 *Mellor v New Zealand National Party* ASCAB 19/279 Appeal 19/279011, 25 November 2019 [*Mellor v New Zealand National Party* (ASCAB)] at 1.

64 At 3.

65 At 3.

66 At 3.

67 At 3.

68 *Webb*, above n 3, at 1.

69 At 1.

70 At 1.

71 At 4.

72 At 4.

73 At 4.

74 At 5.

These decisions reflect a broader pattern. Before 2017, no complaints of this nature were received. In 2017, there were 15 complaints about social media advertising.⁷⁵ Five of these complaints related to advertisements by political parties.⁷⁶ All five complaints concerned claims that the advertisements were misleading. Four of the complaints had no grounds to proceed.⁷⁷ One of the complaints was not upheld.⁷⁸ All five of these decisions adopted a similar approach used to adjudicate the complaints about the petrol advertisement. All five interpreted the consumer takeout broadly and resulted in a low level of substantiation being required.

Of the 603 total complaints to the ASA in 2017, 55 per cent concerned misleading advertising.⁷⁹ 37 per cent of those advertisements were removed or amended.⁸⁰ Similar figures were seen in 2018 and 2019.⁸¹ In comparison, all complaints about political party advertisements on social media concerned claims that the advertisements were misleading. So, political advertisements are more likely to be complained about as being misleading. However, the ASA is far less likely to uphold a complaint about misleading political advertising. In 2017, none of these complaints were upheld; in 2018, one complaint was partially upheld; and in 2019, two complaints were upheld.⁸² Therefore, complaints about misleading political advertising are upheld at a rate of 12.5 per cent.⁸³ This is almost two-thirds lower than the rate at which other complaints made to the ASA are upheld.

This quantitative assessment shows that the ASA is less likely to uphold complaints about misleading political advertising on social media. The various examples used show that the ASA nearly always deploys similar reasoning to that used in the petrol decision. This means that criticisms that can be levelled at the petrol decisions can also be levelled at the ASA's adjudication of complaints about misleading political advertising on social media more generally.

75 See *McLean v Sabotage Theory* ASCB 17/091, 20 March 2017; *Hills v Harvest Cidery* ASCB 17/107, 13 April 2017; *Harper v The Healing Haven* ASCB 17/124, 20 April 2017; *Conceicao v Godfreys* ASCB 17/174, 19 June 2017; *Alcohol Healthwatch* ASCB 17/242, 22 August 2017; *NZ Dental Association v Frucor* ASCB 17/286, 12 September 2017; *Webb*, above n 3; *Sweet*, above n 3; *Thomas*, above n 3; *Trlin*, above n 3; *Macintyre v Make New Zealand Great Again* ASCB 17/338, 10 October 2017; *Crozier v WHET Drinking Room* ASCB 17/360, 14 November 2017; *Stone v Orcon* ASCB 17/373, 14 November 2017; *Aguilar*, above n 3; and *Lynch v New Zealand Racing Board* ASCB 17/393, 14 November 2017.

76 See *Sweet*, above n 3; *Webb*, above n 3; *Thomas*, above n 3; *Trlin*, above n 3; and *Aguilar*, above n 3.

77 See *Sweet*, above n 3; *Webb*, above n 3; *Thomas*, above n 3; and *Aguilar*, above n 3.

78 See *Webb*, above n 3.

79 Advertising Standards Authority *Annual Report 2017*, above n 3, at 4.

80 At 4.

81 Advertising Standards Authority *Annual Report 2018*, above n 3, at 3–4; and Advertising Standards Authority *Annual Report 2019*, above n 3, at 3–4.

82 See *Sweet*, above n 3; *Webb*, above n 3; *Thomas*, above n 3; *Trlin*, above n 3; *Aguilar*, above n 3; *Bruce v New Zealand National Party* ASCB 18/200, 24 July 2018, at 4; *Lawson*, above n 3; and *Mellor v New Zealand National Party* (ASCB), above n 3.

83 *Sweet*, above n 3; *Webb*, above n 3; *Thomas*, above n 3; *Trlin*, above n 3; *Aguilar*, above n 3; *Gribben*, above n 3; *Theobald*, above n 3; *Ahluwalia*, above n 3; *Parry*, above n 3; *Stafford*, above n 3; *Stevenson*, above n 3; *Mitchell*, above n 3; *Munro*, above n 3; *Eakin*, above n 3; *Cooper*, above n 3; *Lawson*, above n 3; *Mellor*, above n 3; *Gauld v New Zealand National Party*, above n 3; *Sherwood*, above n 3; *Martelli*, above n 3; *McKenzie*, above n 3; *Gauld v NZL National Party*, above n 3; and *Kay*, above n 3. The 12.5 per cent rate cited in this text was calculated by the author by determining the number of complaints that were upheld in relation to the total number of cases heard (and listed in this footnote).

V The Consequence of the ASA's Current Approach: Harm

The approach that the ASA takes to adjudicate complaints about misleading political advertising on social media has been outlined through a qualitative assessment of the petrol decision and a quantitative assessment of how this approach is reflected more broadly in the ASA's adjudication. In assessing the ASA's approach, identifying flaws and proposing alternative considerations to address these flaws is essential, because misleading political advertising on social media can cause harm by manipulating public opinion and undermining trust in democracy.

Philip Howard, Director of the Oxford Internet Institute, University of Oxford and co-author of a study (with Samantha Bradshaw, researcher at the Oxford Internet Institute) about political misinformation across 70 countries, states: “[t]he manipulation of public opinion over social media remains a critical threat to democracy”.⁸⁴ For some countries, the threat of misinformation is related to foreign interference.⁸⁵ While that is not the focus of this article, the report details similar harms to citizens and their ability to engage in democracy as a result of misleading information, regardless of its source.⁸⁶

This harm is twofold. First, advertising is shown to “have a measurable effect on consumer behaviour”.⁸⁷ When advertising is misleading, consumers are unable to exercise their autonomy due to a lack of full and accurate information.⁸⁸ Autonomy is essential to a functioning democracy where elections must be free, fair and informed.⁸⁹ More specifically, misleading information can play a role in determining the course of elections.⁹⁰ Democracy presupposes an informed and autonomous electorate.⁹¹ Therefore, where false advertisements mislead voters, they interfere with the process upon which democracy is based.

Secondly, the purpose of regulating misleading advertising is to prevent confidence in advertisers from being undermined.⁹² In the case of misleading political advertising, this could undermine confidence and trust in democracy.⁹³ Howard and Bradshaw, in their co-authored study, affirm this threat.⁹⁴ They say that misleading political information used on social media to manipulate public opinion has the potential to “undermine trust in the

84 Bradshaw and Howard, above n 1, at 3; and Oxford Internet Institute “Use of social media to manipulate public opinion now a global problem, says new report” (26 September 2019) <oi.ox.ac.uk>.

85 Digital, Culture, Media and Sport Committee *Disinformation and ‘fake news’: Final Report* (United Kingdom House of Commons, 14 February 2019) at [249]; and Robert S Muller *Report on the Investigation into Russian Interference in the 2016 Presidential Election Volume I of II* (United States Department of Justice, March 2019).

86 Bradshaw and Howard, above n 1, at 21.

87 Julia Klesse “Regulating Misleading Advertising in New Zealand: Investigating the Two-Track System” (LLM Research paper 532: Consumer Law, Victoria University of Wellington, 2010) at 6.

88 At 7.

89 Michael Pendlebury “Individual autonomy and global democracy” (2004) 103 *Theoria* 43 at 45; and Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986) at [8.26].

90 Monther Aldwairi and Ali Alwahedi “Detecting Fake News in Social Media Networks” (2018) 141 *Procedia Computer Science* 215 at 217; *Harper v Canada (Attorney General)* 2004 SCC 33, [2004] 1 SCR 827 at 828–829; and *Watson v Electoral Commission* [2015] NZHC 666 at [108].

91 Royal Commission on the Electoral System, above n 89, at [8.26].

92 Advertising Standards Authority, above n 5, at 10.

93 Bradshaw and Howard, above n 1, at 21.

94 At 3; and Oxford Internet Institute, above n 84.

media, public institutions, and science”.⁹⁵ Consumers are increasingly aware of misleading information.⁹⁶ For example, 48 per cent of Aotearoa New Zealanders are concerned about mistakenly spreading misinformation, and many are concerned about family members not being able to identify it.⁹⁷

Such harms are not theoretical. The United Kingdom’s parliamentary inquiry into disinformation and fake news stated:⁹⁸

Much has been said about the coarsening of public debate, but when these factors are brought to bear directly in election campaigns then the very fabric of our democracy is threatened.

Ultimately, social media can cause great harm by falsely manipulating public opinion and undermining trust in democracy. Considering this harm, it is essential to scrutinise the approach to regulating misleading political advertising and suggest improvements in light of that scrutiny.

VI Assessing the ASA’s Approach to Adjudicating Complaints about Misleading Political Advertising on Social Media

In light of social science evidence, the ASA’s approach to the petrol advertisement was too lenient. In applying this approach, the ASA misconstrued the context of the advertisement—in particular, the relevance of public discourse and the target audience. The ASA’s consumer takeout, which weighs heavily on its decision, does not align with evidence about consumer behaviour. Finally, the ASA did not give due regard to the shifting role of political parties on social media. This approach is also reflected in its response to other claims that political advertisements on social media are misleading.⁹⁹ Again, this is of concern because misleading advertising can harm democracy.¹⁰⁰

These flaws in the ASA’s adjudication create the risk that advertisements that can mislead consumers will not be subjected to takedown or amendment requirements. A better, stricter approach that addresses these flaws and mitigates this harm is offered in response to each flaw as it is explained. To assist with the application of this alternative approach, this article suggests that five additional points of consideration should be added to the Guidance Note on Advocacy Advertising. These additional points should be considered when adjudicating complaints about misleading political advertising on social media. Once this new approach has been detailed, the subsequent section will provide justifications for this approach, including addressing counterarguments and accounting for greater infringements on the rights of free speech.

95 Bradshaw and Howard, above n 1, at 3.

96 Netsafe *Fake news survey results* (20 August 2020) at 1.

97 At 1.

98 Digital, Culture, Media and Sport Committee, above n 85, at 5.

99 See *Sweet*, above n 3; *Webb*, above n 3; *Thomas*, above n 3; *Trlin*, above n 3; and *Aguilar*, above n 3.

100 Bradshaw and Howard, above n 1, at 21.

A Consumer knowledge and discourse

In the petrol decision, the Board said:¹⁰¹

... the audience was likely to have a political interest in policy and performance comparisons ... and an appreciation of the political stance a party's own Facebook and Twitter platforms were likely to present.

But this not supported by fact. In that decision, the Board did not articulate how having an interest or understanding in policy or the political stance presented by a political party's social media page would prevent consumers from being misled.¹⁰² In a different decision, the ASA said that because of this interest, consumers would have a greater knowledge of the public debate and therefore the objective facts and varying opinions on the issue.¹⁰³ In light of this, the Board said it would be clear to the consumer that the advertisement is simply one of those opinions.¹⁰⁴ Under the Code, opinions do not need to be substantiated.¹⁰⁵ However, the ASA does not provide evidence for this proposition.

It is easier to deploy this reasoning when adjudicating complaints about advertisements on television, radio and similar media. The advertisements will be consumed amongst a variety of advertisements, possibly including competing views on the same issue.¹⁰⁶ However, social media has fundamentally different characteristics.¹⁰⁷ Advertisements can be micro-targeted to very specific groups, and a combination of manual sharing and algorithms dictate the distribution of unpaid content.¹⁰⁸ So, social media users are likely to see advertisements amongst selected or targeted content, rather than a range of views.¹⁰⁹

It is arguable that despite consumers viewing social media advertisements in this isolated context, they will be informed about the public debate from other sources. However, half of Aotearoa New Zealand's population is disengaged from traditional news.¹¹⁰ Facebook has a 16 per cent share of news consumption in Aotearoa New Zealand, whereas newspapers and radio have only 13 per cent and nine per cent, respectively.¹¹¹ So, in contrast to the Board's reasoning, the advertisement may be misleading because consumers do not have the public debate or broader context in which to place the statements.

So, a new approach to adjudicating complaints about misleading political advertising on social media should account for evidence about consumers' knowledge of the public discourse. Such an approach should be reluctant to deem a statement to be an opinion

101 *Reeve v New Zealand National Party* (ASCB), above n 28, at 4.

102 At 4.

103 *Webb*, above n 3, at 4.

104 At 4.

105 Advertising Standards Authority, above n 16, at 13.

106 Julianne Stewart "Political Advertising in Australia and New Zealand" in Lynda Kaid and Christina Holtz-Bacha (eds) *The SAGE Handbook of Political Advertising* (SAGE Publishing, California, 2010) 269 at 275.

107 Sarah Oates *Introduction to Media and Politics* (SAGE Publishing, California, 2012) at 156.

108 Abby K Wood and Ann M Ravel "Fool Me Once: Regulating 'Fake News' and other Online Advertising" (2018) 91 S Cal L Rev 1227 at 1229; Facebook "How News Feed Works" <www.facebook.com>; and Twitter "About your Home timeline on Twitter" <www.twitter.com>.

109 Wood and Ravel, above n 108, at 1229.

110 Acumen *2018 Edelman Trust Barometer: New Zealand Report* (March 2018) at 24.

111 NERA Economic Consulting *Fairfax/NZME: Review of the draft determination* (25 November 2016) at 19.

only on the basis that a consumer would know it is an opinion because they have access to the objective facts, and other opinions, through the broader public discourse and other news sources.

B *Sharing and audience*

The Board noted the context of the petrol advertisement on the National Party Facebook Page, and said this was crucial to its decision.¹¹² It held that those who follow the page will have an interest in the party's policy "and an appreciation of the political stance a party's own Facebook and Twitter platforms were likely to present".¹¹³ Even if the Board's argument is accepted, these followers are not the only consumers of the advertisement. Content on social media is often shared by consumers to their networks.¹¹⁴ When those who follow the political party page share the advertisement, it can reach their friends, family and followers who do not follow that page. Further, social media platforms share content to consumers' News Feeds from pages they do not follow.¹¹⁵

This is different from sharing a television or billboard advertisement. In that context, a person would have to reproduce the advertisement by taking a picture or video recording, and make efforts to distribute this. In this context, the advertiser could only foresee and be responsible for ensuring it is not misleading in the original context, not when it is reproduced.¹¹⁶

Despite this, the Appeal Board has said that the sharing of an advertisement on social media is "outside the Advertiser's control", so those who view it this way are not considered part of the audience.¹¹⁷ However, in contrast to traditional media outlets, the sharing of advertisements is a direct and foreseeable—if not intended—function of social media advertising.¹¹⁸ Indeed, sharing is built into the very infrastructure of the platforms.¹¹⁹ Advertisers are aware of this and seek to capitalise on it.¹²⁰ The extensive proliferation of misleading advertising by political parties on social media supports the view that they are aware of its ability to spread widely.¹²¹ Evidence shows that political parties' use of misleading information to manipulate voters is calculated and evidence-based.¹²²

The ASA is correct to note that a central way through which this extended audience will see the advertisement is when it is manually shared by consumers who follow the page.¹²³ However, this is not the only way. Consumers' News Feeds on Facebook include content about their friends' activities, including when a friend comments on content belonging to

112 *Reeve v New Zealand National Party* (ASCB), above n 28, at 4.

113 At 4.

114 Maksym Gabielkov and others "Social Clicks: What and Who Gets Read on Twitter?" (paper presented to IFIP Performance Conference, Antibes, 13 April 2016) at 9.

115 Facebook, above n 108; and Twitter, above n 108.

116 *Reeve v NZ National Party* (ASCAB), above n 30, at 9.

117 At 4.

118 Facebook "Sharing" <www.facebook.com>.

119 Twitter "Retweet FAQs" <www.help.twitter.com>; and Facebook "How do I share a post I see on my timeline" <www.facebook.com>.

120 McKay Coppins "The Billion Dollar Disinformation Campaign to Re-elect the President" *The Atlantic* (online ed, Boston, 10 February 2020).

121 Bradshaw and Howard, above n 1, at 9.

122 Nicky Hager "The Hollow Men: Chapter 1: The Path of Principle" (21 November 2006) <www.nickyhager.info>.

123 Facebook, above n 108; and Twitter, above n 108.

someone who is not in the consumer's network, or on content in a group that the consumer is not part of.¹²⁴ On Twitter, a consumer's Timeline includes content from pages that the consumer has not followed.¹²⁵

A better way to categorise the audience is to include this larger pool of consumers. This different categorisation of the audience means it is larger, with different levels of knowledge. The audience will include those who follow the page and so, under the ASA's reasoning, will know an advertisement is an opinion. But it will also include those who do not follow the page and therefore do not have the additional knowledge or context that the ASA believes those who follow the page to have. Without this context, they are less likely to know that it is an opinion. This group, therefore, could be misled under r 2 of the Code because, to them, opinion is not clearly distinguishable from fact. Further, in these instances, there is more than one consumer takeout: those who follow the page and therefore, in the ASA's view, will not be misled, and those who see the advertisement through other means. The ASA has held that where there is "more than one consumer takeout", this indicates that "the advertisement lacked the context and qualification needed to avoid confusing consumers".¹²⁶ Therefore, the correct view is that such advertisements could be misleading

C Understanding consumer behaviour

The Appeal Board noted that the visual component of the petrol advertisement "may have more impact than the quoted figures for some consumers".¹²⁷ However, it had to "consider the advertisement in its entirety which included the correct figures".¹²⁸ It held that because of those figures, the advertisement was not misleading.¹²⁹

The ASA's role is to prevent consumers from being misled, and this should be central to its analysis. Research has shown that social media users have a "short attention span" and do not examine content closely.¹³⁰ Further, psychological evidence shows that most users are not good at identifying misleading information.¹³¹ In Aotearoa New Zealand, 64 per cent of people say they cannot decipher journalism from rumour and falsehood.¹³² 53 per cent cannot recognise respected sources of information.¹³³ Finally, 52 per cent of Aotearoa New Zealanders admit to unintentionally believing false information, and 48 per cent are concerned about mistakenly spreading false information.¹³⁴ This evidence—that consumers do not closely examine information—supports the view that using the data displayed in the petrol advertisement to calculate whether the graph visually misrepresented that data is inconsistent with consumer behaviour. In light of this evidence, it can be assumed that most social media users would believe the graph is reflective of the figures and therefore would be misled by the advertisement. When adjudicating complaints, the ASA needs to account for this social science evidence, for the

124 Facebook, above n 108.

125 Twitter, above n 108.

126 *Mellor v New Zealand National Party* (ASCB), above n 3, at 3.

127 *Reeve v NZ National Party* (ASCAB), above n 30, at 5.

128 At 5.

129 At 5.

130 Gabelkov and others, above n 114, at 9.

131 Kai Shu and others "Fake News Detection on Social Media: A Data Mining Perspective" (2017) 19 ACM SIGKDD 5 at 6.

132 Acumen, above n 110, at 7.

133 At 7.

134 Netsafe, above n 96, at 1.

level of attention that consumers may pay to an advertisement, and for how this affects the advertisement's potential to mislead the consumer.

D *Advocates or information disseminators*

The ASA is more likely to find that consumers will know they are viewing an opinion when an advertisement is posted to a political party page, as the ASA believes they will know the "stance" that page will present.¹³⁵ Statements of opinion do not require substantiation.¹³⁶ In contrast, evidence shows that political parties' social media presence plays a dual role as official information channels and advocacy platforms.¹³⁷ This has made it increasingly difficult for consumers to differentiate between fact and opinion.¹³⁸

Previously, there were clearer channels for communicating factual information, such as press conferences or reports on official stationery.¹³⁹ This is no longer the case: announcements of policy are just as likely to be made on a Facebook page as they are to be released in an official government document.¹⁴⁰ This mixture of uses for social media was documented as far back as 2011 in a parliamentary research paper on "New Zealand Parliamentarians and Online Social Media".¹⁴¹ This can create an ill-defined boundary between political and official information.¹⁴² Therefore, in contrast to the ASA's view, it has become increasingly difficult for consumers to differentiate between factual information and opinion or advocacy on political party social media pages.¹⁴³

E *Public function and the Bill of Rights*

In addition, commercial and political cases require a different approach. This different approach should account for the ASA's public function. It should also incorporate an analysis of whether upholding the complaint, which will result in an amendment or takedown, is a proportional and justified restriction on free speech. The Code is commercially focussed. The ASA has described it as: "an expression of the business community's recognition of its social responsibilities".¹⁴⁴ Recognising such social responsibilities and preventing misleading commercial advertising is important. However, misleading political advertising can have far worse consequences.¹⁴⁵ The ASA performs an important public function in preventing such consequences. As discussed above, failing to perform that function could harm democracy. The different impacts of allowing misleading commercial advertising compared to political advertising need to be considered when adjudicating complaints.

This has particular relevance for the ASA's consideration of the Bill of Rights. The ASA does not engage in a reason-based proportionality analysis that demonstrates

135 *Mellor v New Zealand National Party* (ASCAB), above n 63, at 3.

136 Advertising Standards Authority, above n 16, at 13.

137 Claire Robinson "How Facebook has revolutionised the art of persuasion" *Stuff* (online ed, Auckland, 8 September 2019).

138 Robinson, above n 137.

139 Robinson, above n 137.

140 Robinson, above n 137.

141 Christine Busby and Paul Bellamy *New Zealand Parliamentarians and Online Social Media* (Parliamentary Library, 15 February 2011) at 10.

142 Robinson, above n 137.

143 Robinson, above n 137.

144 Advertising Standards Authority, above n 5, at 6.

145 Bradshaw and Howard, above n 1, at 3.

engagement with the individual circumstances: it states its position in identical terms (using the same paragraph) in most decisions.¹⁴⁶ Such an approach does not provide assurance that the legal obligation to comply with the Bill of Rights is being met in every case.¹⁴⁷ While citizens have the right to free speech,¹⁴⁸ rights can be restricted where it is reasonable, prescribed by law, and demonstrably justified in a free and democratic society.¹⁴⁹ For a limit to be demonstrably justified, it must be proportionate.¹⁵⁰ So, when the ASA upholds complaints, it needs to demonstrate that it has considered whether limiting freedom of expression is proportional and justified.¹⁵¹

Proportionality continues to be relevant in a broader sense. A proportionality analysis requires balancing the right to free speech against what is achieved by limiting it through the self-regulatory scheme.¹⁵² The balancing process should include “reasoning rather than an impressionistic process”.¹⁵³ For the objective and limit to be proportional, they must have a rational relationship to each other, create as little interference as possible with the right and be demonstrably justifiable in light of the objective.¹⁵⁴ Preventing harms to democracy is more important than preventing harm to the commercial advertising industry: this is reflected in the strong protections given to democratic rights.¹⁵⁵ Therefore, in political and commercial cases, there may be different limitations that are justified and proportional. The ASA needs to recognise its public function, the harms from misleading political advertising and the impact this has on its role, by providing a greater justification for intervening in—and upholding—complaints.

F *Fair play and robust debate*

The ASA relies on Advocacy Principle four to say that the Code should be interpreted liberally.¹⁵⁶ However, the Advocacy Principles note that the Code “should be interpreted liberally to ensure fair play”.¹⁵⁷ This is because “robust debate in a democratic society is to be encouraged”, and ensuring fair play facilitates this.¹⁵⁸ However, in the ASA’s decisions, applying the Code liberally manifests as allowing an advertisement to remain.¹⁵⁹ Instead,

146 *Reeve v New Zealand National Party* (ASCB), above n 28, at 3; *Bruce*, above n 82, at 4; *Webb*, above n 3, at 3; *Lawson*, above n 3, at 3; and *Mellor v New Zealand National Party* (ASCB), above n 3, at 3.

147 Claudia Geiringer and Steven Price “Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority” in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis, Wellington, 2008) 295 at 297.

148 New Zealand Bill of Rights Act, s 14.

149 Section 5.

150 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [18].

151 See Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] 1 AJHR A6 at [10.57]–[10.58]. The draft Bill of Rights in this White Paper acknowledges the importance of thorough analysis of the reasonableness of limits on expression.

152 *Watson*, above n 90, at [108].

153 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [132] per McGrath J dissenting as cited in Geiringer and Price, above n 147, at 319.

154 *Moonen*, above n 150, at [18].

155 New Zealand Bill of Rights Act, ss 12–18; and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 25.

156 *Reeve v New Zealand National Party* (ASCB), above n 28, at 3.

157 Advertising Standards Authority, above n 21, at 1.

158 At 1.

159 *Mellor v New Zealand National Party* (ASCB), above n 3; *Webb*, above n 3; *Gribben*, above n 3; *Stafford*, above n 3; and *Eakin*, above n 3.

the Code's application should consider whether allowing the advertisement to remain supports fair play or robust debate, as prescribed by the Advocacy Principles.¹⁶⁰

Understanding and accommodating free speech, fair play and robust debate in the age of social media is more complex than simply protecting the right to speak.¹⁶¹ Scholars from the Massachusetts Institute of Technology found that, across the world, "falsehood diffuses significantly farther, faster, deeper, and more broadly than the truth ... and in many cases by an order of magnitude".¹⁶² False stories are 70 per cent more likely to be retweeted than true stories.¹⁶³ Further, true stories take almost six times longer than false stories to reach the same number of people.¹⁶⁴ This means there is a lack of fair play. If one side is sharing misleading information while the other is not, it is challenging to engage in fair and robust debate.

For example, in the lead up to the 2017 general election, the National Party launched the tax agenda advertisement discussed earlier in this article.¹⁶⁵ The advertisement focused on Labour's plan to increase tax, including income tax.¹⁶⁶ Labour had repeatedly ruled out increasing income tax.¹⁶⁷ However, the spread of National's advertisement made it very difficult for Labour to engage in robust debate and get their perspective heard. As a result, the leader of the Labour Party spent the "week denying the income tax claim" and later "ruled out introducing any new taxes until after 2020".¹⁶⁸

Robust debate requires different opinions to be heard. Misleading advertising on social media spreads further, faster and deeper than the truth. This means there is no fair play and those with opposing views cannot engage in robust debate. The ASA's adjudication needs to reflect this dynamic: because of the way information spreads on social media, ensuring fair play and robust debate is not always supported by protecting the right to speak.

G *Greater explanations*

In regards to the petrol advertisement, neither the Complaints Board nor the Appeal Board provided analysis of, or an explanation for, why it categorised the audience as being outside of the advertiser's control.¹⁶⁹ Further, they did not provide analysis of how an interest in policy and performance helped to prevent the advertisement from misleading consumers, or evidence to substantiate this view.¹⁷⁰ Finally, neither Board provided any further commentary on why they believed that displaying the correct numbers prevented

160 Advertising Standards Authority, above n 21, at 1.

161 Danielle Keats Citron "Restricting Speech to Protect It" in Susan J Brison and Katarine Gelber (eds) *Free Speech in the Digital Age* (Oxford University Press, Oxford, 2019) 122 at 131–132.

162 Peter Dizikes "Study: On Twitter, false news travels faster than true stories" MIT News <www.news.mit.edu>.

163 Soroush Vosoughi, Deb Roy and Sinan Aral "The spread of true and false news online" (2018) 359 *Science* 1146 at 1149.

164 At 1148.

165 *Webb*, above n 3, at 1.

166 At 1.

167 Radio New Zealand "Labour rules out income tax increase" (New Zealand, 13 August 2017).

168 Laura Walters "Political parties ramp up attack ads - smart politics or fake news?" *Stuff* (online ed, Auckland, 10 May 2018).

169 *Reeve v New Zealand National Party* (ASCB), above n 28, at 4; and *Reeve v NZ National Party* (ASCB), above n 30, at 4.

170 *Reeve v New Zealand National Party* (ASCB), above n 28, at 4.

the disproportionate graphic from being misleading.¹⁷¹ They did not, for example, say it was because the numbers were displayed prominently as part of the graphic, or because they were simple numbers that consumers could easily engage with. It is not clear at what point such a graphic, even with the correct figures, may become misleading in the Board's opinion.

The Board should provide commentary on how the presence or absence of certain features prevents an advertisement from being misleading. This would help advertisers to understand when an advertisement might be classed as misleading and how to avoid this. Further, it would demonstrate engagement with the facts of each case and whether, in light of those facts, a limit on free speech is justified. This is in contrast to the Board's current approach of repeating its position in identical terms (stating the same paragraph) in every decision.¹⁷²

H *Summary*

Despite the ASA's finding that the petrol advertisement will not mislead consumers, evidence shows that central parts of its reasoning are not congruent with the realities of social media consumption. First, social media advertisements are not consumed in the context of public discourse, so consumers cannot be assumed to have knowledge of public debate on a matter. Secondly, the audience is larger, and has a greater range of knowledge, than that which is accounted for by the ASA. In light of this, there are two different consumer takeouts. Therefore, not all those who view the advertisement will know it is an opinion, nor will all viewers know the stance that the political party page is trying to promote. The ASA has previously said that varying consumer takeouts from one advertisement means it is misleading. Thirdly, consumer behaviour does not closely scrutinise social media content. Not closely scrutinising an advertisement may mean the consumer is misled. The ASA is not holding an advertisement to be misleading in these instances as it is not correctly accounting for consumer behaviour. Fourthly, channels of official and political information are often merged. This means that consumers are less likely to know when something published is an opinion and are more likely to view it as a fact, which must therefore be substantiated or else held to be misleading. Fifthly, the ASA does not acknowledge its public function: specifically, that preventing misleading political advertising is of greater significance than stopping misleading commercial advertising, so it may warrant greater restrictions. Sixthly, the ASA is required to interpret the Code liberally to ensure fair play and robust debate. At present, it only interprets it liberally. Interpreting it liberally to ensure fair play and robust debate may mean being stricter on misleading political advertising, given what social science evidence says about how quickly misleading information spreads, and how difficult it is to provide a countervailing view. Finally, the ASA does not provide much explanation for the decisions it takes, leaving advertisers in the dark about when something may cross the line into "misleading", and therefore creating a large grey area.

171 At 4; and *Reeve v NZ National Party* (ASCAB), above n 30, at 5.

172 See *Reeve v New Zealand National Party* (ASCB), above n 28, at 3; *Bruce*, above n 82, at 4; *Webb*, above n 3, at 3; *Lawson*, above n 3, at 3; and *Mellor v New Zealand National Party* (ASCB), above n 3, at 3.

I Amending the Guidance Note on Advocacy Advertising

To address the criticisms identified in the preceding section and implement the alternative approach that has been advanced at the same time, this article suggests that five additional points of consideration should be added to the Guidance Note on Advocacy Advertising. These points should be considered by the Board when it is adjudicating complaints about misleading political advertising on social media. The additions are as follows:

- (1) Consider the changing ways in which people receive information, including that social media advertisements are consumed in an isolated context. Unlike other media, consumers may not be aware of the broader debate around content referred to in advertisements.
- (2) Acknowledge that the sharing of content is central to the function of social media. As a result, social media advertisements will be shared through a variety of mechanisms and to consumers who do not follow the page from which it originated. So, a wide interpretation of the audience should be taken to ensure that the ASA fulfils its purpose of preventing consumers from being misled.
- (3) When applying r 2(e) of the Code and adjudicating whether opinion is clearly distinguishable from fact, consider the dual role of political parties on social media as both advocates of political perspectives and also disseminators of official information. Specifically, consider the impact that this is shown to have on consumers' ability to differentiate between statements of opinion and fact.
- (4) Consider the impact of the rapid and broad dissemination of misleading advertising on social media and how this prevents robust debate and fair play.
- (5) When upholding a complaint about political advertising and therefore requesting a takedown or amendment, demonstrate that upon engagement with the particular facts, a limit on speech is proportional and justified. In doing so, consider the public function that the ASA plays and the greater justifications that may be provided by preventing harm to democracy. In addition, a clear explanation of the Board's position should be given to minimise the chilling effect of the restriction on speech.

VII Justifications for a Stricter Approach

This alternative approach encourages the ASA to draw on social science evidence about consumer knowledge and behaviour. In doing so, the ASA should take a stricter approach to potentially misleading advertisements. This is justified because it aligns better with the ASA Code and Guidance Notes, and mitigates the potential harms from misleading political advertising on social media.

A Giving effect to the ASA's Code and Guidance Notes

The approach advocated in this article gives better effect to the ASA's objectives, Code and Guidance Notes. Social scientists have noted that it is increasingly difficult for consumers to know when political parties are presenting fact or opinion.¹⁷³ Under r 2 of the Code,

173 Robinson, above n 137.

opinion and fact must be distinguishable.¹⁷⁴ So, if consumers cannot distinguish if an advertisement is fact or opinion, then the complaint should be upheld.¹⁷⁵ However, under the ASA's current approach, such complaints are often not upheld.

The ASA's current approach focuses on interpreting the Code liberally rather than "liberally to ensure fair play", as the Advocacy Principles prescribe.¹⁷⁶ It focuses on protecting the right to speak rather than considering the ability of misleading advertisements to silence one side of the debate due to its faster, deeper and broader spread.¹⁷⁷ Correctly considering these factors, as is advocated in this article, will better give effect to Advocacy Principle four by more accurately ensuring fair play and robust debate.¹⁷⁸

The level of substantiation required in the decision regarding the Provincial Growth Fund advertisement was low.¹⁷⁹ The Board noted that the substantiation "could support the view" made in the advertisement and that the context "helped to justify" the statement.¹⁸⁰ Factors considered when assessing substantiation include the type of claim—for example, this claim relates to political speech, so the ASA may be more liberal with the level of substantiation required.¹⁸¹ However, the Guidance Note also requires the Board to consider the consequences if the claim is false, and the benefits if it is true.¹⁸² As has been outlined in this article, the consequence of political parties making false claims on social media can be very harmful. The approach advocated in this article therefore encourages the ASA to better account for these consequences of false claims, as is required by the guidance note.

The harm from misleading advertising is recognised in the Code and the power of the ASA to restrict speech, including political speech.¹⁸³ The Code was considered and created carefully to achieve that purpose and address that harm without creating unnecessary infringements on speech.¹⁸⁴ Therefore, an approach that is consistent with the Code will achieve its purpose of preventing misleading advertisements without unnecessary infringements.

B Alternative approach justified despite limits on speech

This stricter approach creates a greater restriction on the freedom of expression. The speech in the decisions that the ASA has adjudicated is highly protected speech. Not only is it political speech, it is generally valuable speech that discusses matters of public interest.¹⁸⁵ Political speech is "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".¹⁸⁶ Aotearoa

174 Advertising Standards Authority, above n 16, at 13.

175 *Cullen v National Party* ASCB 17/327, 18 September 2017 as cited in *Sweet*, above n 3, at 2–3; *Sweet*, above n 3; *Thomas*, above n 3; and *Trlin*, above n 3.

176 Advertising Standards Authority, above n 21, at 1.

177 Vosoughi, Roy and Aral, above n 163, at 4.

178 Advertising Standards Authority, above n 21, at 1.

179 *Mellor v New Zealand National Party* (ASCAB), above n 63, at 3.

180 At 3.

181 *Mellor v New Zealand National Party* (ASCAB), above n 3, at 2.

182 At 2.

183 Advertising Standards Authority, above n 21, at 1.

184 Advertising Standards Authority, above n 5, at 10–15.

185 See the complaints mentioned at above n 3.

186 *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 124; and Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2005) at 162.

New Zealand courts have taken a wide interpretation of political speech, noting that “[i]n a representative democracy it would not be right to view information relevant to the democratic process too narrowly.”¹⁸⁷

Political speech is highly valued speech.¹⁸⁸ The Privy Council has said that “[p]olitical debate is at the core of representative democracy.”¹⁸⁹ The High Court has said this is because an individual’s electoral rights cannot be “properly exercised without sufficient knowledge about policies and candidates”.¹⁹⁰

Three predominantly accepted theories validate the protection of speech:¹⁹¹ first, that speech allows for individuals’ self-development of thought and autonomy;¹⁹² secondly, that such speech contributes to the marketplace of ideas, where truth will emerge from the competition of ideas in a free and transparent public discourse;¹⁹³ and finally, that political speech is valuable to democracy and society.¹⁹⁴ On the surface, it appears that the ASA’s approach and its resistance to fetter such speech is justified. In the alternative, a stricter approach is justified. This is because, as will be explored in the following subsections, in this context, the marketplace of ideas does not work as effectively: breathing space is maintained, the chill effect is not large and the harm is severe.¹⁹⁵

1 Harm

Political speech is very important.¹⁹⁶ There are reasons to protect even false speech,¹⁹⁷ such as to prevent deterring citizens from entering debates.¹⁹⁸ However, the harm caused by misleading political advertisements on social media is severe.¹⁹⁹ There must be a point at which even political speech creates more harm than benefit. Even when the impact of chill and breathing space are considered, the harm from misleading political advertisements on social media is significant enough to justify limiting that speech in the manner that this article has proposed.

Political speech is protected on the basis that it is constructive rather than obstructive to the operation of democracy.²⁰⁰ However, misleading political advertising on social media can “manipulate and oppress the voter”.²⁰¹ When discussing balancing the right to speak freely with the rights of voters to engage in an electoral process free from manipulation and oppression, the Supreme Court of Canada said that although political expression “warrants a high degree of constitutional protection, there is nevertheless a

187 *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22 (HC) [*Lange v Atkinson* (HC)] at 30.

188 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) [*Lange v Atkinson* (CA)] at 460–461; and *New York Times Co v Sullivan* 376 US 254 (1964) at 269–271.

189 *Lange v Atkinson* [2000] 1 NZLR 257 (PC) [*Lange v Atkinson* (PC)] at 260.

190 *Lange v Atkinson* (HC), above n 187, at 30.

191 Chris Berg “An Institutional Theory of Free Speech” (8 February 2017) Social Science Research Network <www.ssrn.com> at 1.

192 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [13.6.4].

193 At [13.6.3].

194 At [13.6.8] and [13.6.12].

195 Bradshaw and Howard, above n 1, at 21.

196 *Lange v Atkinson* (PC), above n 189, at 260.

197 *New York Times Co*, above n 188, at 269–271.

198 *Lange v Atkinson* (HC), above n 187, at 37.

199 Bradshaw and Howard, above n 1, at 23.

200 Barendt, above n 186, at 156.

201 *Harper*, above n 90, at 829.

danger that political advertising may manipulate or oppress the voter”.²⁰² The High Court in *Watson v Electoral Commission* was faced with the challenge of ensuring that a limit is not so over-inclusive as to chill protected political speech, but not so under-inclusive as to deprive the electoral process of integrity.²⁰³ The Court said that “it has been long recognised that those two sets of rights must accommodate each other”.²⁰⁴

Any limit on rights must be demonstrably justified to serve an objective that is important and significant enough to limit the right.²⁰⁵ The highly protected position of this speech means that the objective must also be very important and significant. The harm from misleading political advertising on social media is severe and demonstrable.²⁰⁶ Misleading advertisements manipulate and oppress voters by depriving them of the autonomy to make a free and informed choice.²⁰⁷ Preventing such harms is a significant and important objective. As these cases show, where speech may manipulate or oppress the voter, it can be limited.²⁰⁸ The two rights must accommodate each other and, because of the harm demonstrated from this form of advertising, a stricter approach is a reasonable accommodation.

2 Marketplace of ideas

An argument against a stricter approach is that the freedom of speech allows the marketplace of ideas to function. However, due to the nature of social media, the marketplace of ideas does not function properly, so this counterargument does not possess much weight. The marketplace of ideas allows free and transparent public discourse from which ideas and accepted truths will emerge.²⁰⁹ However, in the context of misleading political advertising on social media, the marketplace of ideas does not work as effectively. So, as a rationale for the protection of free speech, the marketplace of ideas is not as robust or relevant.

Consumers do not engage with social media content before sharing it.²¹⁰ So, while content may appear to have widespread acceptance, those sharing it have likely not challenged it or accepted it as truth, as the marketplace of ideas theory presumes.²¹¹ In addition, social media advertisements are consumed in an isolated context, giving people the ability to avoid public discourse.²¹² Further, misleading advertisements have a “pernicious effect ... on the quality of public debate”.²¹³ It is difficult for consumers to consider viewpoints when the marketplace is populated with misleading statements “from seemingly authoritative sources”.²¹⁴ Finally, rather than supporting a functioning

202 At 829.

203 *Watson*, above n 90, at [82].

204 At [108].

205 *Moonen*, above n 150, at [18].

206 Bradshaw and Howard, above n 1, at 23.

207 Klesse, above n 87, at 8.

208 *Watson*, above n 90, at [108].

209 Butler and Butler, above n 192, at [13.6.3]–[13.6.4].

210 Gabielkov and others, above n 114, at 9.

211 At 8.

212 Toni M Massaro and Robin Styker “Freedom of speech, liberal democracy and emerging evidence of civility and effective democracy engagement” (2012) 54 ACJ 375 at 425; and NERA Economic Consulting, above n 111, at 19.

213 Irimi Katsirea “‘Fake news’: reconsidering the value of untruthful expression in the face of regulatory uncertainty” (2019) 10 Journal of Media Law 159 at 176.

214 Butler and Butler, above n 192, at [13.6.7].

marketplace of ideas, misleading advertisements can force opponents to respond to specific statements or engage in similar tactics.²¹⁵ As a result, democratic debates “degenerate into cycles of attack and denial” rather than engagement on substantive issues.²¹⁶

3 Breathing space and chilling effect

A further argument against a stricter approach is that although restricting certain kinds of speech can be warranted, the collateral damage to other forms of speech may undermine those restrictions. However, this counter argument is not valid in this context. First, the chilling effect from restrictions imposed by the ASA is insignificant as the penalties are small. Secondly, if chill is created by a stricter approach, it may in fact bring social media in line with other forms of media.

In discussing political speech, free speech and the potential limits on both, the notion of breathing space is relevant. In *New York Times v Sullivan*, Brennan J famously observed that breathing space is necessary because the “erroneous statement is inevitable in free debate”.²¹⁷ To put the risk and burden of such errors onto speakers of statements creates the risk of self-censorship and discourages robust debate.²¹⁸ In other words, it creates a chilling effect where people are worried to speak for fear that the threat of sanction and the encroachment on free speech is broader than anticipated.²¹⁹

The worst harm that could result from contravening the ASA Code is a takedown request.²²⁰ There are no costs, litigation, fines or retribution. There is no large burden or risk such as a criminal sentence. Because this burden is so small, it is unlikely that advertisers will self-censor where an advertisement is in a grey area, or it is unclear how the Code will apply. Therefore, this small burden reduces the chilling effect. So, even when a stricter approach is taken, it may not create a chilling effect, or the effect will be small.

Andrew Butler and Petra Butler have noted there is an argument to be made that sanctions and their potential chilling effects do “not inhibit responsible journalism”, but instead that they “dissuade media from acting recklessly in publishing content that has not been thoroughly researched”.²²¹ A similar effect may be seen in advertising: social media advertising bypasses broadcasting gatekeepers who traditionally check for compliance with the Code and consider general principles of sound advertising.²²² This is a form of the chilling effect, as gatekeepers engage in self-censorship where application of the Code is not clear because they are cautious not to be involved in a breach of it. This system is not occurring on social media, so there is already a greater ability for those advertising on social media to speak freely without self- or industry-enforced censorship. In light of this, even if a chilling effect is created, it may not create as large a burden on free speech, when accounting for the greater freedoms that already exist in this medium.

215 William P Marshall “False Campaign Speech and the First Amendment” (2004) 135 U Pa L Rev 285 at 294.

216 At 294.

217 *New York Times Co*, above n 188, at 271–272.

218 Geoffrey R Stone “Justice Brennan and the freedom of speech: a first amendment odyssey” (1991) 139 U Pa L Rev 1333 at 1344.

219 Barendt, above n 186, at 32.

220 Advertising Standards Authority, above n 5, at 5.

221 Butler and Butler, above n 192, at [13.17.33] (emphasis omitted).

222 Colin Peacock “Oncoming online onslaught of paid political ads?” (1 September 2019) Radio New Zealand <www.rnz.co.nz>.

If that level and style of chill is accepted across those media, it should be accepted on social media, and may serve to level the playing field between social media and other media.

Finally, an approach that provides more analysis and justification, as suggested in this article, limits the chilling effect. Providing such analysis will help advertisers to better understand whether an advertisement will be found to be misleading. If advertisers have greater certainty about what is likely to get taken down, then it narrows the range of advertisements that might be affected by the chilling effect.

A stricter approach creates a greater restriction on speech. However, in the context of social media, the marketplace of ideas does not work effectively, breathing space is maintained, the chilling effect is not large and the harm is severe. Therefore, this restriction is justified.

VIII Conclusion

When the ASA found that the petrol advertisement was not misleading, it continued its reluctance to uphold complaints regarding misleading social media advertising by political parties.²²³ Similar reasoning is reflected in most decisions regarding misleading political advertising on social media and the low rate at which complaints of this nature are upheld.²²⁴ The ASA's approach is too lenient and not congruent with social science evidence.

Misleading political advertisements on social media are harmful to consumers and democracy. In light of that harm, an alternative stricter approach, including five additional points of consideration, should be added to the Guidance Note on Advocacy Advertising. These will guide the ASA in adjudicating complaints about misleading political advertising on social media. These include: considering the isolated context in which social media advertisements are consumed; acknowledging that sharing of content is central to the function of social media; when applying r 2(e) of the Code, considering the dual role of political parties as both information disseminators and advocacy groups; considering the rapid and broad dissemination of misleading advertising on social media preventing robust debate; and finally, when upholding complaints, demonstrating that upon engagement with the particular facts, a limit on speech is proportional and justified.

Such an approach will likely result in more advertisements being found to be misleading. This fetters the highly protected political speech contained in advertisements. Such restrictions are justified in light of the "critical threat to public life" that misleading social media advertising poses.²²⁵ In response to research on the global proliferation of misleading political information on social media, political scientists and legal scholars argued that "[w]e must redesign our information ecosystem in the 21st century" to mitigate the harm it causes.²²⁶ By taking an evidence-based and cautious alternative approach, the ASA can play the role entrusted to it in ensuring the information ecosystem is fit for the 21st century. Doing so is essential to mitigating the threat that misleading political advertising on social media poses to Aotearoa New Zealand's democracy.

223 *Reeve v New Zealand National Party* (ASCB), above n 28, at 1.

224 *Mellor v New Zealand National Party* (ASCB), above n 3, at 1; *Mellor v New Zealand National Party* (ASCAB), above n 63, at 1; and *Webb*, above n 3, at 1.

225 Bradshaw and Howard, above n 1, at 3.

226 David Lazer and others "The science of fake news" (2018) 359 *Science* 1094 at 1095.