

Maisy Bentley

The Advertising Standards Authority and the self-regulation of misleading political advertising on social media: the need for a stricter approach to protect New Zealand's democracy.

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2020

Abstract

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. Now advertising by political parties on social media is commonplace. Public discourse about misleading political information on social media is growing, so too are concerns about the impact this has on democracy. In New Zealand, the Advertising Standards Authority, through a self-regulatory 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 paper assesses the reasoning the Advertising Standards Authority uses to adjudicate claims that a political party advertisement on social media is misleading. This paper argues that the approach is too lenient and key elements are not congruent with social science evidence. Misleading political advertising can harm democracy, 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 includes five additional points of consideration to 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.

Keywords *“Advertising”, “Political speech”, “Self-regulation”, “Social media”, “Democracy”.*

Table of Contents:

<i>I Introduction</i>	1
<i>II The ASA</i>	2
<i>III Decision on the Petrol Advertisement</i>	4
<i>IV The ASA’s Broader Approach</i>	7
<i>V Assessing the ASA’s decision</i>	9
<i>A Consumer Knowledge and Discourse</i>	10
<i>B Sharing and Audience</i>	11
<i>C Understanding Consumer Behaviour</i>	13
<i>D Advocates or Information Disseminators</i>	13
<i>E Summary</i>	14
<i>VI The Consequence: Harm</i>	14
<i>VII A Better, Stricter Approach</i>	16
<i>A Public Discourse</i>	16
<i>B Sharing and Audience</i>	16
<i>C The Dual Nature of Political Parties’ Social Media Channels</i>	17
<i>D Public Function and The Bill of Rights</i>	17
<i>E Fair Play and Robust Debate</i>	19
<i>F Greater Explanations</i>	20
<i>G Amending the Guidance Note on Advocacy Advertising</i>	21
<i>VIII Justifications</i>	22
<i>A Giving effect to the ASA’s Code and Guidance Notes</i>	22
<i>B Alternative Approach Justified Despite Limits on Speech</i>	23
1 <i>Harm</i>	25
2 <i>Marketplace of ideas</i>	26
3 <i>Breathing space and chilling effect</i>	27
<i>IX Conclusion</i>	28
<i>X Bibliography</i>	31

I Introduction

On 5 December 2019, the National Party of New Zealand posted an advertisement on their Facebook and Twitter pages.¹ The advertisement contained a bar graph which disproportionately displayed the price of petrol and the amount of tax paid on petrol under the Labour and National Governments.² It was held by the Advertising Standards Authority (the ASA) not to be misleading.³ This paper will detail the reasoning the ASA used to adjudicate this complaint. It will then outline how using a similar approach, the ASA upholds complaints about misleading political advertising on social media at a rate that is nearly two-thirds lower than other types of complaints made to the ASA.⁴ This paper suggests that approach is too lenient and at odds with social science evidence about what will mislead consumers. This is of importance because misleading political advertising is harmful to democracy, the information infrastructure of social media exacerbates such harm.⁵ In light of that harm, this paper will then suggest an alternative stricter approach. Including, five additional points of consideration to be added to the ASA's Guidance Note on Advocacy Advertising. These would be considered when adjudicating complaints about misleading political advertising on social media. This approach is a greater restriction on the highly protected political speech contained in such advertisements. However, this is justified in light of the "critical threat to public life" that misleading political advertising on social

¹ NZ National Party "Status 5 December 2019" Twitter <www.twitter.com>, New Zealand National Party "Status 5 December 2019" Facebook <www.facebook.com>.

² Thomas Lumley "Graphical Inflation" (5 December 2019) StatsChat <statschat.org.nz>.

³ 19/465 The Advertising Standards Authority 22 January 2020 at 1.

⁴ The Advertising Standards Authority *Annual Report 2019* (2019) at 4, The Advertising Standards Authority *Annual Report 2018* (2018) at 4, The Advertising Standards Authority *Annual Report 2017* (2017) at 4, 17/320 The Advertising Standards Authority, 18 September 2017, 17/303 The Advertising Standards Authority, 7 September 2017, 17/334 The Advertising Standards Authority, 18 September 2017, 17/335 The Advertising Standards Authority, 18 September 2017, 17/377 The Advertising Standards Authority, 16 October 2017, 18/208 The Advertising Standards Authority, 24 July 2018, 18/015 The Advertising Standards Authority, 2 February 2018, 17/435 The Advertising Standards Authority, 24 January 2018, 19/047 The Advertising Standards Authority, 19 February 2019, 19/071 The Advertising Standards Authority, 9 April 2019, 19/104 The Advertising Standards Authority, 9 April 2019, 19/237 The Advertising Standards Authority, 8 July 2019, 19/251 The Advertising Standards Authority, 13 August 2019, 19/259 The Advertising Standards Authority, 13 August 2019, 19/261 The Advertising Standards Authority, 22 July 2019, 19/275 The Advertising Standards Authority, 27 August 2019, 19/279 The Advertising Standards Authority, 27 August 2019, 19/293 The Advertising Standards Authority, 12 August 2019, 19/314 The Advertising Standards Authority, 14 October 2019, 19/344 The Advertising Standards Authority, 15 October 2019, 19/356 The Advertising Standards Authority, 24 September 2019, 19/373 The Advertising Standards Authority, 30 September 2019, 19/399 The Advertising Standards Authority, 14 October 2019.

⁵ Samantha Bradshaw and Philip Howard "Challenging Truth and Trust: A Global Inventory of Organized Social Media Manipulation" (Working Paper, University of Oxford, 2018) at 21.

media poses.⁶ An alternative approach not only has merit but is essential to mitigate such a threat to New Zealand's democracy.

II The ASA

The ASA is a self-regulatory body.⁷ It is funded by the advertising and media industries.⁸ The system is complementary to a legislative framework.⁹ The ASA has three objectives. First, to maintain proper and generally acceptable standards of advertising and to ensure that advertising is not misleading or deceptive. Second, to establish and promote effective self-regulation. Finally, establish and fund an Advertising Standards Complaints Board (the Board) and an Advertising Standards Appeal Board (the Appeal Board).¹⁰ 'The ASA' will be used to refer to all three bodies throughout this paper.

The ASA's jurisdiction extends to social media.¹¹ The ASA's Guidance Note on Identifying Advertising includes a broad definition.¹² The note defines advertising as:¹³

[A]ny message, the content of which is controlled directly or indirectly by the advertiser ... with the intention to influence the choice, opinion or behaviour of those to who it is addressed.

Consumers complain to the Board when they believe an advertisement breaches the Advertising Standards Code (the Code).¹⁴ The Board adjudicates whether the advertisement has breached the Code.¹⁵ If the Code has been breached, a complaint is upheld and the advertisement must be removed or amended.¹⁶ Decisions can be appealed to the Appeal

⁶ University of Oxford "Use of social media to manipulate public opinion now a global problem says new report" (26 September 2019) Oxford Internet Institute <www.oii.ox.ac.uk> at [4].

⁷ *Laws of New Zealand* Regulation of Publication by the Media (online ed) at [193].

⁸ The Advertising Standards Authority *Bugger, it's Okay- the Case for Advertising Self-regulation* (2008) at 3.

⁹ At 7.

¹⁰ *Laws of New Zealand*, above n 7, at [193].

¹¹ The Advertising Standards Authority *Guidance Note on Social Media* (The Advertising Standards Authority, October 2012) at 1.

¹² The Advertising Standards Authority *Guidance Notes on Identification of Advertisements* (The Advertising Standards Authority, September 2020) at 1.

¹³ At 1.

¹⁴ Rosemary Tobin *New Zealand Media and Entertainment Law* (Thomson Reuters, Wellington, 2017) at 237.

¹⁵ The Advertising Standards Authority "The Complaint Decision Process" The Advertising Standards Authority <www.asa.co.nz>.

¹⁶ Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (7th ed, Lexis Nexis, Wellington, 2015) at 895.

Board.¹⁷ The ASA cannot enforce takedown or amendment requests.¹⁸ However, there is “invariably compliance”.¹⁹

The purpose of the Code is to “ensure that every advertisement is a responsible advertisement”.²⁰ The Code is made up of two principles: social responsibility and truthful representation.²¹ Each is supported by rules, that are “examples of how the principles are to be interpreted and applied”.²² Each rule is supported by guidelines, that “further explain a rule”.²³ In addition, the Code is accompanied by several guidance notes that “provide more extensive guidelines and are to be read in conjunction with specific rules”.²⁴ For example, the “Guidance Note on Advocacy Advertising” captures the Advocacy Principles and is to be read in conjunction with r1 2(e).²⁵ The Advocacy Principles apply to political advertisements.²⁶ The Advocacy Principles include five points, they are:²⁷

1. 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 advertisers. The Codes should be interpreted liberally to ensure fair play by the contestants.

¹⁷ At 894.

¹⁸ Ursula Cheer, above n 16, at 896.

¹⁹ The Advertising Standards Authority, above n 8, at 7.

²⁰ The Advertising Standards Authority *The Advertising Standards Code* (The Advertising Standards Authority, 2018) at 2.

²¹ At 2-8.

²² At 1.

²³ At 1.

²⁴ At 2.

²⁵ Advertising Standards Authority *Guidance Note on Advocacy Advertising* (The Advertising Standards Authority, 2018) at 1.

²⁶ At 1.

²⁷ At 2.

5. That it is essential in all advocacy advertisements that the identity of the advertiser is clear.

III Decision on the Petrol Advertisement

The Board applied the Code and principles to find that the petrol advertisement posted by the National Party in December was not misleading.²⁸ Subsequently, the Appeal Board used similar reasoning to dismiss an appeal of that decision.²⁹

The advertisement featured a bar graph. The graph compared the average price of petrol over nine years while the National Party was in government with the average price of petrol over one month while the Labour Party was in government.³⁰ The graph disproportionately displayed the price of petrol and the amount of tax paid on petrol under the Labour Government.³¹ It exaggerated the price four-fold.³² However, the correct figures were listed in the advertisement.³³

First, the Board assessed whether the advertiser's identity was clear and concluded that it was.³⁴ Then, the Board assessed that it was an advocacy advertisement so, rl 2(e) applied.³⁵ Rule two is concerned with truthful representation, to ensure this, rl 2(e) requires that:³⁶

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, what the consumer would likely perceive when viewing the advertisement.³⁷ The ASA's objective through rl 2 is to prevent consumers from being misled; therefore, the consumer takeout weighs heavily

²⁸ The Advertising Standards Authority, above n 3, at 4.

²⁹ *19/465 Appeal 20/002* The Advertising Standards Authority, 19 March 2020, at 1.

³⁰ The New Zealand National Party, above n 1.

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

³² Thomas Lumley, above n 2.

³³ The Advertising Standards Authority, above n 3, at 4.

³⁴ At 3.

³⁵ At 3.

³⁶ The Advertising Standards Authority, above n 20, at 9.

³⁷ *18/208* The Advertising Standards Authority, 24 July 2018 at 2, *19/275* The Advertising Standards Authority, 27 August 2019 at 2.

on the Board's decision.³⁸ 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.³⁹ The Board then assesses whether that fact is substantiated.⁴⁰ 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, they would become law".⁴¹ 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.⁴² The advertiser did not have to show that it would at some point come into force.⁴³

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."⁴⁴ However, Thomas Lumley, a Professor of biostatistics at the University of Auckland, found that the graph portrayed that, under Labour, the price of petrol was 61 per cent more and tax was 92 per cent more.⁴⁵ If the Board recognised this as the consumer takeout, it would be impossible to substantiate because it was not true.

The Board decided the advertisement was not misleading because the correct figures were on the graph.⁴⁶ A minority disagreed and said, "it was reasonable for an audience to assume the visual element of a graphic comparison would match the numerical data it represents."⁴⁷ The Appeal Board agreed with the majority noting 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.⁴⁸

³⁸ The Advertising Standards Authority, above n 20, at 12.

³⁹ 19/279 The Advertising Standards Authority, 27 August 2019 at 2.

⁴⁰ The Advertising Standards Authority, above n 20, at 10.

⁴¹ 17/303 The Advertising Standards Authority, 7 September 2017 at 4.

⁴² At 4.

⁴³ At 4.

⁴⁴ The Advertising Standards Authority, above n 3, at 2.

⁴⁵ Thomas Lumley, above n 2.

⁴⁶ The Advertising Standards Authority, above n 3, at 3.

⁴⁷ At 3.

⁴⁸ The Advertising Standards Authority, above n 29, at 5.

The Board noted the placement of the advertisement on the National Party Facebook and Twitter pages. It said:⁴⁹

[T]he 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:⁵⁰

[T]he 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.”⁵¹ It then stated that the advertisement reaching a wider audience through sharing on the social media platform was outside the advertiser’s control and intended audience.⁵² Neither board explained how an interest in policy and performance helped to prevent the advertisement from being misleading nor evidence to substantiate this view.⁵³

The New Zealand Court of Appeal has held that the ASA “in carrying out a public regulatory role, though in accordance with powers conferred ... by a private organisation, must be regarded as exercising public power.”⁵⁴ Therefore, the ASA has a legal obligation to comply with the New Zealand Bill of Rights Act 1990 (Bill of Rights).⁵⁵ The ASA self-regulatory system fetters free speech in its ability to request the amendment or takedown of advertisements that are deemed to breach the Code.⁵⁶ The ASA takes a boilerplate approach

⁴⁹ The Advertising Standards Authority, above n 3, at 4.

⁵⁰ At 4.

⁵¹ The Advertising Standards Authority, above n 29, at 4.

⁵² At 4.

⁵³ At 4, The Advertising Standards Authority, above n 3, at 4.

⁵⁴ *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA) at 433.

⁵⁵ The New Zealand Bill of Rights Act 1990, s 3.

⁵⁶ Rosemary Tobin, above n 14, at 2.

to the Bill of Rights. Most decisions, including the petrol advertisement, have the same paragraph summarising the Board’s position:⁵⁷

Political advertisements 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

The reasoning used to respond to complaints about the petrol advertisement reflects the ASA’s broader approach. Complaints about social media advertisements still make up a minority of complaints received by the ASA but have been increasing since 2012.⁵⁸ All complaints about political advertising on social media concern claims that the advertisement is misleading compared to 45 per cent of all complaints received by the ASA.⁵⁹ Around 35 per cent of all complaints are upheld.⁶⁰ However, complaints about political party advertisements are upheld at only a rate of 12.5 per cent since 2017.⁶¹ Many of the decisions use similar reasoning to the petrol decision.⁶² For example, in 2019 the National Party posted an advertisement on social media claiming Labour had put “75 times more funding into the Provincial Growth Fund than it had into Pharmac”.⁶³ The Appeal Board found it not misleading.⁶⁴ It noted the placement of the advertisement on the National Party Facebook page.⁶⁵ It said consumers would likely have a “political interest in budget

⁵⁷ The Advertising Standards Authority, above n 3, at 3, 18/200 The Advertising Standards Authority, 24 July 2008 at 4, 17/303 The Advertising Standards Authority, 7 September 2017 at 3, 19/275 The Advertising Standards Authority, 27 August 2019, at 3, 19/279 The Advertising Standards Authority, 27 August at 3.

⁵⁸ The Advertising Standards Authority *Annual Report 2019* (2019) at 3, The Advertising Standards Authority *Annual Report 2018* (2018) at 3, The Advertising Standards Authority *Annual Report 2017* (2017) at 3.

⁵⁹ The Advertising Standards Authority, above n 4.

⁶⁰ The Advertising Standards Authority, above n 58.

⁶¹ The Advertising Standards Authority, above n 4.

⁶² The Advertising Standards Authority, above n 58.

⁶³ The Advertising Standards Authority, above n 39, at 1.

⁶⁴ 19/279 Appeal 19/011 The Advertising Standards Authority, 25 November 2019 at 1.

⁶⁵ At 3.

allocations” and the “political stance a party’s own Facebook page was likely to present”.⁶⁶ This affected the consumer takeout of what statement the advertisement was making, this in turn, affected the level of substantiation required.⁶⁷ The Appeal Board said:⁶⁸

The substantiation provided within the context of an advocacy advertisement could support the view that in 2019 the Provincial Growth Fund continued to receive \$1 billion while Pharmac was only allocated an extra or new \$40 million over 4 years. Looking at the wider context helped to justify the 75 times more statement.

Similarly, in 2017 the National Party posted a video to its Twitter page that outlined “Labour’s Tax Agenda”.⁶⁹ The advertisement used the Labour Party logo and the colour red.⁷⁰ The advertisement attracted several complaints. The complaints said it would lead consumers to think these taxes were Labour’s official stance.⁷¹ Such a statement could not be substantiated.⁷² Like other decisions referenced, the Board said the context, including public debate and placement on the Twitter page, was crucial to its decision.⁷³ 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 Labour’s tax policy not Labour’s official stance.⁷⁴ The advertiser, therefore, did not have to substantiate its comments and the complaint was not upheld.⁷⁵

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.⁷⁶ Five of these

⁶⁶ At 3.

⁶⁷ At 3.

⁶⁸ At 3.

⁶⁹ The Advertising Standards Authority, above n 41, at 1.

⁷⁰ At 1.

⁷¹ At 1.

⁷² At 4.

⁷³ At 4.

⁷⁴ At 4.

⁷⁵ At 5.

⁷⁶ 17/091 The Advertising Standards Authority, 20 March 2017, 17/107 The Advertising Standards Authority, 13 April 2017, 17/124 The Advertising Standards Authority, 20 April 2017, 17/242 The Advertising Standards Authority, 22 August 2017, 17/286 The Advertising Standards Authority, 12 September 2017, 17/303 The Advertising Standards Authority, 7 September 2017, 17/320 The Advertising Standards Authority, 18 September 2017, 17/334 The Advertising Standards Authority, 18 September 2017, 17/335 The Advertising Standards Authority, 18 September 2017, 17/338 The Advertising Standards Authority, 10 October 2017, 17/360 The Advertising Standards Authority, 14 November 2017, 17/373 The Advertising Standards Authority, 14 November 2017, 17/377 The Advertising Standards Authority, 16 October 2017, 17/393 The Advertising Standards Authority, 14 November 2017.

complaints related to advertisements by political parties.⁷⁷ All five complaints concerned claims the advertisements were misleading.⁷⁸ Four of the complaints had no grounds to proceed.⁷⁹ One of the complaints was not upheld.⁸⁰ All five of these decisions adopted a similar approach used to adjudicate complaints about the petrol advertisement.⁸¹ All five assumed a consumer takeout that interpreted the advertisement broadly and resulted in a low level of substantiation being required.⁸²

Of the total 603 complaints to the ASA in 2017 55 per cent concerned misleading advertising.⁸³ 37 per cent of advertisements were removed or amended.⁸⁴ Similar figures were seen in 2018 and 2019.⁸⁵ In comparison, all complaints about political party advertisements on social media concerned claims the advertisements were misleading.⁸⁶ In 2017 none of these complaints were upheld, in 2018 one complaint was partially upheld and in 2019 two complaints were upheld.⁸⁷ Therefore, complaints about misleading political advertising are upheld at a rate of 12.5 per cent.⁸⁸ This is almost two-thirds lower than the rate at which other complaints made to the ASA are upheld.⁸⁹

V Assessing the ASA's decision

In light of social science evidence, the ASA's approach to the petrol advertisement is too lenient. Such an approach is reflected in its response to many other claims that political

⁷⁷ 17/320 The Advertising Standards Authority, 18 September 2017, 17/303 The Advertising Standards Authority, 7 September 2017, 17/334 The Advertising Standards Authority, 18 September 2017, 17/335 The Advertising Standards Authority, 18 September 2017, 17/377 The Advertising Standards Authority, 16 October 2017.

⁷⁸ At 1.

⁷⁹ 17/320 The Advertising Standards Authority, 18 September 2017, 17/334 The Advertising Standards Authority, 18 September 2017, 17/335 The Advertising Standards Authority, 18 September 2017, 17/377 The Advertising Standards Authority, 16 October 2017.

⁸⁰ 17/303 The Advertising Standards Authority, 7 September 2017.

⁸¹ 17/320 The Advertising Standards Authority, 18 September 2017, 17/334 The Advertising Standards Authority, 18 September 2017, 17/335 The Advertising Standards Authority, 18 September 2017, 17/377 The Advertising Standards Authority, 16 October 2017, 17/303 The Advertising Standards Authority, 7 September 2017.

⁸² At 2.

⁸³ The Advertising Standards Authority *Annual Report 2017* (2017), at 4.

⁸⁴ At 4.

⁸⁵ The Advertising Standards Authority *Annual Report 2018* (2018), at 4.

⁸⁶ The Advertising Standards Authority, above n 4.

⁸⁷ 17/320 The Advertising Standards Authority, 18 September 2017, 17/303 The Advertising Standards Authority, 7 September 2017, 17/334 The Advertising Standards Authority, 18 September 2017, 17/335 The Advertising Standards Authority, 18 September 2017, 17/377 The Advertising Standards Authority, 16 October 2017, 18/200 The Advertising Standards Authority, 24 July 2008 at 4, 19/275 The Advertising Standards Authority, 27 August 2019, 19/279 The Advertising Standards Authority, 27 August 2019.

⁸⁸ The Advertising Standards Authority, above n 4.

⁸⁹ The Advertising Standards Authority, above n 58, at 4.

advertisements on social media are misleading. This is of concern because misleading advertising can harm democracy.⁹⁰ The ASA misconstrued the context, in particular, the relevance of public discourse and the target audience of the advertisement. 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.

A Consumer Knowledge and Discourse

The Board's proposition that:⁹¹

[T]he 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.

is not supported by fact.

In this decision, the Board has not articulated how having an interest in policy or understanding the political stance presented by a political party social media page would prevent consumers from being misled.⁹² In other decisions, the ASA said that because of this interest consumers would have a greater knowledge of the public debate.⁹³ Such knowledge would make clear the advertisement is an opinion, which under the Code does not need to be substantiated.⁹⁴ 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 mediums. The advertisements will be consumed among a variety of advertisements, possibly including competing views on the same issue.⁹⁵ Social media has fundamentally different characteristics.⁹⁶ Advertisements can be micro-targeted

⁹⁰ Samantha Bradshaw and Philip Howard, above n 5, at 23.

⁹¹ The Advertising Standards Authority, above n 3, at 4.

⁹² At 4.

⁹³ The Advertising Standards Authority, above n 41, at 4.

⁹⁴ The Advertising Standards Authority, above n 20, at 9, The Advertising Standards Authority, above n 64, at 3.

⁹⁵ 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) at 275.

⁹⁶ Sarah Oates *Introduction to Media and Politics* (SAGE Publishing, California, 2012) at 156.

to very specific groups.⁹⁷ A combination of manual sharing and algorithms dictate the distribution of unpaid content.⁹⁸ So, social media users are likely to see advertisements amongst selected or targeted content rather than a range of views or the public discourse.⁹⁹ It could be argued that despite consumers viewing social media advertisements in this isolated context they will be informed of the public debate from other sources. However, half of New Zealand's population is disengaged with traditional news.¹⁰⁰ Instead, Facebook has a 15 per cent share of news consumption in New Zealand, comparatively, newspapers and radio have 13 per cent and nine per cent respectively.¹⁰¹ 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 made.

B Sharing and Audience

The Board noted the context of the advertisement on the National Party Facebook Page and said this was crucial to its decision.¹⁰² It held that those who follow the page will have an interest in policy and the stance the party "will make on their own page".¹⁰³ Even where 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, groups they are a part of or other pages.¹⁰⁴ When those who follow the political party page share the advertisement, it will reach their friends, family and followers who may have different views and who do not follow that page. Further, using data and algorithms social media platforms share content to consumers' News Feeds from pages they do not follow.¹⁰⁵

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 that context, the advertiser could only foresee and be

⁹⁷ Abby K. Wood and Ann M. Ravel "Fool me once: regulating "Fake news" and other online advertising" (2017) 91 S.Cal. L. Rev 1223 at 1225.

⁹⁸ Facebook "How News Feed Works" Facebook <www.facebook.com> Twitter "About your Twitter timeline" <www.twitter.com>.

⁹⁹ Abby K. Wood and Ann M. Ravel, above n 96, at 1225.

¹⁰⁰ Acumen *The Battle for Truth 2018 Acumen Edelman Trust Barometer* (March 2018) at 8.

¹⁰¹ NERA Economic Consulting *Fairfax/NZME: Review of the draft determination* (25 November 2016) at 19.

¹⁰² The Advertising Standards Authority, above n 3, at 4.

¹⁰³ At 10.

¹⁰⁴ Maksym Gabielkov, Arthi Ramachandran, Augustin Chaintreau and Arnaud Legout "Social Clicks: What and Who Gets Read on Twitter?" (paper presented to IFIP Performance Conference, Antibes, 13 April 2016) at 9.

¹⁰⁵ Facebook and Twitter, above n 98.

responsible for ensuring it is not misleading in the original context not when it is reproduced.¹⁰⁶

Despite this, the Appeal Board has said that sharing of the advertisement on social media is outside of the advertisers' control and therefore those who view it this way are not considered as part of the audience.¹⁰⁷ However, in contrast to traditional mediums, sharing of advertisements is a direct and foreseeable, if not intended, purpose and function of social media advertising.¹⁰⁸ It is built into the very infrastructure of the platforms.¹⁰⁹ Advertisers are aware of this and seek to capitalise off it.¹¹⁰ The extensive proliferation of misleading advertising by political parties on social media supports the view that they are aware of the ability it has to spread widely.¹¹¹ Evidence shows that political parties' use of misleading information to manipulate voters is calculated and evidence based.¹¹²

The ASA is correct to say that a central way this extended audience will see the advertisement is when it is manually shared by consumers who follow the page.¹¹³ However, this is not the only way. Consumers' News Feeds on Facebook includes content about their friends' activity. Including, when a friend comments on content belonging to someone who is not in the consumer's network or on content in a group that the consumer is not part of.¹¹⁴ On Twitter, a consumer's Timeline includes content from pages that the consumer has not followed.¹¹⁵

So, 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. It will also include those who do not follow the page,

¹⁰⁶ The Advertising Standards Authority, above n 29, at 9.

¹⁰⁷ The Advertising Standard Authority, above n 3, at 4.

¹⁰⁸ Facebook "Sharing" Facebook <www.facebook.com>.

¹⁰⁹ Twitter "Retweet FAQs" <www.help.twitter.com>, Facebook "How do I share a post I see on my timeline" <facebook.com>.

¹¹⁰ McKay Coppins "The Billion Dollar Disinformation Campaign to Re-elect the President" *The Atlantic* (online ed, Boston, 10 February 2020) at [27].

¹¹¹ Samantha Bradshaw and Philip Howard, above n 5, at 9.

¹¹² Nicky Hager "The Hollow Men: Chapter 1: The Path of Principle" (21 November 2006) Nicky Hager <www.nickyhager.info>.

¹¹³ Facebook and Twitter, above n 98.

¹¹⁴ Facebook "How News Feed Works" Facebook <www.facebook.com>.

¹¹⁵ Twitter "About your Twitter timeline" Twitter <www.twitter.com>.

so without this context are less likely to know it is an opinion. This group, therefore, could be misled under r1 2 of the Code as opinion is not clearly distinguishable from fact.

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” but that it had to “consider it in its entirety which included the correct figures.”¹¹⁶ It held that because of those figures the advertisement was not misleading.¹¹⁷

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 globally have a “short attention span” and do not examine content closely.¹¹⁸ Further, psychological evidence shows most users are not good at identifying misleading information.¹¹⁹ In New Zealand, 64 per cent of people say they cannot decipher journalism from rumour and falsehood.¹²⁰ Additionally, 53 per cent cannot recognise respected sources of information.¹²¹ Finally, 52 per cent of New Zealanders admit unintentionally believing false information and 48 per cent are concerned about mistakenly spreading false information.¹²² This evidence supports the view that using the data displayed to calculate that the graph visually misrepresented it is inconsistent with consumer behaviour which does not closely examine information. In light of this evidence, it can be assumed most social media users would believe the graph is reflective of the figures and therefore be misled by the advertisement.

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 they will know the “stance” that page will present.¹²³ Statements of opinion do not require substantiation.¹²⁴ In contrast, evidence

¹¹⁶ The Advertising Standards Authority, above n 29, at 5.

¹¹⁷ At 5.

¹¹⁸ Maksym Gabielkov, Arthi Ramachandran, Augustin Chaintreau and Arnaud Legout, above n 103, at 9.

¹¹⁹ Kai Shu, Amy Silvia, Suhang Wang, Jiliang Tang and Huan Liu “Fake News Detection on Social Media: A Data Mining Perspective” (2017) 19 ACM SIGKDD 5 at 6.

¹²⁰ Acumen, above n 100, at 7.

¹²¹ At 7.

¹²² Netsafe *Fake news survey results* (20 August 2020) at 1.

¹²³ The Advertising Standards Authority, above n 39, at 3.

¹²⁴ The Advertising Standards Authority *Guidance Note on Responding to a Complaint about Misleading Claims* (October 2019) at 1.

shows that political parties' social media presence plays a dual role as official information channels and advocacy platforms.¹²⁵ This has made it increasingly difficult for consumers to differentiate between fact and opinion.¹²⁶

Previously, there were clear channels of communicating factual information such as reports on official stationery or a press conference.¹²⁷ This is no longer the case. New Zealand political communications Professor Claire Robinson notes that announcements of policy are just as likely to be on a Facebook page as they are to be released as an official government document.¹²⁸ This mixture of uses was documented as far back as 2011 in a parliamentary research paper on "New Zealand Parliamentarians and Online Social Media".¹²⁹ This can create an ill-defined boundary between political and official information.¹³⁰ Therefore, in contrast to the ASA's view, the erosion of this boundary means it has become increasingly difficult for consumers to differentiate between factual information and opinion or advocacy on political party social media pages.¹³¹

E Summary

Despite the ASA finding that this advertisement will not mislead consumers, evidence shows that central parts of its reasoning are not congruent with the realities of social media consumption.

VI The Consequence: Harm

In light of social science evidence, the ASA's approach to the petrol advertisement is too lenient. That approach is reflected in how the ASA adjudicates other similar complaints. This is of significance because misleading political advertising on social media can cause great harm. Professor Philip Howard, Director of the Oxford Internet Institute and co-author of a study of political misinformation across 70 countries says, "the manipulation of public opinion over social media platforms has emerged as a critical threat to public life".¹³² For

¹²⁵ Claire Robinson "How Facebook has revolutionised the art of persuasion" *Stuff* (online ed, Auckland, 8 September 2019) at [13].

¹²⁶ At [13].

¹²⁷ At [10].

¹²⁸ At [12].

¹²⁹ Christine Busby and Paul Bellamy *New Zealand Parliamentarians and Online Social Media* (Parliamentary Library, 15 February 2011) at 10.

¹³⁰ Claire Robinson, above n 125, at [13].

¹³¹ At [15].

¹³² Samantha Bradshaw and Philip Howard, above n 5, at 1.

some countries, the threat of misinformation is related to foreign interference.¹³³ While that is not the focus of this paper, the report details similar harms to citizens and their ability to engage in democracy as a result of this misleading information regardless of its source.¹³⁴

This harm is twofold. First, advertising is shown to have a measurable effect on consumer behaviour.¹³⁵ When advertising is misleading consumers are unable to exercise proper autonomy due to lacking full and accurate information.¹³⁶ Autonomy is essential to a functioning democracy and elections must be free, fair and informed.¹³⁷ More specifically, it is known that misleading information plays a role in determining the course of elections.¹³⁸ False statements cannot only influence but distort the electoral process.¹³⁹ Democracy presupposes an informed and autonomous electorate.¹⁴⁰ So, where false advertisements mislead voters, they interfere with the process upon which democracy is based.

Second, the purpose of regulating misleading advertising is to prevent undermining confidence in advertisers.¹⁴¹ In the case of misleading political advertising, this could undermine confidence and trust in democracy.¹⁴² Professor Philip Howard affirms this threat, saying, the use of misleading political information to manipulate public opinion over social media has the potential “to undermine trust in the media, public institutions and science”.¹⁴³ Despite not being able to identify individual instances of misleading advertising, consumers are increasingly aware of misleading information.¹⁴⁴ For example,

¹³³ Digital, Culture, Media and Sport Committee *Disinformation and 'fake news': Final Report* (United Kingdom House of Commons, 14 February 2019), 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).

¹³⁴ Samantha Bradshaw and Philip Howard, above n 5, at 21.

¹³⁵ At 7, 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 12.

¹³⁶ At 8.

¹³⁷ Michael Pendlebury “Individual autonomy and global democracy” (2004) 103 *Theoria: A Journal of Social and Political Theory* 43 at 45, Royal Commission on the Electoral System Report of the Royal Commission on the Electoral System: Towards a Better Democracy (December 1986) at 190.

¹³⁸ Monther Aldwairi and Ali Alwahedi “Detecting Fake News in Social Media Networks” (2018) 141 *Procedia Computer Science* 215 at 217.

¹³⁹ *Harper v Canada* [2004] 1 SCR 827 at 828-829, *Watson v Electoral Commission* [2015] NZHC 666; BC201560840 [108].

¹⁴⁰ Royal Commission on the Electoral System, above n 137, at 190.

¹⁴¹ The Advertising Standards Authority, above n 8, at 2.

¹⁴² Samantha Bradshaw and Philip Howard, above n 5, at 21.

¹⁴³ At 1.

¹⁴⁴ Netsafe, above n 122, at 1.

48 per cent of New Zealanders are concerned about mistakenly spreading it and many are concerned about family members not being able to identify it.¹⁴⁵

Such harms are not theoretical. The United Kingdom Parliament's inquiry into disinformation and fake news stated:¹⁴⁶

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

VII A Better, Stricter Approach

A better, stricter approach is needed to mitigate the harm caused by misleading political advertising.

A Public Discourse

A new approach should account for evidence about consumers' knowledge of the public discourse. The ASA has said that because of an interest in politics which can be assumed by their following of a political party page, consumers would have a greater knowledge of the public debate and surrounding facts.¹⁴⁷ Such knowledge would make clear the advertisement is an opinion, which under the Code does not need to be substantiated.¹⁴⁸ However, evidence shows that social media advertisements are consumed in an isolated context and consumers are disengaged from traditional news.¹⁴⁹ The ASA needs to account for the fact that because consumers do not have this broader context in which to place the statements made in advertisements they may be more likely to be misled.

B Sharing and Audience

When correctly considered the placement on a political party's page should not be a determinant when adjudicating complaints. The ASA's view is that those who like the page will have an interest in politics or a higher level of knowledge.¹⁵⁰ Even if this is accepted,

¹⁴⁵ At 1.

¹⁴⁶ Digital, Culture, Media and Sport Committee, above n 133, at 5.

¹⁴⁷ The Advertising Standards Authority, above n 41, at 4.

¹⁴⁸ The Advertising Standards Authority, above n 20, at 9, The Advertising Standards Authority, above n 64, at 3.

¹⁴⁹ Abby K. Wood and Ann M. Ravel, above n 97, at 1225, NERA Economic Consulting, above n 101, at 19.

¹⁵⁰ The Advertising Standards Authority, above n 6, at 3.

it does not prevent the advertisement from misleading those who do not like or follow the page but see the post as a result of micro-targeting, sharing or otherwise. This wider audience seeing the advertisements is inevitable, well known and sought to be utilised by advertisers.¹⁵¹ In such an instance, 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 the advertisement "lacked context or qualification to prevent misleading or confusing consumers".¹⁵² So, the correct view is that such advertisements could be misleading.

C The Dual Nature of Political Parties' Social Media Channels

Due to the dual channels of communicating both advocacy and official information it is increasingly difficult for consumers to know what is fact and opinion on political parties' social media channels. So, in contrast to the ASA's current approach consumers may be less likely to know they are receiving an opinion when an advertisement is on a political party's social media page. This may lead consumers to be confused as to the nature of the statement. Under r1 2 of the Code, opinion and fact must be distinguishable.¹⁵³ So if consumers cannot distinguish if it is fact or opinion it will breach that rule and the complaint should be upheld.¹⁵⁴

D Public Function and The Bill of Rights

In addition, commercial and political cases need a different approach. Such an approach should account for the ASA's public function. It should also incorporate an analysis of whether upholding the complaint, which results in an amendment or takedown is a proportional and justified restriction on free speech.

The Code is commercially focused. It has been described as "an expression of the business community's recognition of its social responsibilities".¹⁵⁵ Recognising such social responsibilities and preventing misleading commercial advertising is important. However,

¹⁵¹ Nicky Hager, above n 112.

¹⁵² The Advertising Standards Authority, above n 3, at 3.

¹⁵³ The Advertising Standards Authority, above n 8, at 8.

¹⁵⁴ The Advertising Standards Authority, above n 25, at 8.

¹⁵⁵ The Advertising Standards Authority, above n 8, at 3.

misleading political advertising can have far worse consequences.¹⁵⁶ The ASA performs an important public function in preventing such consequences. 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 engagement with the individual circumstances but uses the same paragraph in most decisions.¹⁵⁷ Such an approach does not provide assurance that the legal obligation to comply with the Bill of Rights is being met in every case.¹⁵⁸

Citizens have the right to free speech.¹⁵⁹ However, rights can be restricted where it is reasonable, prescribed by law and demonstrably justified in a free and democratic society.¹⁶⁰ For a limit to be demonstrably justified it must be proportionate.¹⁶¹ The ASA needs to demonstrate that it has considered whether limiting freedom of expression is proportional and justified.¹⁶²

A proportionality analysis requires balancing the right to free speech against what is achieved by limiting it through the self-regulatory scheme.¹⁶³ The balancing process should include "reasoning rather than an impressionist process".¹⁶⁴ For the objective and limit to be proportional they must have a rational relationship to each other, there must be as little interference as possible with the right and the limitation must be demonstrably justifiable in light of the objective.¹⁶⁵

¹⁵⁶ Samantha Bradshaw and Philip Howard, above n 5, at 3.

¹⁵⁷ The Advertising Standards Authority, above n 58.

¹⁵⁸ 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) at 297.

¹⁵⁹ New Zealand Bill of Rights Act 1990, s 14.

¹⁶⁰ Section 5.

¹⁶¹ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [18].

¹⁶² The White Paper draft Bill of Rights acknowledged the importance of thorough analysis of the reasonableness of limits on expression. Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6, [10.57].

¹⁶³ *Watson v Electoral Commission*, above n 139, at [108].

¹⁶⁴ Claudia Geiringer and Steven Price, above n 158, 319.

¹⁶⁵ *Moonen v Film and Literature Board of Review*, above n 161, at [18].

Preventing harms to democracy is more important than preventing harm to the commercial advertising industry and is reflected in the strong protections given to democratic rights.¹⁶⁶ Therefore, in political compared to commercial cases there may be different limitations that are justified and proportional. The ASA needs to recognise this public function, the harms from misleading political advertising and the impact this has on its analysis by providing a greater justification for limits on free speech.

E Fair Play and Robust Debate

The ASA relies on Advocacy Principle four to say that the Code should be interpreted liberally.¹⁶⁷ However, the Advocacy Principles note that the Code should be interpreted “liberally to ensure fair play”.¹⁶⁸ This is because “robust debate in a democratic society is to be encouraged” and ensuring fair play facilitates this.¹⁶⁹ However, in the ASA’s decisions applying the Code liberally manifests in focusing on allowing an advertisement to remain.¹⁷⁰ Instead, it should consider whether allowing the advertisement to remain supports fair play or robust debate as prescribed by the Advocacy Principles.¹⁷¹

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.¹⁷² Three Massachusetts Institute of Technology scholars found that across the world, “falsehood diffuses significantly further, faster, deeper and more broadly than the truth, and in many cases by an order of magnitude”.¹⁷³ False stories are 70 per cent more likely to be retweeted than true stories are.¹⁷⁴ Further, true stories take almost six times longer than false stories to reach the same number of people.¹⁷⁵ This means there is not fair play. If one side is

¹⁶⁶ New Zealand Bill of Rights Act 1990, s 12-18, International Convention on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 25.

¹⁶⁷ The Advertising Standards Authority, above n 4, at 2.

¹⁶⁸ The Advertising Standards Authority, above n 25, at 1.

¹⁶⁹ At 1.

¹⁷⁰ 19/279 The Advertising Standards Authority, 27 August 2019, 17/303 The Advertising Standards Authority 7 September 2017, 18/208 The Advertising Standards Authority 24 July 2018, 19/071 The Advertising Standards Authority, 9 April 2019, 19/259 The Advertising Standards Authority, 13 August 2019.

¹⁷¹ The Advertising Standards Authority, above n 25, at 1.

¹⁷² 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) at 137.

¹⁷³ Peter Dizikes “Study: On Twitter, false news travels faster than true stories” MIT News <www.news.mit.edu>.

¹⁷⁴ Soroush Vosoughi, Deb Roy and Sinan Aral “The spread of true and false news online” (2018) 359 *Science* 1146 at 4.

¹⁷⁵ At 3.

sharing misleading information while the other is not it makes it extremely difficult to engage in fair and robust debate.

For example, in the lead up to the 2017 election, the Labour Party campaigned on fixing the housing crisis and said it was willing to look at tax measures like a capital gains tax to do so.¹⁷⁶ In response, the National Party launched the tax agenda advertisement discussed earlier in this paper.¹⁷⁷ The advertisement focused on Labour's plan to increase tax, including income tax.¹⁷⁸ Labour had repeatedly ruled out increasing income tax.¹⁷⁹ 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, Jacinda Ardern the leader of the Labour Party spent the week denying the income tax claim and later ruling out introducing any new taxes until after 2020.¹⁸⁰

Having robust debate requires different opinions to be heard. Misleading advertising on social media spreads further, faster and deeper than truth. This means there is not fair play and those with opposing views cannot engage in robust debate. The ASA needs to consider that 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.

F Greater Explanations

In regard to the petrol advertisement, neither the Complaints Board nor Appeal Board provided analysis or explanation of why it categorised the audience as outside of the advertiser's control.¹⁸¹ Further, it 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.¹⁸² Finally, neither Board provided any further commentary on why it believed the correct numbers being present prevented the disproportionate graphic from

¹⁷⁶ Laura Walters "Political parties ramp up attack ads- smart politics or fake news?" Stuff (online ed, Auckland, 10 May 2018) at [30].

¹⁷⁷ The Advertising Standards Authority, above n 41, at 1.

¹⁷⁸ At 1.

¹⁷⁹ Radio New Zealand "Labour rules out income tax increase" Radio New Zealand (New Zealand, 13 August 2017) at [1].

¹⁸⁰ Laura Walters, above n 176, at [33].

¹⁸¹ The Advertising Standards Authority, above n 3, at 4, The Advertising Standards Authority, above n 29, at 4.

¹⁸² The Advertising Standards Authority, above n 3, at 4.

being misleading.¹⁸³ It 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 engage with easily. 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 engage in such analysis. This would demonstrate engagement with the facts of each case and whether in light of those facts a limit on free speech is justified, rather than repeating the same paragraph in every decision as the Board does currently.¹⁸⁴ Additionally, doing so would help advertisers to better know when an advertisement might be classed as misleading.

G Amending the Guidance Note on Advocacy Advertising

Finally, to assist with the application of this alternative approach, this paper suggests that five additional points of consideration be added to the Guidance Note on Advocacy Advertising. These should be considered when adjudicating complaints about misleading political advertising on social media.

The additions are as follows:

- (1) Consider the changing way in which people receive information, including, that social media advertisements are consumed in an isolated context. Unlike other mediums, consumers may not be aware of the broader debate of 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 to those who do not follow a page. 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 rl 2(e) and adjudicating whether opinion is clearly distinguishable from fact the Board should consider the dual role of political parties on social media as advocates of political perspectives and disseminators of official information. Specifically, consider the impact this is shown to have on consumers' ability to differentiate between statements of opinion and fact.

¹⁸³ At 4, The Advertising Standards Authority, above n 29, at 5.

¹⁸⁴ The Advertising Standards Authority, above n 57.

- (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 the ASA should demonstrate that upon engagement with the particular facts a limit on speech is proportional and justified. In doing so consider the public function it 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.

VIII Justifications

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 better aligns 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 paper gives better effect to the ASA's objectives, Code and Guidance Notes. For example, social science evidence shows that it is increasingly difficult for consumers to know when political parties are presenting fact or opinion.¹⁸⁵ Under r1 2 of the Code, opinion and fact must be distinguishable.¹⁸⁶ So if consumers cannot distinguish if an advertisement is fact or opinion the complaint should be upheld.¹⁸⁷ Under the approach in this paper, the complaint would be upheld in line with r1 2. However, under the ASA's current approach, it is not. In contrast, the ASA uses the placement of the advertisement on a political party page as justification that a consumer would know they are receiving an opinion.¹⁸⁸

¹⁸⁵ Claire Robinson, above n 125, at [13].

¹⁸⁶ The Advertising Standards Authority, above n 20, at 2.

¹⁸⁷ The Advertising Standards Authority, above n 124, at 8.

¹⁸⁸ The Advertising Standards Authority, above n 3, at 4.

The ASA’s current approach focuses on interpreting the Code liberally rather than “liberally to ensure fair play” as the Advocacy Principles prescribe.¹⁸⁹ 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.¹⁹⁰ Correctly considering these factors as is advocated in this paper will better give effect to Advocacy Principle four by more accurately ensuring fair play and robust debate.¹⁹¹

The level of substantiation required in the decision regarding the provincial growth fund advertisement was low.¹⁹² The Board noted that the substantiation required “could support the view” made in the advertisement and that the “context helped to justify” the statement.¹⁹³ 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.¹⁹⁴ However, the guidance note also includes the need to consider the consequences if the claim is false and benefits if it is true.¹⁹⁵ As has been outlined the consequence of political parties making false claims on social media can be very harmful. The approach advocated in this paper encourages the ASA to better account for these harms.

The harm from misleading advertising is recognised in the Code and the power of the ASA to restrict speech, including political speech.¹⁹⁶ The Code was considered and created carefully to achieve that purpose and address that harm without creating unnecessary infringements on speech.¹⁹⁷ Therefore, an approach that is consistent with the Code achieves 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 free speech. 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, policy, election or a

¹⁸⁹ The Advertising Standards Authority, above n 25, at 1.

¹⁹⁰ The Advertising Standards Authority, above n 4, at 2, Soroush Vosoughi, Deb Roy and Sinan Aral, above n 174, at 4.

¹⁹¹ The Advertising Standards Authority, above n 25, at 2.

¹⁹² The Advertising Standards Authority, above n 64, at 3.

¹⁹³ At 3.

¹⁹⁴ The Advertising Standards Authority, above n 124, at 2.

¹⁹⁵ At 2.

¹⁹⁶ The Advertising Standards Authority, above n 25, at 1.

¹⁹⁷ The Advertising Standards Authority, above n 8, at 10-15.

referendum.¹⁹⁸ Political speech is “all speech relevant to the development of public opinion on a range of issues which intelligent citizens should think about.”¹⁹⁹ New Zealand courts have taken a wide interpretation of political speech noting that “in a representative democracy it would not be right to view information relevant to the democratic process too narrowly.”²⁰⁰

Political speech is extremely high-value speech.²⁰¹ The Privy Council has said, “political debate is at the core of representative democracy.”²⁰² New Zealand High Court has said this is because:²⁰³

[E]lectorate rights now affirmed by s 12 of the New Zealand Bill of Rights Act 1990 and the International Covenant on Civil and Political Rights on which it is based, cannot be properly exercised without sufficient knowledge about policies and candidates.

Three predominantly accepted theories validate the protection of speech.²⁰⁴ First, allowing individuals self-development of thought and autonomy.²⁰⁵ Second, that such speech contributes to the marketplace of ideas where truth will emerge from the competition of ideas in a free transparent public discourse.²⁰⁶ Finally, that political speech is valuable to democracy and society.²⁰⁷

On the surface, it appears that the ASA’s approach and its resistance to fetter such speech is justified. In the alternative, as will be argued here, a stricter approach is justified because of the extensive harm that is shown to be caused by misleading political advertising on social media.²⁰⁸

¹⁹⁸ The Advertising Standards Authority, above n 4.

¹⁹⁹ *Theophanous v. Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 124.

²⁰⁰ *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22 at 30.

²⁰¹ *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 460-461, *New York Times v Sullivan* (1964) 376 US 254 (SC) at 269-271.

²⁰² *Lange v Atkinson* [1999] UKPC 46 at [6], *Lange v Atkinson* [2000] 1 NZLR 257 at 260.

²⁰³ *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 200, at 30.

²⁰⁴ Chris Berg “An Institutional Theory of Free Speech” (Working paper, SSRN Electronic Journal, 8 February 2017) at 1.

²⁰⁵ Andrew Butler and Petra Butler *New Zealand Bill of Rights Act: A Commentary* (2nd edition, Lexis Nexis, Wellington, 2015), at 523.

²⁰⁶ At 523.

²⁰⁷ At 525.

²⁰⁸ Eric Barendt *Political Speech in Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2007) at 170, Samantha Bradshaw and Philip Howard, above n 5, at 23.

1 Harm

Political speech is very important.²⁰⁹ There are reasons to protect even false speech.²¹⁰ For example, to prevent the chilling effect that deters citizens from entering debates.²¹¹ However, such speech can also do harm. The harm from the speech contained in misleading political advertisements on social media, as explained above, is severe.²¹² There must be a point at which, even protected 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 way proposed.

Political speech is protected on the basis that it is constructive rather than obstructive to the operation of democracy.²¹³ However, misleading political advertising on social media can manipulate and oppress the voter.²¹⁴ When discussing balancing the rights of those to speak freely and voters to engage in an electoral process free from manipulation and oppression the Canadian Supreme Court said, “[Political expression] warrants a higher degree of constitutional protection, there is nevertheless a danger that political advertising may manipulate or oppress the voter.”²¹⁵ The New Zealand Court in *Watson v Electoral Commission* was faced with the challenge of ensuring that a limit is not over-inclusive as to chill protected political speech but not be under-inclusive as to deprive the electoral process of integrity.²¹⁶ The Court said, “it has long been recognised that the two sets of rights must accommodate each other”.²¹⁷

Any limit on rights must be demonstrably justified to serve an objective that is important and significant enough to limit the right.²¹⁸ The highly protected position of this speech means the objective must also be very important and significant. The harm from misleading

²⁰⁹ *Lange v Atkinson*, above n 201, at [6].

²¹⁰ *New York Times v Sullivan*, above n 201, at 269-271.

²¹¹ *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 200, at 37.

²¹² Samantha Bradshaw and Philip Howard, above n 5, at 23.

²¹³ Eric Barendt, above n 208, at 156.

²¹⁴ *Harper v Canada*, above n 139, at 828-829.

²¹⁵ At 828-829.

²¹⁶ *Watson v Electoral Commission*, above n 139, at [82].

²¹⁷ At [108].

²¹⁸ *Moonen v Film and Literature Board of Review*, above n 161, at [18].

advertising on social media is severe and demonstrable.²¹⁹ Misleading advertisements manipulate and oppress voters by depriving them of the autonomy to make a free and informed choice.²²⁰ 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.²²¹ The two rights must accommodate each other, because of the harm demonstrated from this form of advertising a stricter approach is a reasonable accommodation.

2 *Marketplace of ideas*

The marketplace of ideas allows a free and transparent public discourse from which ideas and accepted truths will emerge.²²² 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 thoroughly with social media content before re-sharing it.²²³ So, content may appear to have widespread acceptance, however, those sharing it have not challenged it or accept it as truth as the marketplace of ideas theory presumes.²²⁴ In addition, social media advertisements are consumed in an isolated context and social media gives people the ability to avoid public discourse.²²⁵ Further, misleading advertisements have a pernicious effect on the quality of democratic debate.²²⁶ It is difficult for citizens to consider viewpoints when the marketplace is populated with misleading statements from seemingly authoritative sources.²²⁷ Finally, rather than supporting a functioning marketplace of ideas, misleading advertisements often force opponents to respond to specific statements or engage

²¹⁹ Samantha Bradshaw and Philip Howard, above n 5, at 23.

²²⁰ Julia Klesse, above n 135, at 8.

²²¹ *Watson v Electoral Commission*, above n 139, at [108].

²²² Andrew Butler and Petra Butler, above n 205, at 523.

²²³ Maksym Gabielkov, Arthi Ramachandran, Augustin Chaintreau and Arnaud Legout, above n 103, at 9.

²²⁴ At 8.

²²⁵ 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, NERA Economic Consulting, above n 101, at 19.

²²⁶ Irini Katsirea “‘Fake news’: reconsidering the value of untruthful expression in the face of regulatory uncertainty” (2019) 10 Journal of Media Law 159 at 184.

²²⁷ Andrew Butler and Petra Butler, above n 205, at 524.

in similar tactics.²²⁸ As a result “democratic debate degenerates into cycles of attack and response” rather than engagement on substantive issues.²²⁹

3 *Breathing space and chilling effect*

In discussing political speech, free speech and 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 “erroneous statement is inevitable in free debate”.²³⁰ To put the risk and burden of such errors on to speakers of statements risks self-censorship and discourages robust debate.²³¹ In other words, it creates a chilling effect where people are worried to speak fearing the threat of sanction and the encroachment on free speech is broader than anticipated.²³²

The worst harm of contravening the ASA Code is a takedown request.²³³ There are no costs, litigation, fines or retribution. There is not a large burden or risk such as a criminal sentence, fines or fees. It is therefore hard to say that the risk or burden of making errors and contravening the Code is significant enough to risk self-censorship.

Academics have argued that sanction and their potential chilling effects do not inhibit responsible journalism but instead dissuade media from acting recklessly in publishing content that has not been sufficiently researched.²³⁴ A similar effect may be seen in advertising. Social media advertising bypasses broadcasting gatekeepers who traditionally check for compliance with the ASA Code and consider general principles of sound advertising.²³⁵ This is a form of chilling effect and self-censorship as these gatekeepers are cautious not to be involved in a breach of the Code. 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

²²⁸ William P Marshall “False Campaign Speech and the First Amendment”(2004) 135 U.Pa.L.Rev 285 at 294.

²²⁹ At 294.

²³⁰ *New York Times v Sullivan*, above n 201, at 272.

²³¹ Geoffrey R. Stone “Justice Brennan and the freedom of speech: a first amendment odyssey” (1991) 139 UPa LRv 1333 at 1344.

²³² Eric Barendt, above n 208, at 32.

²³³ The Advertising Standards Authority, above n 8, at 2.

²³⁴ Andrew Butler and Petra Butler, above n 205, at 601.

²³⁵ Colin Peacock “Oncoming online onslaught of paid political ads?” (1 September 2019) Radio New Zealand <www.rnz.co.nz> at [8].

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

Finally, an approach that provides more analysis and justification as is argued for limits the chilling effect. Providing such analysis will help advertisers to better know whether an advertisement is going to be found misleading. If advertisers have greater certainty as to what is likely to get taken down 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 this context the marketplace of ideas does not work as effectively, breathing space is maintained, chill effect is not large, and the harm is severe, so this restriction is justified.

IX Conclusion

On 22 January 2020 when the ASA found the petrol advertisement not misleading it continued its reluctance to uphold complaints regarding misleading social media advertising by political parties.²³⁶ 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.²³⁷ However, this 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 to be added to the Guidance Note on Advocacy Advertising is suggested. These will guide the ASA in adjudicating complaints about misleading political advertising on social media. These include; consider the isolated context in which social media advertisements are consumed and acknowledge that sharing of content is central to the function of social media and as a result take a broad approach to the audience. Additionally, when applying r1 2 (e) consider the dual role of political parties as information disseminators and advocacy groups and the impact this has on consumers' ability to

²³⁶ The Advertising Standards Authority, above n 3, at 1.

²³⁷ 19/279 The Advertising Standards Authority above n 6 at 1, 19/279 Appeal 19/011 The Advertising Standards Authority 25 November 2019 at 1, 17/303 The Advertising Standards Authority 7 September 2017 at 1.

distinguish fact and opinion. Further, when applying Advocacy Principle four consider the rapid and broad dissemination of misleading advertising on social media and how this prevents robust debate and fair play. Finally, when upholding complaints about misleading political advertising on social media demonstrate that upon engagement with the particular facts a limit on speech is proportional and justified. In doing so, provide clear explanations to minimise the chilling effect of such restrictions on speech. Such an approach will likely result in more advertisements being found misleading. This fetters the highly protected political speech contained in such advertisements. Such restrictions are justified in light of the “critical threat to public life” that misleading social media advertising poses.²³⁸ In response to research on the global proliferation of misleading political information on social media 16 political scientists and legal scholars argued that “we must redesign our information ecosystem in the 21st century” to mitigate the harm it causes.²³⁹ 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 mitigate the threat misleading political advertising on social media poses to New Zealand’s democracy.

²³⁸ Samantha Bradshaw and Philip Howard, above n 5, at 1.

²³⁹ David M. J. Lazer, Matthew A. Baum, Yochai Benkler, Adam J. Berinsky, Kelly M. Greenhill, Filippo Menczer, Miriam J. Metzger, Brendan Nyhan, Gordon Pennycook, David Rothschild, Michael Schudson, Steven A. Sloman, Cass R. Sunstein, Emily A. Thorson, Duncan J. Watts and Jonathan L. Zittrain “The science of fake news” (2018) 359 *Science* 1094 at 1095.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises 7998 words.

X Bibliography

A Cases

New Zealand

Electoral Commission v Cameron [1997] 2 NZLR 421 (CA).

Kumar and the Radio Network LTD [2014] NZBSA.

Lange v Atkinson [1998] 3 NZLR 424 (CA).

Lange v Atkinson [1999] UKPC 46 at [6].

Lange v Atkinson [2000] 1 NZLR 257 at 260.

Lange v Atkinson and Australian Consolidated Press NZ Ltd [1997] 2 NZLR 22.

Moonen v Film and Literature Board of Review [2000] 2 NZLR 9.

Rameka and Māori Television Service [2017] NZBSA.

Watson v Electoral Commission [2015] NZHC 666; BC201560840.

Australia

Theophanous v. Herald & Weekly Times Ltd (1994) 182 CLR 104.

Canada

Harper v Canada [2004] 1 SCR 827.

United States

New York Times v Sullivan (1964) 376 US 254 (SC).

B Legislation

Broadcasting Act 1989.

Electoral Act 1993.

New Zealand Bill of Rights Act 1990.

C Treaties

International Convention on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

D The Advertising Standards Authority Complaints Board and Appeal Board Decisions

16/412 The Advertising Standards Authority, 30 November 2016.

17/091 The Advertising Standards Authority, 20 March 2017.

17/107 The Advertising Standards Authority, 13 April 2017.

17/124 The Advertising Standards Authority, 20 April 2017.

17/242 The Advertising Standards Authority, 22 August 2017.

17/303 The Advertising Standards Authority, 7 September 2017.

17/286 The Advertising Standards Authority, 12 September 2017.

17/320 The Advertising Standards Authority, 18 September 2017.

17/334 The Advertising Standards Authority, 18 September 2017.

17/335 The Advertising Standards Authority, 18 September 2017.

17/338 The Advertising Standards Authority, 10 October 2017.

17/377 The Advertising Standards Authority, 16 October 2017.

17/360 The Advertising Standards Authority, 14 November 2017.

17/373 The Advertising Standards Authority, 14 November 2017.

17/393 The Advertising Standards Authority, 14 November 2017.

17/435 The Advertising Standards Authority, 24 January 2018.

18/015 The Advertising Standards Authority, 2 February 2018.

18/200 The Advertising Standards Authority, 24 July 2018.

18/208 appeal 18/010 The Advertising Standards Authority, 6 August 2018.

18/208 The Advertising Standards Authority 24 July 2018.

19/099 The Advertising Standards Authority, 18 March 2018.

19/047 The Advertising Standards Authority, 19 February 2019.

19/071 The Advertising Standards Authority, 9 April 2019.

19/104 The Advertising Standards Authority, 9 April 2019.

19/237 The Advertising Standards Authority, 8 July 2019.

19/251 The Advertising Standards Authority, 13 August 2019.

19/259 The Advertising Standards Authority, 13 August 2019.

19/261 *Appeal 19/006*, The Advertising Standards Authority, 12 September 2019.

19/261 The Advertising Standards Authority, 22 July 2019.

19/275 The Advertising Standards Authority, 27 August 2019.

19/275 The Advertising Standards Authority, 27 August 2019.

19/279 *Appeal 19/011* The Advertising Standards Authority 25 November 2019.

19/279 The Advertising Standards Authority, 27 August 2019.

19/293 The Advertising Standards Authority, 12 August 2019.

19/314 The Advertising Standards Authority, 14 October 2019.

19/344 The Advertising Standards Authority, 15 October 2019.

19/349 The Advertising Standards Authority, 16 September 2019.

19/356 The Advertising Standards Authority, 24 September 2019.

19/373 The Advertising Standards Authority, 30 September 2019.

19/382 The Advertising Standards Authority, 12 November 2019.

19/399 The Advertising Standards Authority, 14 October 2019.

19/410 The Advertising Standards Authority, 29 October 2019.

19/465 *Appeal 20/002* The Advertising Standards Authority, 19 March 2020.

19/465 The Advertising Standards Authority 22 January 2020.

19/469 The Advertising Standards Authority, 22 January 2020.

E Books and Chapters in Edited Books

Eric Barendt *Political Speech in Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2007).

Mel Bunce *The broken estate: Journalism and Democracy in a Post-Truth World* (Bridget Williams Books, Wellington, 2019).

Andrew Butler and Petra Butler *New Zealand Bill of Rights Act: A Commentary* (2nd edition, Lexis Nexis, Wellington, 2015).

Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (7th ed, Lexis Nexis, Wellington, 2015).

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).

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).

Laws of New Zealand Regulation of Publication by the Media (online ed).

Laws of New Zealand Human Rights (online ed).

Laws of New Zealand Constitutional Law (online ed).

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

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).

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

F Journal Articles

Monther Aldwairi and Ali Alwahedi “Detecting Fake News in Social Media Networks” (2018) 141 *Procedia Computer Science* 215.

Hunt Allcott and Matthew Gentzkow “Social Media and Fake News in the 2016 Election” (2017) 31 *Journal of Economic Perspectives* 211.

Prida Ariani Ambar “Freedom of Expression through Social Media and Political participation” (2016) 4 *Socrates* 75.

Micael Dahlen and Sara Rosengren “If Advertising Won’t Die, What Will It Be? Toward a Working Definition of Advertising” (2016) 45 *Journal of Advertising* 334.

Rodney Duffett “The influence of Facebook advertising on cognitive attitudes amid Generation Y” (2015) 15 *Electronic Commerce Research* 243.

David Dyzenhaus “Regulating Free Speech”(1991) 23 *Ottawa L Rev* 289.

Gian Fulgoni and Andrew Lipsman “The Downside of Digital Word of Mouth and the Pursuit of Media Quality” (2017) 57 *Journal of Advertising Research* 127.

Linda Jalvin “Echo Chamber” (2020) 38 *The Monthly* 41.

Harvey C. Jassem “An Examination of Self-Regulation of Broadcasting” (1998) 5 Comm & L 51.

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

David M. J. Lazer, Matthew A. Baum, Yochai Benkler, Adam J. Berinsky, Kelly M. Greenhill, Filippo Menczer, Miriam J. Metzger, Brendan Nyhan, Gordon Pennycook, David Rothschild, Michael Schudson, Steven A. Sloman, Cass R. Sunstein, Emily A. Thorson, Duncan J. Watts and Jonathan L. Zittrain “The science of fake news” (2018) 359 Science 1094.

Gregory P. Magarian “Regulating Political Parties Under a “Public Rights” First Amendment” (2003) 44 Wm & Mary L Rev 1939.

Toni M. Massaro and Robin Styker “Freedom of speech, liberal democracy and emerging evidence of civility and effective democracy engagement” (2012) 54 ACJ 375.

Anu Mitra, Mary Anne Raymond and Christopher Hopkins “Can consumers recognise misleading advertising content in a media rich online environment?” (2008) 25 Psychology and Marketing 655.

Michael Pendlebury “Individual autonomy and global democracy” (2004) 103 Theoria: A Journal of Social and Political Theory 43.

Isabel Riquelme and Sergio Roman “The Influence of Consumers’ Cognitive and Psychographic Traits on Perceived Deception: A Comparison Between Online and Offline Retailing Contexts” (2013) Journal of Business Ethics 405.

Kai Shu, Amy Silvia, Suhang Wang, Jiliang Tang and Huan Liu “Fake News Detection on Social Media: A Data Mining Perspective” (2017) 19 ACM SIGKDD 5 at 6.

Geoffrey R. Stone “Justice Brennan and the freedom of speech: a first amendment odyssey” (1991) 139 UPa LRv 1333.

Soroush Vosoughi, Deb Roy and Sinan Aral “The spread of true and false news online” (2018) 359 Science 1146.

Abby K. Wood and Ann M. Ravel “Fool me once: regulating “Fake news” and other online advertising” (2017) 91 S.Cal. L. Rev 1223.

G Parliamentary and Government Materials

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

Justice Select Committee *Inquiry into the 2017 General Election and 2016 Local Elections* (December 2019).

Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984-1985] I AJHR A6.

Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986).

H The Advertising Standards Codes and Guidance Notes

The Advertising Standards Authority *Guidance Note on Social Media* (The Advertising Standards Authority, October 2012).

The Advertising Standards Authority *Guidance Note on Substantiation* (The Advertising Standards Authority, November 2013).

The Advertising Standards Authority *The Advertising Standards Code* (The Advertising Standards Authority, 2018).

The Advertising Standards Authority *Guidance Note on Advocacy Advertising* (The Advertising Standards Authority, 2018).

The Advertising Standards Authority *Guidance Note on Responding to a Complaint about Misleading* (The Advertising Standards Authority, October 2019).

I Reports

Acumen *The Battle for Truth 2018 Acumen Edelman Trust Barometer* (March 2018).
Chris Berg “An Institutional Theory of Free Speech” (Working paper, SSRN Electronic Journal, 8 February 2017).

The Advertising Standards Authority *Annual Report 2017* (2017).

The Advertising Standards Authority *Annual Report 2018* (2018).

The Advertising Standards Authority *Annual Report 2019* (2019).

The Advertising Standards Authority *Bugger, it's okay- the case for advertising self-regulation* (2008).

The Electoral Commission Party secretary handbook for the 2020 General Election (Electoral Commission 2020).

Samantha Bradshaw and Philip Howard “Challenging Truth and Trust: A Global Inventory of Organized Social Media Manipulation” (Working Paper, University of Oxford, 2018).

Andrew Chadwick and Cristian Vaccari “News sharing on UK Social Media” (Survey report, Loughborough University, 1 April 2019).

Digital, Culture, Media and Sport Committee *Disinformation and 'fake news': Final Report* (United Kingdom House of Commons, 14 February 2019).

Maksym Gabielkov, Arthi Ramachandran, Augustin Chaintreau and Arnaud Legout “Social Clicks: What and Who Gets Read on Twitter?” (paper presented to IFIP Performance Conference, Antibes, 13 April 2016).

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).

NERA Economic Consulting “Fairfax/NZME: Review of the draft determination” (2016, November 25).

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

J Dissertations

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

Stephen James Thomson “Protecting Legitimate Speech Online: Does the Net work?” (LLB(Hons) dissertation, University of Otago, October 2012).

K Internet Resources and Newspaper Articles

The Advertising Standards Authority “The Complaint Decision Process” The Advertising Standards Authority <www.asa.co.nz>.

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

Briony Davies and Megan Richards “Political Speak”- Recent decisions by the ASA, BSA and Chief Ombudsman (22 March 2018) <minterellison.co.nz>.

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

Facebook “How News Feed Works” Facebook <www.facebook.com>.

Peter Griffin Government needs to do more to fight digital threats to democracy Noted (7 May 2019) <www.noted.co.nz>.

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

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

Katie Kenny and Tommy Livingston “Can Kiwis tell fact from fake news in the leadup to the 2020 elections?” *Stuff* (online ed, Auckland, 5 September 2019).

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

Yvette McCulloch “National Party ads ruled acceptable despite criticism” (31 January 2020) Radio New Zealand <www.rnz.co.nz>.

New Zealand National Party “Status 5 December 2019” Facebook <www.facebook.com>.

New Zealand National Party “Status 5 December 2019” Twitter <www.twitter.com>.

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

Guy Parker “The ASA can’t regulate political advertisements. Here’s why” *The Guardian* (Online ed, London, 6 July 2016).

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

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

Aimee Shaw “Advertising organisations call for Government to take action on social media standards” *New Zealand Herald* (online ed, Auckland, 12 April 2019).

Twitter “About your Twitter timeline”<www.twitter.com>.

University of Oxford “Use of social media to manipulate public opinion now a global problem says new report” (26 September 2019) Oxford Internet Institute <www.oii.ox.ac.uk>.

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