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| COMPLAINT NUMBER | 19/356 |
| COMPLAINANT | W. McKenzie |
| ADVERTISER | Phil Goff |
| ADVERTISEMENT | Phil Goff for Mayor, Digital Marketing |
| DATE OF MEETING | 24 September 2019 |
| OUTCOME | Not Upheld No further action required |

Description of Advertisements

Ad 1 is a tweet from Phil Goff's Twitter account that states: "The 18 lane harbour bridge that John Tamihere is proposing would cost over \$10 billion to build."

Ad 2 is a Facebook post on Phil Goff's Facebook page. It repeats the statement about the harbour bridge and other claims included "widening the motorway at either end to match the 18 lanes would see massive demolition of buildings and destruction of homes and neighbourhoods."

Ad 3 is a tweet from Phil Goff's Twitter account that states: "Mr Tamihere's transport plan is unfundable, unworkable and undeliverable. It also states: "There is no business case to back it up, no engineering case to show that it's even viable."

Summary of the Complaint

The Complainant considered the advertisements to be misleading. The Complainant said the advertisements are in contravention of the ASA Code Rule 2(b) Truthful presentation and Rule 2 (e) Advocacy advertising as all of the claims in the advertisements are misleading and none of the of the claims have been or can be substantiated as factual.

Issues Raised

- Truthful Presentation
- Advocacy Advertising

Summary of the Advertiser's Response

Legal Counsel on behalf of the Advertiser said the content was robust political comment, not advertising.

Legal Counsel said that: "should the Authority still consider it has jurisdiction, then we suggest that as Advocacy Advertising this commentary clearly falls within the robust debate criteria of the Authority's Code and Guidance Notes on Advocacy Advertising."

Information to support statements made in the advertising was provided.

Summary of the Complaints Board Decision

The Complaints Board did not uphold the complaint about two tweets and a Facebook post from Phil Goff about Mayoral candidate John Tamihere's transport plan.

The Board confirmed the content was covered under the ASA definition of advertisement. The Board agreed the advertisements were advocacy advertisements and the identity and position of the Advertiser was clear. The Board said the majority of the statements in the advertisements were opinion and provided for under the advocacy principles. The Advertiser had provided sufficient substantiation to support their cost estimate, the reference to the 18 lane bridge and the reference to widening the bridge.

The Board said in the context of robust debate during the local election campaign, the political advocacy advertisements were unlikely to mislead consumers.

The Complaints Board ruled the complaint was not upheld.

No further action required.

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

Relevant ASA Codes of Practice

The Acting Chair directed the Complaints Board to consider the complaint with reference to the following code:

ADVERTISING STANDARDS CODE

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

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

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

Complaints Board Discussion

Preliminary matter

In the process of obtaining a response from the Advertiser, the matter of jurisdiction was raised.

Are the Tweets and Facebook Posts advertising?

The Complaints Board confirmed the ASA definition of advertising to be "any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed."

In assessing whether the material complained about was advertising, the Complaints Board considered the above definition and whether the message was controlled by the advertiser.

The content was on publicly available platforms and was controlled by Phil Goff, as the account holder. The Board confirmed that it had previously dealt with tweets as advertisements including in Decisions 13/140 and 19/259. The Board confirmed it had also dealt with Facebook posts on public pages including those of elected representatives, for example, Decision 19/251.

The Complaints Board noted the Auckland City Council had provided guidance on the use of social media accounts for electioneering in its candidate information booklet.

The Complaints Board confirmed that content posted on social media accounts by candidates during an election campaign that promoted their candidacy and / or commented on other candidate's policies meet the ASA definition of advertising.

The Complaints Board confirmed that the two tweet advertisements and the Facebook advertisement before it did come under the jurisdiction of the Advertising Standards Authority and the Advertising Codes of Practice. The Complaints Board confirmed that this did not mean that all tweets or Facebook posts on individual social media accounts for people standing for public roles were advertising and an assessment would be made on a case by case basis on receipt of complaints.

The Complaints Board noted that a fourth piece of content had been complained of in the complaint before it. This content was a Radio New Zealand interview with Mayoral candidate Phil Goff. The Chair did not accept this part of the complaint as the ASA does not have jurisdiction over programme content on Radio New Zealand.

Consumer Takeout

The Complaints Board agreed the consumer takeout for the three advertisements is:

Ad 1: Phil Goff thinks the 18 lane harbour bridge proposed by John Tamihere will cost \$10 billion.

Ad 2: Phil Goff thinks John Tamihere's plan to widen the harbour bridge will cost more, have a significant impact on nearby housing and is impossible to deliver.

Ad 3: Phil Goff thinks John Tamihere's plan is unworkable and does not have a business case or engineering case to support it.

Are the advertisements advocacy advertising?

The Complaints Board said the advertisements before it fell into the category of advocacy advertising and noted the requirements of Rule 2(e) of the Advertising Standards Code. This Rule required the identity of the advertiser to be clear; opinion to be distinguished from factual information and factual information must be able to be substantiated. The Advocacy Principles developed by the Complaints Board in previous decisions considered under Rule 11 of the Code of Ethics remain relevant. They state:

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 rights 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 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.

Having established the advertisements are from Phil Goff, Mayoral candidate for Auckland, the Complaints Board noted that 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.

Is the identity of the Advertiser clear?

The Complaints Board agreed the Advertiser had met the identity requirements for advocacy advertising under Rule 2(e). Two advertisements were tweets from Phil Goff's account and the Facebook Post was from Phil Goff's Facebook page. The Board said the context, placement and content made the identity of the Advertiser clear.

Are the advocacy advertisements misleading?

Ad 1: "The 18 lane harbour bridge that John Tamihere is proposing would cost over \$10 billion to build."

The Complaints Board said the Advertiser had provided sufficient substantiation to support the reference to the 18 lane harbour bridge and his view that the cost would be over \$10 billion. The Board noted that John Tamihere's plan does include 18 lanes in two tiers and this part of the statement was not misleading. The calculation provided to support the cost estimate of \$10 billion from Phil Goff was sufficient in the context of advocacy advertising.

The Complaints Board unanimously ruled the advocacy advertisement labelled Ad 1 was not in breach of Principle 2 or Rule 2(b) of the Advertising Standards Code.

Ad 2: "The 18 lane harbour bridge that John Tamihere is proposing would cost over \$10 billion to build. Either he intends to bankrupt the city, burden ratepayers with massive extra rates or his is making it up because he knows he is never going to deliver it. Widening the motorway at either end to match the 18 lanes would see massive demolition of buildings and

destruction of homes and neighbourhoods. This will cost further billions of dollars that Auckland doesn't have and the Government won't pay for. This is total fantasy stuff and fundamentally dishonest to promise."

"Tamihere's Plan

- ✓ Bulldoze Neighbourhoods
- ✓ Bankrupt Auckland
- ✓ Impossible to deliver
- ✓ Increase congestion"

The Board confirmed the statements that repeated the claims in Ad 1 were not in breach of the Advertising Standards Code.

The Board discussed the statement: "Widening the motorway at either end to match the 18 lanes would see massive demolition of buildings and destruction of homes and neighbourhoods." The Complaints Board said this interpretation of John Tamihere's transport plan by Phil Goff presented a view in opposition to another candidate's policy and this was provided for under the advocacy principles.

The Complaints Board confirmed the other statements in the Facebook post were clearly opinion statements permitted under the advocacy principles.

The Complaints Board unanimously ruled the advocacy advertisement labelled Ad 2 was not in breach of Principle 2 or Rule 2(b) of the Advertising Standards Code.

Ad 3: "Mr Tamihere's transport plan is unfundable, unworkable and undeliverable. Its pure fantasy. There is no business case to back it up, no engineering case to show that it's even viable."

The Complaints Board confirmed the statements in the tweet labelled Ad 3 were clearly opinion statements and permitted under the advocacy principles.

The Complaints Board unanimously ruled the advocacy advertisement labelled Ad 3 was not in breach of Principle 2 or Rule 2(b) of the Advertising Standards Code.

Outcome

The Complaints Board ruled the complaints about the three advertisements were **Not Upheld**.

No further action required.

APPEAL INFORMATION

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website www.asa.co.nz. Appeals must be made in writing via email or letter within 14 days of receipt of this decision.

DESCRIPTION OF ADVERTISEMENTS

Ad 1 is a tweet from Phil Goff's twitter account that states: "The 18 lane harbour bridge that John Tamihere is proposing would cost over \$10 billion to build."

Ad 2 is a Facebook post on Phil Goff's Facebook page. It repeats the statement about the harbour bridge and other claims included "widening the motorway at either end to match the 18 lanes would see massive demolition of buildings and destruction of homes and neighbourhoods." The advertisement includes an image with a quote from a headline on www.stuff.co.nz, an image of Mr Tamihere's face and four statements with ticks alongside, similar to a ballot paper.

Ad 3 is a tweet from Phil Goff's twitter account that states: "Mr Tamihere's transport plan is unfundable, unworkable and undeliverable. It also states, "There is no business case to back it up, no engineering case to show that it's even viable."

COMPLAINT FROM W MCKENZIE

Please process this complaint under the "ASA fast-track process" used for election related complaints. As voting papers will start arriving this Friday, time is of the essence.

The advertiser is Phil Goff. The advertisements are advocacy advertisements under the ASA code, for the Auckland mayoralty in the 2019 local body elections.

The first advertisement was posted on Twitter at 12:38pm 16 August, was still on Twitter at 10:43am, 16 September and is still up. The screenshot to follow shows the time and date the advertisement was posted and, at bottom right, the time and date of the screenshot.

The second advertisement was posted on Facebook at 2:20pm 16 August, was still on Facebook at 10:23am 16 September and is still on Facebook. The screenshot to follow shows the time and date the advertisement was posted and, at bottom right, the time and date of the screenshot.

The first and second advertisements claim:

- 1: That John Tamihere has proposed an "18-lane harbour bridge".
- 2: That the "harbour bridge that John Tamihere is proposing is going to cost over \$10 billion to build."
- 3: That John Tamihere "intends to bankrupt the city, burden ratepayers with massive extra rates or he is making it up because he knows he is never going to deliver it."
- 4: That "Widening the motorway at either end to match the 18 lanes would see massive demolition of buildings and destruction of homes and neighbourhoods."
- 5: That "This will cost further billions of dollars that Auckland doesn't have and the Government won't pay for."
- 6: That "This is total fantasy stuff and fundamentally dishonest to promise."

The rendered advertisement in the second advertisement makes four claims in a layout that looks like a voting paper with a tick in a white circle preceding each of the claims:

“Tamihere’s Plan”

7: (tick) “Bulldoze Neighbourhoods”

8: (tick) “Bankrupt Auckland”

9: (tick) “Impossible to deliver”

10: (tick) “Increase congestion”

The third advertisement was posted at 1:20pm Wednesday 21 August 2019 on Twitter in response to the release of the “John Tamihere Road and Rail Plan” released on that date. The tweet was still on Twitter 16 September 2019 and is still on Twitter. The screenshot to follow shows the time and date the advertisement was posted and, at bottom right, the time and date of the screenshot.

The advertisement claims:

11: That “Mr Tamihere’s transport plan is unfundable, unworkable and undeliverable. It’s pure fantasy. There is no business case to back it up, no engineering case to show that it’s even viable.

12: That “It’s electioneering nonsense costing billions of dollars that the government won’t fund and Aucklanders couldn’t and wouldn’t fund through their rates.

The fourth advertisement was a radio interview on National Radio at 5:30pm on 1 September 2019. The URL

<https://www.rnz.co.nz/national/programmes/checkpoint/audio/2018712681/auckland-mayoraldebate-phil-goff-v-john-tamihere> contains a transcript of the interview. A screenshot of part of the transcript follows. The statement falls within the definition of advertisement in the ASA Code. The advertiser stated:

13: “The gradient (of the harbour bridge) is so steep the trains won’t go over that gradient, and you can ask any transport authority on that.” The advertiser has repeated the claim numerous times in mediums that also fall under the ASA definition of advertisement.

The advertisements are in contravention of the ASA Code rule 2(b) Truthful presentation and rule 2 (e) Advocacy advertising as all of the claims in the advertisements are misleading and none of the of the claims have been or can be substantiated as factual.

I note that none of the claims are obvious untruths, exaggeration, puffery or deliberate hyperbole.

Please note that I have read the ASA Guidance Note on Advocacy Advertising.

It appears from reading the comments to the posts on Facebook and Twitter that most readers of the advertisements have been misled into believing that all the claims in the advertisements are true.

The advertisements were in response to the attached press releases and policy documents which were released on 16 August and 21 August 2019. The claims in the advertisements are listed below and the relevant facts as detailed in the policy and Q&A documents are in italics.

1: That John Tamihere has proposed an “18-lane harbour bridge”.

The proposed harbour bridge has 10 lanes. Footpaths, cycle paths and railway lines are not lanes. For example, the advertiser was overhead stating that the proposed bridge has 18 lanes by the complainant on Saturday 14 September. The complainant asked the advertiser how many lanes Queen Street has. The advertiser answered “four” which is correct as footpaths are not lanes; the proposed harbour bridge has 10 lanes, it is misleading to state that it has 18 lanes. In contravention of the ASA Code the claim is misleading and has not and cannot be substantiated as factual.

2: That the “harbour bridge that John Tamihere is proposing is going to cost over \$10 billion to build.”

The bridge replacement has been reliably costed at \$2 billion. The costing method was, on advice from bridge engineers we have worked out the costing as follows:

- *The Milton-Madison Bridge replacement project replaced a 6 metre wide, 1,000 metre long bridge deck with a 13.5 metre wide bridge deck over the Ohio River in the United States.*
- *The cost was US\$103.7m in 2014; approx. NZ\$ 200 million in 2019 dollars which is*
- *approximately NZ\$14,000 per square metre (sqm) of bridge deck.*
- *The AHB replacement will create 70,000 sqm of deck @ \$14,000 per sqm amounts to a total of \$980 million.*
- *To that we have added 50%, \$500 million, to allow for increases in costs over the time of the build and increased costs for the project being in New Zealand; total \$1.5 billion.*
- *We have also added a 33% contingency, a further \$500 million, bringing the total cost to not more than \$2 billion.*
- *This is a conservative costing. Bridges are usually costed in New Zealand at around \$5,000 per sqm of deck including the cost of foundations and piers.*

The method was then checked by applying it to NZTA's Auckland Harbour Bridge Shared Path proposal:

- *The NZTA proposal is for a 4th bridge on the existing piers, 1,000 metres long and 5 metres wide.*
- *That is 5,000 square metres of bridge deck @\$14,000 per sqm a total of \$70 million.*
- *To that we have added 50%, \$35 million, to allow for increases in costs over the time of the build and increased costs for the project being in New Zealand; total \$105 million.*
- *We have also added a 33% contingency, a further \$35 million, bringing the total cost to **\$140 million.***
- *NZTA estimate is that its shared path proposal will cost **\$100 to \$140 million.***

The costing method is accurate. In contravention of the ASA Code the claim is misleading and has not and cannot be substantiated as factual.

3: That John Tamihere “intends to bankrupt the city, burden ratepayers with massive extra rates or he is making it up because he knows he is never going to deliver it.”

The harbour bridge is part of state highway 1 which is managed and paid for by central government. Whilst if elected Mayor of Auckland having run on the policy, John Tamihere would have a mandate to advocate the replacement of the harbour bridge by central government as prescribed in the Local Government Act (Auckland Council) Act 2009.

However Auckland Council can not be bankrupted by something it would not pay for and ratepayers cannot be burdened by something their rates would not pay for. Mr Tamihere presented the policy, which has been determined as feasible by a University of Auckland Associate Professor of Engineering, in good faith. It was not something “he is making (it) up because he knows he is never going to deliver it.” In contravention of the ASA Code the claims are misleading and have not and cannot be substantiated as factual.

4: That “Widening the motorway at either end to match the 18 lanes would see massive demolition of buildings and destruction of homes and neighbourhoods.”

At the moment there are 10 motorway lanes leading to the south side of the bridge and 10 lanes leading to the north of the bridge but only 8 lanes on the bridge itself necessitating the use of the movable median strip and tidal flow traffic control. With the new 10 lane bridge in place the motorway to the south of the bridge, over the bridge and to the north of the bridge would all be 10 lanes. There would be no need to widen the motorway at either end to match the 18 lanes because there would be 10 lanes. There would be no need to “demolish buildings, homes and neighbourhoods.” A small number of properties would need to be purchased or leased on the eastern side of the bridge on Stokes Point during the construction period of up to six years. In contravention of the ASA Code the claim is misleading and has not and cannot be substantiated as factual.

5: That “This will cost further billions of dollars that Auckland doesn’t have and the Government won’t pay for.”

Auckland Council has budgeted \$5.1 billion for roads and greenfield infrastructure in Auckland by 2028. NZTA estimates that the weight limit on the harbour bridge clip-ons will be reduced around 2030 from the current 50 tonnes, and that the Northern Busway will be at full capacity from 2030 necessitating the use of a higher capacity public transport mode. Mr Tamihere has proposed a policy for necessary infrastructure which Auckland Council and Government have budgeted for. In contravention of the ASA Code the claim is misleading and has not and cannot be substantiated as factual.

6: That “This is total fantasy stuff and fundamentally dishonest to promise.”

The harbour bridge replacement policy is feasible. It is neither a fantasy nor dishonest in any way. The claim is defamatory and in contravention of the ASA Code the claim is misleading and has not and cannot be substantiated as factual.

7: “Bulldoze neighbourhoods”

No additional land would be required, other than during construction, so no neighbourhoods would be bulldozed. In contravention of the ASA Code the claim is misleading and has not and cannot be substantiated as factual.

8: “Bankrupt Auckland”

The proposal can be advocated for by the Mayor of Auckland, but it would be paid for by central government as the harbour bridge is part of state highway 1. Implementation of the proposal could not bankrupt Auckland. In contravention of the ASA Code the claim is misleading and has not and cannot be substantiated as factual.

9: “Impossible to deliver”

A similar project was implemented in the United States. The Milton-Madison Bridge over the Ohio River was replaced in 2014 for \$US104 million by a structure the same length and

width as the original Auckland Harbour Bridge. The proposal as been determined as feasible by the Engineering Associate Professor whose email is reproduced on page 12 of the Q&A document. The proposal is able to be delivered. In contravention of the ASA Code the claim is misleading and has not and cannot be substantiated as factual.

10: "Increase congestion"

The proposal would not increase peak direction traffic capacity which would remain at 5 lanes so it would not increase congestion. The capacity of the rail services to the North Shore would significantly increase the number of public transport users able to be carried which would decrease congestion. In contravention of the ASA Code the claim is misleading and has not and cannot be substantiated as factual.

11: That "Mr Tamihere's transport plan is unfundable, unworkable and undeliverable. It's pure fantasy. There is no business case to back it up, no engineering case to show that it's even viable.

As detailed in the Road and Rail Plan and in the Q&A document released at the same time, all aspects of the plan are to be funded from the \$28 billion Auckland Transport Alignment Plan, i.e. from the \$28 billion budgeted to be spent on transport in Auckland by 2028. All aspects of the transport plan are workable. All aspects of the transport plan are deliverable. None of the plan is fantasy. Business cases for some of the proposals in the plan have been prepared by Auckland Transport and the New Zealand Transport Agency. All of the proposals involve standard road and railway construction techniques which have been proven as viable hundreds of thousands of times all over the world since the start of the railway age circa 1830. There is no requirement for a politician to prove that a railway can be constructed on an existing railway reserve or that a road can be constructed on land already designated for road construction; it is misleading to imply that there is such a requirement. In contravention of the ASA Code the claims are misleading and have not and cannot be substantiated as factual.

12: That "It's electioneering nonsense costing billions of dollars that the government won't fund and Aucklanders couldn't and wouldn't fund through their rates.

"It" is not nonsense. "It" is a suite of policies presented to the electorate in a mayoral election in a free and democratic society that have already been budgeted to be paid for by rates and central government taxes. Central government has agreed to pay its contribution to the \$28 billion budget. In contravention of the ASA Code the claim is misleading and has not and cannot be substantiated as factual.

13: "The gradient (of the harbour bridge) is so steep the trains won't go over that gradient, and you can ask any transport authority on that."

The bridge has a gradient of 5%, which the New Zealand Transport Agency or Beca will confirm, and trains are easily able to go up and down grades of 5, 6, 7 and some 8% as they do every day on many railways in the world. For example the Bernina railway in Switzerland has inclines of up to 7%, the Uetilberg commuter railway in Zurich has inclines of up to 7.9%, and the Appenzell–St. Gallen–Troger railway has inclines of up to 8%. Railways with 5% and more inclines carry millions of passengers of millions of tonnes of freight every year. These railways are "adhesion" railways i.e. a normal railway with wheels that grip the tracks by adhesion and not a "rack" railway with special grip mechanism. In contravention of the ASA Code the claim is misleading and has not and cannot be substantiated as factual.

This complaint is made in the light of the ASA Guidance Note on Advocacy Advertising. As stated above the advertisements are in contravention of rules 2(b) and 2(e) of the Code as

all of the claims in the advertisements are misleading and none have been or can be substantiated as factual.

I request that the advertiser immediately remove the advertisements. I also request that the advertiser agrees not to repeat the misleading claims or make different misleading claims in future advertisements which, under the ASA Code, includes written statements and verbal statements.

CODES OF PRACTICE

ADVERTISING STANDARDS CODE

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

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

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

INITIAL RESPONSE FROM LEGAL COUNSEL ON BEHALF OF THE ADVERTISER, PHIL GOFF

I am the recipient of your communication in respect of the above complaint, and the campaign director of Phil Goff's Mayoral campaign. I am also writing in my professional capacity as lawyer for the campaign.

The recipient of your communication has been given a very short timeframe in which to respond to what is effectively a political campaign of contested policy proposals.

Before we do so we seek the ruling or precedent basis for personal commentary one-off tweets on Twitter, and non-boosted, personal opinion Facebook posts being Advertisements within the jurisdiction of the ASA.

Ad 1 - was an opinion tweet not an ad. It is not authorised as an advertisement under the Local Electoral Act, nor are any tweets.

Ad 2 - was an opinion Facebook post on a political position - not boosted/paid for – and not an ad either.

Ad 3 - was an opinion tweet not an ad. As with Ad 1.

We await your response.

RESPONSE FROM THE ASA SECRETARIAT TO LEGAL COUNSEL FOR THE ADVERTISER

Thank you for your email, in your capacity as the Campaign Director of Phil Goff's Mayoral Campaign and as lawyer for the campaign.

In response to your request for a ruling or the precedent basis for considering personal commentary on social media platforms as advertising, the ASA regularly deals with a wide range of advertising on many different platforms.

The ASA definition of "advertisement" is:

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

I note the following extract from the Candidate Information Booklet <https://www.aucklandcouncil.govt.nz/elections/information-for-candidates/Documents/candidate-information-booklet-elections-2019.pdf> - page 23 in the section on campaigning, under the heading "Social Media":

- *If a candidate uses a social media account to promote the candidate's election, the candidates should include an authorising statement on the account's main page (or profile page), confirming that the account has been authorised by the candidate.*
- *Should a candidate not set up a separate account for election purposes but uses their personal social media account for electioneering, a candidate should place an authorising statement on the account's main page for the duration of the time that the account is used for electioneering.*
- *It is not necessary to authorise each individual post or tweet.*
- *It is not necessary to authorise likes, comments, replies, shares, retweets, etc.*

In the Chair's view, the tweets and Facebook posts referred to in Complaint 19/356 are content controlled by Mr Goff, with the intent of influencing voters in the upcoming local body election and they meet the definition of advertisement for the purposes of the Advertising Standards Code.

FURTHER RESPONSE FROM LEGAL COUNSEL ON BEHALF OF THE ADVERTISER, PHIL GOFF

Thank you for your reply of 18 September 2019.

We asked for the legal basis for political comment in a tweet and Facebook post being deemed advertisements by an advertiser within the jurisdiction of your Authority. You replied that in the opinion of the Authority chair, without citing an authority, they were.

We wish to place on record that neither the candidate nor his campaign agree with that view, particularly in respect to the two tweets; Ad 1 and Ad 3, and the political comment in Ad 2. They are and remain robust political comment, not an advertisement. We believe the chair's view is a dangerous precedent for democracy and democratic election campaigns, and may have the effect of limiting a candidate's ability to respond to policy proposals with a comment. It may be harmful to facilitating a democratic exchange of views using social media, particularly word limited fora such a Twitter, and therefore potentially blunt a free and fair exchange of views. In future any candidate can utilise the Authority as a tool to dampen

the ability for any candidate to respond with what are clearly personal political comment in reply to that candidate's political policy.

We believe Mayor Phil Goff's comments are protected by section 14 of the Bill of Rights Act 1990. To treat them as advertisements requiring factual enquiry by the Authority fails the Authority's own Code's Advocacy Principle 4 that dictates to require the Authority to interpret liberally robust debate in a democratic society to ensure fair play by the contestants. We reserve all rights to pursue this view, should the campaign feel that necessary following the outcome of the Authority's position on the complaint.

Notwithstanding that, and as the candidate and campaign are of the view that the complaint lacks merit on its face, and on a without prejudice basis, we reply on behalf of Phil Goff and his election campaign to the complaints as follows:

1: That John Tamihere has proposed an "18-lane harbour bridge".

We attach the candidate's own plan of his proposal. It clearly shows 18 lanes. 10 vehicle lanes – 4 rail track lanes – 2 cycle lanes – 2 two pedestrian path lanes. Total 18.

2: That the "harbour bridge that John Tamihere is proposing is going to cost over \$10 billion to build."

<https://at.govt.nz/media/imported/5044/Waitemata%20Harbour%20Crossing%20-%20Consultants%20report.pdf>

This 2008 report has the most viable alternative bridge option as costing between \$3.1-\$3.5 billion. This is for a 6-lane bridge.

Taking the middle figure of \$3.3 billion and adding 7% per annum, which is the average increased cost of construction, this takes us to \$6.9 billion in 2019 dollars. If this cost was then even conservatively double to account for the 18 lanes proposed by Mr Tamihere, the cost of this project would be over \$10billion.

3: That John Tamihere "intends to bankrupt the city, burden ratepayers with massive extra rates or he is making it up because he knows he is never going to deliver it."

The city hits its debt to revenue ceiling between 2020 and 2024, it is not possible to borrow more to fund this project. Therefore, borrowing over this period, would result a credit downgrade, significantly increased interest costs, and in bankruptcy.

<https://www.aucklandcouncil.govt.nz/about-auckland-council/business-in-auckland/docs/investorinformation/investor-update.pdf>

4: That "Widening the motorway at either end to match the 18 lanes would see massive demolition of buildings and destruction of homes and neighbourhoods."

This is based on our transport experts advice that expanding the number of car lanes would result in increased traffic flows in both ends and widening would be needed. In addition there are the new rail track lanes that need to be accommodated either end. This means, a significant number of houses will have to be demolished.

5: That "This will cost further billions of dollars that Auckland doesn't have and the Government won't pay for."

See point 3

6: That "This is total fantasy stuff and fundamentally dishonest to promise."

Our assessment shows this project is not achievable and also an opinion.

10: "Increase congestion"

The number of motor vehicle's crossing the bridge at peak times has been stable for some years, with the increases coming from public transport use by buses. It is generally accepted that more vehicle lanes generally and an expanded bridge entering and exiting to an existing single point increase congestion.

Should the Authority still consider it has jurisdiction, then we suggest that as Advocacy Advertising this commentary clearly falls within the robust debate criteria of the Authority's Code and Guidance Notes on Advocacy Advertising.

We request that the complaint be dismissed, and await your response.