

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 20/92  
Dated the 7th day of May 1992

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

JOCELYN FISH  
of Hamilton

Broadcaster  
TELEVISION NEW ZEALAND  
LIMITED

I.W. Gallaway Chairperson  
J.R. Morris  
R.A. Barraclough  
L.M. Dawson

DECISION

Introduction

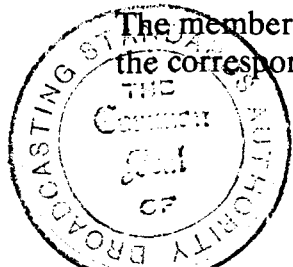
*New Zealand Today* was the name of a programme Television New Zealand Ltd began to broadcast during the day on Monday to Fridays late in 1991. The programme included discussions about commercial products.

Mrs Fish complained that part of the *New Zealand Today* programme broadcast by TVNZ between 11.30am and 12.30pm on Friday 29 November 1991 breached the requirement in the Television Code of Advertising Standards that advertisements must be clearly distinguishable from other programme material.

TVNZ declined to uphold the complaint as, it said, the viewers would recognise they were watching a commercial promotion. As Mrs Fish was dissatisfied with TVNZ's decision, she referred her complaint to the Broadcasting Standards Authority under s.8(a) of the Broadcasting Act 1989.

Decision

The members have viewed the programme to which the complaint relates and have read the correspondence (summarised in the Appendix). As is its usual practice, the Authority



has determined the complaint "on the papers". The Authority acknowledges that the complainant, Mrs Jocelyn Fish, was a member of the Authority for more than two years until September 1991 and, consequently, is well-known to two of the present members and has a comprehensive understanding of the Codes of Broadcasting Practice.

The Television Code of Advertising Standards is an approved code of broadcasting practice within the terms of s.4(1)(e) of the Broadcasting Act 1989 and, consequently, applies to all broadcasters. It reads in part:

- (i) Advertisements shall be clearly distinguishable from other programme material.

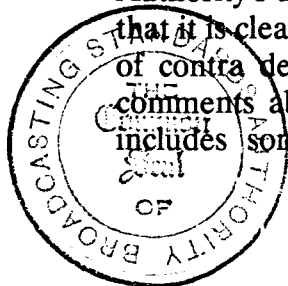
Mrs Fish complained that the requirement was breached in the final segment of the programme *New Zealand Today* broadcast by TVNZ between 11.30 - 12.30pm on 29 November 1991. Whereas, she said, advertisements on earlier segments had been clearly labelled "advertisement" or had otherwise been clearly distinguished from the programme material, that distinction had not occurred in the segment in question. It had shown one presenter spinning a wheel and the other drawing a name out of a bin. The prize designated by the spin was given to the person whose name had been drawn. One of the presenters had referred favourably to the qualities of the prize and had given its price.

TVNZ said the item was an advertising programme and that there was widespread public acceptance of the format used - as was apparent from commercial promotions on such programmes as *Wheel of Fortune* and *Sale of the Century*.

In subsequent correspondence, Mrs Fish has emphasised the requirement in the standard for a "clear" distinction between programme and advertising material while TVNZ has stressed the public acceptance and understanding of the format used. It has also referred to its wish to avoid "labelling overkill" which would occur if it was necessary to impose captions on every item which involved some aspect of advertisement as defined in the Broadcasting Act 1989. As part of its public acceptance argument, TVNZ referred to the long history of advertising programmes in New Zealand including *Aunt Daisy* and *It's in the Bag*.

The Authority records that the Broadcasting Act does not impose a maximum number of minutes of advertising per hour. Consequently, unlike the situation in countries with strict regulations on this point, the distinction between programme material and advertisements is not such a vital issue for New Zealand broadcasters.

On the one hand, looking at the issue from a common sense commercial viewpoint, it is apparent that most people would realise that any programme in which a prize was offered was likely to involve some commercial deal. The advertising of the prize would be the return expected by the person or organisation offering the prize. TVNZ drew the Authority's attention to the widely watched programme *Sale of the Century* to illustrate that it is clearly apparent that the prizes are donated or are obtained through some form of commercial deal, and the offering of those prizes is accompanied by some favourable comments about the prize's quality (i.e. the advertising blurb). *New Zealand Today* includes some segments which are clearly not advertising material but from the



commercial common sense perspective the segment to which the complaint referred did not require a caption for the viewer to realise that the programme had moved from an easy listening piano item to an advertisement.

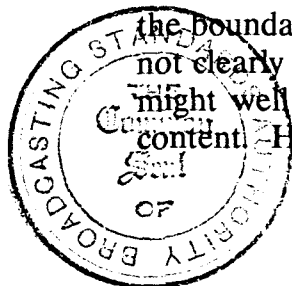
On the other hand, if the complaint is examined from a technical viewpoint which gives more emphasis to the exact wording of the standard, there are other matters to be considered. From this approach, attention can be drawn to the usual format in which advertisements are shown on television. A caption is unnecessary as they come in a sequence of three or four or more and are shown in what are clearly designated "commercial breaks". Further, the advertisements which are shown in the "commercial breaks" usually extol products unashamedly, while promotions on programmes often promote the product or service less directly.

In resolving these approaches, the Authority examined the arguments advanced by the parties - were public expectations to be given prominence (as TVNZ argued) or was the standard's requirement for "clarity" (as Mrs Fish argued) the major consideration?

The Authority was divided in its decision. The majority, applying commercial common sense and taking into account the broadcast of similar programmes in the past, agreed with TVNZ that it was obvious, indeed "clearly" obvious, that the segment complained about was an advertisement. The majority also took note of the wording of the standard. It requires that advertisements and other material be clearly distinguishable - not clearly distinguished. Although the segment of *New Zealand Today* complained about did not fit within a "commercial break", the presenter was seen to look for, and read, a promotional blurb. Further, the photograph of the product screened could well have come from a print advertisement. The majority also agreed with TVNZ that the use of captions to distinguish programme material from advertising segments in a programme would be unnecessary and distracting for the viewer. The majority believed that although the advertising/editorial divide has become very blurred in today's commercial environment, viewers were becoming more sophisticated and had little difficulty in discerning when they are being "sold" something - especially in a lightweight commercially-driven programme like *New Zealand Today*.

TVNZ had recognised (somewhat belatedly) that there was a need for a clear distinction when the programme introduced a new concept, "advertorials", to viewers. However, the spin the wheel segment did not involve a new format and therefore did not require a specific labelling.

The minority applied what were considered to be reasonable expectations on the part of the viewer. Most of the time, a regular format was followed which allowed programme material to be clearly distinguished from advertisements. The exceptions to the usual format, ranging from *Aunt Daisy* to *Sale of the Century*, were well-known. However, *New Zealand Today* added a new dimension in that programme material and advertisements occurred on the same programme by the use of advertorials and, while the boundaries between some segments were labelled for clarity, other boundaries were not clearly drawn. The minority accepted that programmes such as *New Zealand Today* might well represent a trend of increasing commercial participation in programme content. However, the standard required a "clear" distinction. If the broadcasters felt

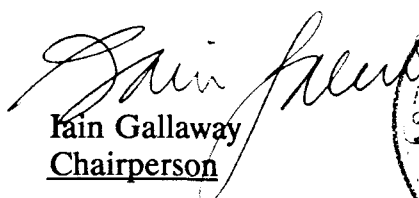


the standard was inappropriate, then the minority maintained that they should work for a revision of the standard.

It will be apparent that this complaint provoked considerable discussion among the members of the Authority. If the wording of the relevant standard had required that advertisements be clearly distinguished from other material, the Authority might well have upheld the complaint. However, the requirement in the standard refers to the necessity for advertisements to be clearly distinguishable from other material. In an era when commercial promotions are of increasing importance to the media - and are obviously so - a majority of the Authority believes that viewers are likely to be aware that, when a programme focuses on a product or a package as occurred in the segment complained about, some kind of commercial promotion is taking place. A majority of the Authority believes that viewers, although they might not have consciously considered such segments as advertisements, nevertheless are aware that the portrayal of a product or a service on the screen is the fruition of some kind of commercial arrangement.

**For the reasons set forth above, the majority of the Authority declines to uphold the complaint that the broadcast of the spin the wheel segment on *New Zealand Today* on 29 November 1991 breached standard (i) of the Television Code of Advertising Practice.**

Signed for and on behalf of the Authority

  
Iain Gallaway  
Chairperson



7 May 1992

## Appendix

### Mrs Fish's Complaint to Television New Zealand Limited

In a letter dated 2 December 1991, Mrs Fish complained to Television New Zealand Ltd about the programme *New Zealand Today* broadcast between 11.30am - 12.30pm on Friday 29 November. She wrote that the programme breached standard (i) of the Television Code of Advertising Standards which reads:

- (i) Advertisements shall be clearly distinguishable from other programme material.

Whereas in the final sequence of the programme some sections were clearly labelled advertisements and some sections were clearly not advertisements, the programme concluded with the two presenters drawing a name out of a bin and spinning a wheel. The prize designated by the spin was given to the person whose name had been drawn. One of the presenters "vigorously praised" the prize which had been won and gave its price.

Mrs Fish said that she was unable to distinguish whether this part of the programme was or was not an advertisement.

### TVNZ's Response to the Formal Complaint

TVNZ advised Mrs Fish of its Complaints Committee's decision in a letter dated 20 December 1991.

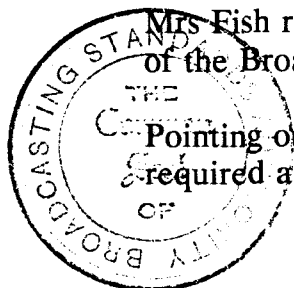
It explained that commercial arrangements were made for the exposure of products on the prize wheel and the segment complained about was an advertising programme. It added, however, that viewers would realise that and to include the caption "advertisement" could amount to "labelling overkill". Further, TVNZ said, a simpler method to distinguish the demarcation between advertising and other programme material had already been introduced.

In the circumstances, including the public acceptance of commercial promotions on the programmes *Wheel of Fortune* and *Sale of the Century*, the complaint was not upheld.

### Mrs Fish's Complaint to the Broadcasting Standards Authority

As she was dissatisfied with TVNZ's response, in a letter dated 30 December 1991 Mrs Fish referred her complaint to the Broadcasting Standards Authority under s.8(a) of the Broadcasting Act 1989.

Pointing out that standard (i) of the Television Code of Advertising Standards required a "clear" distinction between advertising and other material, she argued that



there should be no room for confusion or even doubt. Moreover, the programme complained about extended the practice on the other programmes cited as the presenter on *New Zealand Today* actively promoted the product.

Specifically, in regard to TVNZ's response, she stated:

- a) The "labelling overkill" comment avoided the question whether the programme breached the code.
- b) TVNZ's recently introduced simpler way of demarcation indicated that the programme had breached the code.
- c) Public acceptance was not an excuse for breaches of the code.
- d) Reliance on public acceptance built up over some years did not acknowledge that public attitudes might change nor did the public acceptance of a questionable practice justify extending its boundaries.

#### TVNZ's Response to the Authority

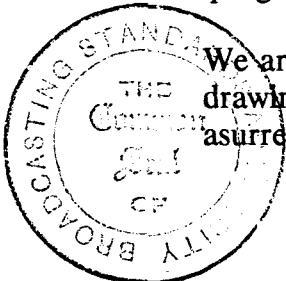
As is its practice, the Authority sought the broadcaster's response to the referral. The letter to TVNZ is dated 4 February 1992 and its reply, 6 March.

Citing the definition of an "Advertising Programme" in the Broadcasting Act 1989, TVNZ acknowledged that the segment complained about was indeed an advertising programme but maintained that fact would have been quite apparent to viewers. New Zealand audiences, it continued, were experienced in distinguishing advertising material from other material and although some paid promotions were labelled "advertisement", it was not necessary to do so on this occasion to comply with the standard. When there might be doubt, TVNZ noted, the "advertisement" label was included as had happened in another segment of the programme complained about and to which Mrs Fish had referred.

The care it took with items where the distinction might be unclear, TVNZ remarked, was the basis for its comments about labelling overkill and resolving demarcation difficulties. Furthermore, TVNZ stated, references to a product's quality and its price added to the evidence that the segment was an advertisement.

Referring to the history of the rule, TVNZ said it was originally designed to prevent surreptitious or subliminal advertising. Now it was a rule found in a number of jurisdictions which also showed programmes similar to *New Zealand Today* but, by doing so, were not considered to have infringed the rule. TVNZ also referred to similar programmes from *Aunt Daisy* to *It's in the Bag*, and concluded:

We are also strongly of the view that in no way could it be claimed that the drawing of the prize on *New Zealand Today* and its promotion was as surreptitious or subliminal advertisement.



We agree with the complainant that Codes have been established and accepted by broadcasters in order that to set and maintain standards in broadcasting. However, this particular standard, we submit, was clearly not intended to prevent the broadcast of programmes such as the one in question, *Sale of the Century* and *Wheel of Fortune*. We certainly do not see any relevance of the comparison with drink/driving laws and the attitudes to them by society as referred to by the complainant.

### Mrs Fish's Final Comment to the Authority

When asked to comment on TVNZ's response, in a letter dated 18 March 1992 Mrs Fish made four observations.

- a) TVNZ's reference to the ability of viewers to distinguish between advertisements and other programme missed the point of the complaint. The requirement in the Code, she argued, required clear distinctions to be made in the advertisements - not experience on the part of the viewers.
- b) The history of the requirement, although interesting, was irrelevant to the complaint.
- c) As complaints could only be made about one specific programme, references to similar programmes were irrelevant. The other programmes would be judged on their own if complained about.
- d) Reference to changing public attitudes were relevant, Mrs Fish believed, as programmes similar to the one she complained about were increasing in number. That increase, she added, could well lead to changing attitudes.

She concluded by stressing that her complaint focused on the programme *New Zealand Today* which, she maintained, breached the Code.

### TVNZ's Advice to the Authority

In view of TVNZ's comment to Mrs Fish in its letter of 20 December that a simpler method of demarcation between advertisements and other material was being used on *New Zealand Today*, the Authority asked TVNZ for more detail. In a letter dated 6 April 1992, TVNZ enclosed an internal memorandum dated 22 November 1991 from the Director of Production to the Director of Marketing which recorded:

This will confirm that NEW ZEALAND TODAY will, from mid next week, carry a "super" at the beginning of every advertorial segment within the programme, indicating that that particular segment is an advertisement.

