

## How to defend your ads against complaints to the ASA

The Advertising Standards Authority (**ASA**) provides a quick and easy complaints service to allow consumers and competitors to complain about your ads. If the Advertising Standards Complaints Board (**Complaints Board**) upholds a complaint, you have to either change your ad to comply with the Advertising Codes of Practice (**ASA Codes**), or withdraw your ad.

Craig Nelson, Principal at law firm Martelli McKegg with significant experience in dealing with ASA complaints for advertisers, offers some tips on how to respond to and avoid complaints.

### Don't take the process too lightly

Don't dismiss complaints as being unreasonable or without merit and don't take the ASA complaints process too lightly. The Complaints Board Chairman will only allow a complaint to proceed if it has some merit. Without a response from you, the advertiser, the Complaints Board will have to base its decision on the complaint alone.

What will happen if the complaint is upheld and your ad has to be withdrawn, or modified? What will it cost? How long will it take to fix, if it can be fixed? What reputational damage might occur? Does the complaint relate to an immaterial statement on your website, or does it relate to the main tag line for your entire business?

While it is quick and easy to make a complaint, responding can be challenging and the stakes can be very high for advertisers. Think carefully and take your time when responding – request an extension if necessary. The ASA has recently sped up the process to ensure an efficient and timely complaints process, but extensions can be obtained where there is genuine need.

Seek legal advice if the stakes are high, like if a high cost TV commercial is the subject of a complaint. Of course, there is a cost benefit analysis to be done when considering how to respond to a complaint. For example, for a high cost TV commercial you might take legal advice and commission market research to show that viewers were not offended by the ad. But, for a simple website ad, you might just write to the Complaints Board and agree to amend the ad.

### Treat complaints with respect and empathise with the complainant

While you may have little empathy for competitors who complain about your ads, many complainants are your customers and they are expressing genuine concerns. We all have different perspectives, beliefs, values, and standards. Those should be respected. You can empathise with a complainant, while still respectfully disagreeing with their view.

There is little to be gained and much to be lost by being disrespectful to and dismissive of complainants. Antagonising complainants in your response could lead to them appealing the Complaints Board decision, not to mention cause damage to your reputation in a public forum.

## Tell your side of the story

It can be tempting to immediately go on the defensive and focus only on the complaint, but make sure you tell your side of the story first. Describe the ad from your perspective and explain the lengths you went to to ensure compliance with the ASA Codes and why it complies with the ASA Codes.

What is your product or service? What is the insight behind your advertising campaign? How is the campaign being executed? Set the scene before responding to the complaint.

Providing context allows the Complaints Board to reach an informed decision. Don't assume the Complaints Board knows what you know. Complaints often focus on one aspect of an ad in isolation and offer only the complainant's perspective. As the advertiser, you need the Complaints Board to understand the overall impression the ad gives a reasonable consumer.

## Provide a clear and concise written response

The Complaints Board deals with a lot of complaints about a lot of ads and its first point of reference will be the complaint. You need to make the Complaints Board's job easy by providing a clear and concise response to the complaint. Good responses will contain the following:

- A complete response to every complaint and on every part of the ASA Codes deemed relevant by the ASA. The ASA is finding that some advertisers need to improve the depth of their knowledge of the ASA Codes, particularly in areas like safety (Code of Ethics, Rule 12) and people in advertising (Code for People in Advertising).
- A summary of your position on each complaint, so the Complaints Board can quickly understand your position.
- Reasons why your ad complies with the ASA Codes, together with supporting evidence and references to relevant previous decisions of the Complaints Board.

## Provide objective evidence, not just your subjective opinion

Give the Complaints Board evidence to support your position, not just your subjective opinion.

Complaints are usually brief and highly subjective – for example, “*I found the portrayal of women offensive*”. A subjective response like, “*we were not offended by the ad and the complainant is overly sensitive*” is unlikely to be persuasive. Providing evidence will be persuasive - for example, “*the ad was tested with audiences prior to screening and 98% of respondents were not offended*”.

The ASA Codes are not designed to allow a sole conservative complainant to cause an ad to be withdrawn. They require an objective assessment of the ad. For example, Rule 4 of the Code of Ethics (Decency) considers whether content “*clearly offends against generally prevailing community standards...*”. Evidence about what those standards are and how your ad complies with those standards should be submitted.

## **Use precedents**

While the Complaints Board is not a court of law and is not bound by its previous decisions, past decisions will be considered and they can be very persuasive. The ASA's website ([asa.co.nz](http://asa.co.nz)) contains a searchable database of previous decisions. You should carefully research and consider previous decisions (both favourable and unfavourable) and include them in your submissions to the Complaints Board.

## **Know when to settle**

We all make mistakes, and sometimes the best response to a complaint is to simply tell the Complaints Board that your ad will be withdrawn or modified. Typically, the Complaints Board will then record that the complaint has been "settled" and that will be the end of the matter. Obviously, before modifying or withdrawing an ad, you will need to carefully consider the merits of the complaint and the implications of withdrawing or modifying the ad.

## **Prevention is better than cure**

The cost, effort and stress caused by complaints can be avoided by pre-vetting your ads to ensure compliance with the ASA Codes.

Some advertisers choose to have all of their ads legally reviewed before release. Others take a risk based approach and get legal sign off for high risk or high value campaigns. Others might produce a plan B version of high risk ads which can be used to replace the offending version of the ad if complaints are made.

If you anticipate ASA complaints as you are producing an ad, try to build a defence in anticipation of this happening and get expert advice. A good lawyer won't tell you what you can't do, they will tell you what you can do within the limits of the ASA Codes and your appetite for risk.

While prevention is better than cure, someone may still complain about your ads. Getting advice from a specialist lawyer experienced in dealing with ASA complaints will give you the best chance of convincing the Complaints Board not to uphold the complaint. For those who prefer prevention over cure, getting your ads pre-vetted by an expert before release is a good option. Talk to an experienced lawyer about what will work best for you and your business.

## **Contact**

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