

## Advertising Claims Board Determination

1. Matter Reference	LEH:3516504
2. Advertiser	Australian Associated Motor Insurers Limited
3. Complainant	NRMA Insurance Australia Limited
4. Type of Advertisement	Print, bus shelters, bus sides
5. Nature of Complaint	Sections 1.2, 1.3 and 2.5 of the Australian Association of National Advertisers Code of Ethics
6. Product	AAMI Car Insurance
7. Panel Members	Ian Robertson, Chair – Holding Redlich  Jennifer Huby – Tress Cox  Lyndon Sayer-Jones – Lyndon Sayer-Jones & Associates
8. Determination	Complaint Upheld – Advertisement discontinued voluntarily prior to determination.
9. Date of Determination	21 December 2009

This is a determination of the Advertising Claims Board (**Board**) in relation to a complaint made by NRMA Insurance Australia Limited (**Complainant**) in relation to print advertisements and posters on bus shelters and bus sides for car insurance for Australian Associated Motor Insurers (**Advertiser** or **AAMI**).

### 1 The Complaint

The Advertisements include:

- (a) print advertisements which appeared in the following publications:
  - (i) North Shore Times (7, 14, 21 August 2009); and
  - (ii) Manly Daily (18 August 2009);
- (b) Adshel metrolites/bus shelters targeted to Northern Sydney (estimated to be a four week campaign during August/September 2009); and
- (c) 24 foot posters on bus sides operating on bus routes throughout Sydney's North Shore (estimated to be a five week campaign during August/September 2009),

(together, referred to as the **Advertisements**).

### 2 The Advertisements

- (a) **Print Advertisements**

The Advertisements which appeared in the North Shore Times and Manly Daily have the headline:

*"It's unlucky if you're with NRMA"*

The descriptive text below is in smaller font and includes the following statements:

*"AAMI just lowered car insurance prices on the North Shore. Switch now and you could save."*

(b) **Bus Shelter Advertisements**

The Advertisements appearing on bus shelters include the headline:

*"It's unlucky if you're with NRMA"*

The descriptive text below is in smaller font and includes the following statements:

*"AAMI just lowered car insurance prices on the North Shore. Switch now and you could save."*

(c) **Bus Side Advertisements**

The Advertisements appearing on the side of buses include the headline:

*"It's unlucky if you're with NRMA"*

This statement is followed on the same line, however in smaller font:

*"AAMI just lowered car insurance prices on the North Shore"*

### 3 **Nature of the Complaint**

The Complainant alleges that the Advertisements contravene sections 1.2, 1.3 and 2.5 of the *Australian Association of National Advertisers Code of Ethics (AANA Code)*. The relevant sections of the AANA Code provide:

- 1.2 *Advertising or Marketing Communications shall not be misleading or deceptive or be likely to mislead or deceive.*
- 1.3 *Advertising or Marketing Communications shall not contain a misrepresentation, which is likely to cause damage to the business or goodwill or a competitor.*
- 2.5 *Advertising or Marketing Communications shall only use language which is appropriate in the circumstances and strong or obscene language shall be avoided.*

The Board has considered:

- (a) the Advertisements;
- (b) the Complainant's submission of 25 August 2009;

- (c) the Advertiser's response of 27 October 2009;
- (d) the Complainant's reply of 18 November 2009;
- (e) the Advertiser's letter of 27 November 2009; and
- (f) the Advertiser's letter of 8 December 2009.

#### 4 **Advertising Claims Board – jurisdiction to hear complaints about advertisements that have been withdrawn or discontinued**

Notwithstanding that the Advertiser denies that it has breached the AANA Code, in its letter to the Board of 8 December 2009, the Advertiser informed the Board that it had taken the decision that it will not run the campaign in its current state in the future.

The Board notes that section 1.6 of the *Advertising Claims Board Procedural Guidelines for Participants* relevantly provides that:

*"1.6 The Claims Board does not usually consider the following:*

- *Complaints about advertising that has been withdrawn or discontinued before challenge."*

The Board notes that the Advertisements were not withdrawn or discontinued before the complaint by the Complainant.

#### 5 **Summary of the Determination**

The Board is unanimously of the view that:

- (a) the Advertisements contravene section 1.2 of the AANA Code because they are misleading or deceptive, or likely to mislead or deceive;
- (b) the Advertisements contravene section 1.3 of the AANA Code because they contain a misrepresentation which is likely to cause damage to the business or goodwill of a competitor; and
- (c) the Advertisements do not breach section 2.5 of the AANA Code.

#### 6 **Totality**

The Board notes that the Complainant submitted that "NRMA Insurance does not require the panel members of the Advertising Claims Board to rule on any insurance pricing issues as part of an examination of this complaint." Further, when the Advertiser was provided with an opportunity to substantiate the claims in the Advertisements by providing information as to the actual premiums charged and the market research referred to in its submissions, the Advertiser responded by querying "why the ACB wishes AAMI to provide further details of its pricing research, given that this is not the subject of the complaint".

Notwithstanding these 2 particular submissions, the Board notes that it is required to consider the Advertisements in their totality in the context of the advertising mediums (being print, bus shelter and bus side advertisements). As stated by Gibbs CJ in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1989) 149 CLR 191 at 199:

*“The conduct of a defendant must be viewed as a whole. It would be wrong to select some words or act which, alone, would be likely to mislead if those words or acts, when viewed in their context, were not capable of misleading. It is obvious that where the conduct complained of consists of words it would not be right to select some words only and to ignore others which provided the context which gave meaning to the particular words. The same is true of acts.”*

The Board notes that it is not appropriate to take part of an advertisement and endeavour to ascertain in isolation the meaning of each of the critical words or phrases. As stated by Sheppard J in *Tobacco Institute of Australia v AFCO* (1993) ATPR 41-199 at 40,759:

*“...an attempt should be made to measure the veracity of its message by reading it in context. One needs also to take into account the fact that many readers would not make a close study of the advertisement but would read it fleetingly and absorb its general thrust.”*

## 7 **Comparative advertisement**

The Board is of the view that the statements in the Advertisements “It’s unlucky if you’re with NRMA” is a statement of comparison between AAMI and NRMA car insurance which is intended to represent that AAMI car insurance is superior to NRMA car insurance.

On its own, the statement may address a number of comparative factors including the price of the premiums, the level of cover provided, the applicable excess, the quality and benefits of cover, and the level of customer service in dealing with claims.

However, given that the second statement in the Advertisements relates to price and makes representations about the comparative price between AAMI and NRMA, the Board is of the view that a reasonable person will consider that the Advertisements represent that AAMI’s car insurance is less expensive than NRMA’s car insurance.

In the Board’s view the reference to price in the second part of the Advertisements must mean sensibly that NRMA car insurance premiums are more expensive than AAMI’s car insurance for average insureds.

Accordingly, the Board agrees with the Advertiser’s submission that:

*“the Headline is used in conjunction with the Savings Claim. Therefore, it is clear that the Headline relates to being unlucky in terms of the amount customers may be paying for their comprehensive car insurance with NRMA. In this regard, NRMA customers would be unlucky if they were paying a higher premium with NRMA than what they would be with AAMI.”*

### (a) General principles

The following principles apply to comparative advertisements:

- (i) there is a heavy burden on the advertiser to ensure that its comparisons are accurate, for inaccurate comparisons are inherently likely to mislead the public: *State Government Insurance Commission v J.M. Insurance Pty Ltd* (1984) ATPR 40-465 at 45,362;

- (ii) errors in comparative advertising may have a greater potential to mislead consumers than statements made in ordinary advertisements which may be perceived as mere 'puffs': *Trade Practices Commission v Telstra Corporation Ltd* (1993) ATPR 41-256 at 41,454; and
- (iii) to publish an advertisement suggesting that one product will outperform another product, without there being any tests to demonstrate the truth of the claim, is itself to engage in misleading conduct: *Colgate-Palmolive Pty Ltd v Rexona Pty Ltd* (1981) ATPR 40-242 at 43,192.

(b) Principles in relation to advertising motor vehicle insurance

The following excerpt from the judgment of Fisher J in *State Government Insurance Commission v J.M. Insurance Pty Ltd* (1984) ATPR 40-465 outlines the difficulties associated with comparative advertising in motor vehicle insurance:

*"In this sophisticated and highly technical area of motor vehicle insurance JM has decided to engage in comparative advertising. There is in my opinion a heavy responsibility on it to ensure that its comparisons are accurate, for inaccurate comparisons are inherently likely to mislead the public. I agree wholeheartedly with the words of Lockhart J in Stuart Alexander & Co" (Interstate) Pty Ltd & Anor v Blenders Pty Ltd (1981) ATPR 40-244 at p. 43, 203:*

*'When a person produces a television commercial that not only boosts his own product but, as in this case, compares it critically with the product of another so that the latter is shown up in an unfavourable light by the comparison, in my view he ought to take particular care to ensure that the statements are correct.'*

*Mr Justice Northrop expressed his agreement with these views in Insurance Commissioner v Australian Associated Motor Insurers Ltd & Ors (1982) ATPR 40-299 at p. 43, 711.*

*These present matters illustrate how difficult it is, in an area as complex as the insuring of motor vehicles, to make accurate comparisons, and in particular to ensure that like policies are compared. General statements in advertisements may frequently fall into the category of puffing but the comparisons of costs, both oral and visual, in this matter go much further and have very significant impact."*

## 8 Use of the word "unlucky"

A component of the Complaint is the use of the word "unlucky".

According to the Macquarie Dictionary, "unlucky" means:

- (a) not lucky;
- (b) not having good luck; or
- (c) unfortunate or ill-fated.

The Board does not agree with the Complainant's submission that the use of the word "unlucky" has a broad inference extending to reputational issues such its customer service, the manner in which it makes its claims payments, its financial stability and the like.

The Board also does not agree with the Complainant's submission that the use of the word "unlucky" is inappropriate in the circumstances or strong or obscene in breach of section 2.5 of the AANA Code. This is because the point of the Advertisements is to compare 2 competitors' products by making a negative comment about one product in order to provide the consumer with a positive impression about the Advertiser's product. In these cases, negative language is not prohibited. In addition, the word "unlucky" is inoffensive and is reflective of common use of that term in contemporary Australian society.

## 9 Puffery

Even if it were accepted that the statement in the Advertisements "It's unlucky if you're with NRMA" may be mere puffery, the Advertisements considered as a whole can not reasonably be considered puffery because they contain a direct comparison between competitor's products. Such a direct comparison places a heavier burden on the Advertiser to ensure the comparison is correct and not misleading.

## 10 Car Insurance Premium Information

As stated above, the Board must consider the Advertisements in their totality and accordingly, the Board is of the view that the Advertisements are a claim to the effect that NRMA customers pay higher insurance premiums than AAMI customers which should be capable of substantiation by quantitative research or information.

If the price representation that NRMA customers pay more than AAMI customers for their car insurance premiums could be substantiated, then the use of the word "unlucky" may be appropriate. If the Advertiser is not able sufficiently to substantiate the representations complained of, the Complainant would be successful in its complaint that the Advertisements are misleading or deceptive or likely to mislead or deceive.

### (a) Information provided by NRMA

The Complainant provided a sample of 20 common insurance customer types from the North Shore of Sydney and compared their comprehensive car insurance premiums with those of the Advertiser which are set out in the Schedule (**Sample**).

### (b) Information provided by AAMI

AAMI referred in its submissions to market research it had conducted which indicated that:

*"90% of AAMI's new business customers would experience a reduction in premiums as a result of the price reduction."*

The Advertiser also submitted that it had conducted market research which:

*"directly compared the cost of AAMI comprehensive car insurance against the cost of NRMA comprehensive car insurance. The research confirmed that AAMI had a reasonable basis for making the claim that*

*NRMA customers in the North Shore could save if they switched to AAMI."*

(c) Request for further information

On 3 December 2009, the Board met after reviewing the parties' submissions and on 4 December 2009 the Board gave the Advertiser the opportunity to substantiate the claims in the Advertisements by providing information as to the actual premiums charged and the market research referred to in its submissions.

In response, the Advertiser declined to provide the information because the Advertiser considers that:

- "(a) the information is commercially sensitive; and*
- (b) AAMI's methods for conducting market research are proprietary and represent part of its valuable intellectual property."*

The Advertiser had previously responded to the Sample in its submission of 27 October 2009 as follows:

*"it is not clear how NRMA have calculated the 20 examples of insurance customers who they allege will save with NRMA and in particular, when this research was conducted and why these customers were selected. The sample is small and therefore is not representative of insurance customers as a whole. The sample merely indicates that some customers may (based on the figures used by NRMA) pay less on their comprehensive car insurance with NRMA."*

Accordingly, the Advertiser has failed to substantiate the claim in the Advertisements that NRMA customers pay more than AAMI customers for their car insurance premiums.

## 11 Determination of Board

Accordingly, the Board:

- (a) upholds the complaint in relation to sections 1.2 and 1.3 of the AANA Code but dismisses the complaint under section 2.5;
- (b) finds that the Advertisements should be discontinued and notes that the Advertisements will not be run in their current state in the future.

## 12 Advertiser's Statement

Prior to the Panel's determination, on 8 December 2009, the Advertiser advised the Board that they would not continue the Advertisements in their current state in the future.

On 21 December 2009, the Advertiser was provided with a copy of the Panel's determination. In accordance with the Procedural Guidelines and on the basis of the Panel's determination, the Advertiser was requested to formally provide an Advertiser's Statement confirming that they would discontinue or modify the Advertisements. On

21 December 2009, the Advertiser confirmed that they would not continue the Advertisements in their current state in the future.



## SCHEDULE

<b>Gender</b>	<b>Age</b>	<b>Suburb</b>	<b>Car</b>	<b>AAMI Premium</b>	<b>NRMA Insurance Premium</b>	<b>Percentage by which NRMA Insurance is cheaper</b>
Female	23	North Turramurra	1998 Hyundai Excel	\$705	\$673	4.5%
Male	22	Castle Cove	2009 Suzuki Swift	\$1130	\$1019	9.83%
Female	22	Castle Cove	2009 Suzuki Swift	\$1031	\$871	15.5%
Male	47	North Sydney	2000 Holden Commodore	\$1758	\$1492	15.1%
Female	31	Asquith	1993 Holden Barina	\$509	\$439	13.7%
Female	36	Lane Cove	2009 Mazda CX7	\$954	\$838	12.2%
Male	23	Longueville	2008 Ford Falcon	\$1714	\$1676	2.22%
Female	33	Wollstonecraft	2009 Volkswagen Tiguan	\$962	\$721	25%
Male	42	North Willoughby	2008 Subaru Impreza	\$1692	\$1012	40.2%
Female	36	Lane Cove	1992 Ford Falcon	\$556	\$504	9.3%
Male	20	Northwood	1999 Mitsubishi Lancer	\$1822	\$1734	4.84%
Female	48	Artarmon	2009 Mazda 3	\$795	\$729	8.3%
Male	39	Gordon	2005 Holden Commodore	\$1910	\$1350	29.3%
Female	53	Naremburn	1996 Ford Fairmont	\$605	\$546	9.7%
Female	45	Asquith	2004 Mazda RX8	\$1329	\$1186	10.7%
Male	33	Wollstonecraft	2008 Volkswagen Tiguan	\$1088	\$960	11.77%
Female	57	East Lindfield	2009 Honda Civic	\$736	\$634	13.8%
Male	51	Crows Nest	2009 Honda CRV	\$906	\$751	17.1%
Female	58	Northbridge	2009 Mazda 3	\$844	\$693	17.9%
Female	52	Greenwich	1994 Holden Commodore	\$2426	\$1894	21.9%