



ADVERTISING
STANDARDS
BUREAU

Research Report

Discrimination and Vilification in Advertising

Produced for the Advertising Standards Bureau by

Dr Fiona Giles, Sydney University
Jenni Whelan, Discrimination and Rights Education (DARE)

March 2009

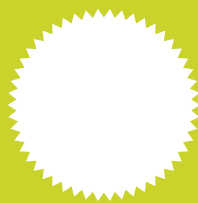
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CEO introduction

Following a request from Advertising Standards Board members, the Advertising Standards Bureau commissioned research into discrimination and vilification in advertising.

Two consultants were engaged to provide complimentary papers from a legal and a socio/ethical perspective.

The papers each provide:

- A plain English overview of the legal or socio/ethical concepts of discrimination and vilification;
- An analysis and discussion of twenty advertisements in terms of discrimination and vilification issues; and
- A guideline based conclusion that draws together major points in the paper, and includes “tips and traps” for the Board when making determinations involving discrimination and vilification issues.

We hope this document will be helpful to advertisers in designing campaigns.

This research package also distils information from both papers to provide a brief reference document for Board members when making determinations involving discrimination and vilification matters.

The paper includes:

- *Key principles regarding the application of the relevant provisions of the Code to the work of the Board;* and
- *Guidelines for use by Advertising Standards Board when determining cases involving discrimination and vilification issues.*

The researchers also conducted a short peer review which is included in the package.

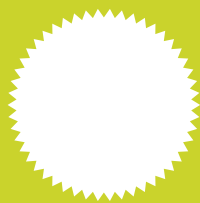
This is the first of what I envisage as a suite of research papers designed to provide information and guidance to the Board. In addition, I hope that the information included here is interesting and useful to academics and others.

Fiona Jolly
Chief Executive Officer

March 2009

*Discrimination and Vilification
in Advertising*

Part 1



Key principles regarding the application of relevant provisions of the code to the work of the board

1. Since decision-making by the Board clearly affects the rights and interests of advertisers whose advertisements have been the subject of complaint, decisions relating to whether an advertisement breaches the Code must be made in accordance with rules of natural justice.
2. The members of the Board must be unbiased and must not have a personal interest in the matter to be decided, nor appear as if they bring a prejudice of mind to the decision-making.
3. Each decision-maker is obliged to exercise their own discretion and judgement in relation to every complaint considered by the Board.
4. Each decision of the Board must be reasonable and must be based on the evidence provided.
5. The Board must give all relevant facts or issues which are relevant to the making of the decision full and proper consideration and ignore any irrelevant considerations.
6. The relevant considerations that the Board must consider are contained in Section 2 of the Code and it is the duty of the Board to apply the Code to the advertisement and to consider each relevant ground of complaint in turn.
7. The Board should adhere to a consistent decision-making procedure when assessing and considering whether to uphold or dismiss each and every complaint under Section 2 of the Code. The Board should agree on and accurately record reasons for determinations so that the reasons for each and every decision of the Board have a logical basis that can be identified and sustained. Accordingly, each Board member should be applying mutually agreed definitions of the terms of the Code in each of its determinations.

Guidelines for use by advertising standards board when determining cases involving discrimination and vilification issues

S 2.1 AANA Code of Ethics:

Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

The overarching question for the Board will always be “does the Board consider that community standards would be breached?” Nevertheless, it is helpful to apply questions that provide a consistent framework for considering the advertisements that come before the Board.

Section 2.1 contains four elements that must be established if a complaint is to be upheld.

1. The portrayal of people or depiction of material
2. In a way which discriminates or vilifies
3. A person or section of the community
4. On account of:
 - a) race, ethnicity, nationality;
 - b) sex;
 - c) age;
 - d) sexual preference;
 - e) religion;
 - f) disability; or
 - g) political belief

The current wording of the Code does not allow the Board to uphold a complaint on ethical grounds alone. Rather, it is required to apply the legal standards as a base-line for considering complaints of discrimination or vilification and then to have regard to additional socio-ethical considerations. The latter is likely to be of greatest importance in borderline cases.

1. Legal considerations

(a) *Discriminates and vilifies*

With regard to determinations against element 2 above, the following summarises the legal concepts of discrimination and vilification which are relevant to the duties of the Board for the purposes of Section 2.1 of the Code.

Discriminates

Acts with inequity, bigotry or intolerance or gives unfair, unfavourable or less favourable treatment to one person or a group because of their race, ethnicity, nationality, sex, age, sexual preference, religion, disability and/or political belief.

Vilifies

Humiliates, intimidates, incites hatred towards, contempt for, or ridicule of one person or a group of people because of their race, ethnicity, nationality, sex, age, sexual preference, religion, disability and/ or political belief. Vilification is generally understood to refer to the making of malicious and abusive statements about an individual or group. It encapsulates notions of disparagement, denigration and slander.

(b) *On account of*

With regard to determinations against element 4 above, the following summarises the legal concepts which are relevant to the duties of the Board for the purposes of Section 2.1 of the Code.

On account of

Owing to, because of, or due to (no requirement for motive).

Race

People of a common descent or ancestral lineage.

Ethnicity

Segments of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not biologically the same race.

Nationality

The status of belonging to a particular nation by origin, birth, or naturalisation.

Sex

The status of being a male, female, intersex, trans-sexual or transgender and of having characteristics attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

Age

The number of years that someone is or characteristics generally pertaining to a stage or phase in someone's life, or characteristics generally imputed to people of that stage or phase.

Sexual preference

Homosexuality, heterosexuality, bisexuality and trans-sexuality.

Religion

People's beliefs and opinions concerning the existence, nature, and worship of God, a god, or gods, and divine involvement in the universe and human life or an institutionalised or a personal system of beliefs and practices relating to the divine.

Disability

A current, past or potential physical, intellectual, psychiatric, or sensory illness, disease, disorder, malfunction, malformation, disfigurement or impairment.

Political belief

Support for, or opposition to, government or civil administration or a particular political party.

2. Socio-ethical considerations

In addition to considering the legal perspective, it is also important for the Board to consider socio-ethical issues when determining complaints against Section 2.1 of the Code. As with many ethical dilemmas and debates, there are no absolutely right or wrong answers, only more and less justifiable solutions to problems considered on a case-by-case basis. By addressing the questions below, it may be possible to determine if any ethical breaches or risks identified are defensible and worthwhile in terms of the possible meanings of the advertisements to their potential audiences.

(a) Identifying and avoiding offence with regard to stereotyping, misrepresentation, vilification or satire

- Does the advertisement portray a negative stereotype that implicates a disadvantaged or minority population group covered by the Code?
- If so, is it done humorously and in a lighthearted, comfortable tone and clearly produced by people belonging to, or sensitive to the same group?
- If the advertisement is intended to be humorous, is the humour successful and relevant?
- Is the stereotype hurtful to the individual or population group to which the individual belongs?
- If the stereotype is based on evidence, is the negative representation socially useful?
- Is the stereotype satirising the behaviour of the individual based on choice, or is it satirising a feature of the individual over which he or she has no control?
- Is the person exhibiting the stereotype passive or active in the advertisement? Passivity can contribute to negative treatment and an unfortunate tone.
- Could this advertisement cause offence?
- If so, is the offence caused to a minority or disadvantaged group?

(b) Identifying and avoiding offence with regard to using divisive social issues in order to gain support of one group at the expense of another group, or with regard to incitement. This could be termed “wedge advertising”.

Could the advertisement be regarded as a form of wedge advertising?

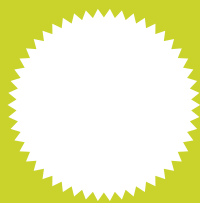
That is:

- Does the advertisement promote the interests of one population group at the expense of another group?
- Does the advertisement include negative stereotyping?
- Does the advertisement include inflammatory language?
 - where any of these approaches could incite hatred or contempt by one group for another group, or conflict between groups.

If so, this can also be considered to be discriminating or vilifying a person or section of the community and breach Section 2.1.

*Discrimination and Vilification
in Advertising*

Part 2



List of twenty advertisements considered in this paper

Item no.	Complaint number	Media type	Advertisement description	Board determination	Category
1	193/07	Radio	Sydney Breast Enlargement and Cosmetic Centre	Upheld	Gender
2	277/07	Outdoor	Inghams — Breast Awareness Week	Upheld	Gender
3	444/07	Television	Rugby WA — 12 year old training bra	Upheld	Gender/age
4	311/07	Television	Sony Music — Kevin Bloody Wilson CD	Upheld	Race
5	453/07	Print	Herringbone — why you should never buy a shirt from a Bulgarian	Upheld	Nationality
6	448/07	Television	BSR Beta Electrical — Baby Jesus	Upheld	Religion
7	108/07	Television	Masterfoods — Starburst — Siamese Twins	Upheld	Disability
8	7/07	Transport	SBS (transport) — not everyone has less on in summer...	Dismissed	Age
9	95/08	Television	Kimberley Clarke — Kotex U — beaver	Dismissed	Gender
10	82/08	Television	Virgin Money — Everlasting Love	Dismissed	Age
11	59/08	Radio	Townsville Automotive Detailing “wogs” and “stooges”	Dismissed	Ethnicity
12	528/06	Outdoor	CUB — Immaculate Consumption	Dismissed	Religion
13	441/07	Print	Trend Micro PC — old man depicted as typical web paedophile	Dismissed	Age
14	286/07	Television	H.J.Heinz — Baked Beans — men in supermarket	Dismissed	Sexual preference
15	181/98; 193/08	Television	Mars — Dove — memory loss	Dismissed	Gender
16	13/07	Television	APIA — chat show — young people...	Dismissed	Age
17	130/08	Outdoor	Cockatoo Ridge Wines	Dismissed	Gender
18	113/08	Television	Skins compression garment — African athletes extolling their superiority	Dismissed	Race
19	123/08	Outdoor	Roads and Traffic Authority — Pinkie	Dismissed	Gender
20	214/08 (three ads)	Television	Inghams — something wrong with you if you don't like chicken	Dismissed	Other (vegetarianism)

AANA Code Of Ethics

This Code has been adopted by the AANA as part of advertising and marketing self-regulation. The object of this Code is to ensure that advertisements are legal, decent, honest and truthful and that they have been prepared with a sense of obligation to the consumer and society and fair sense of responsibility to competitors.

In this Code, unless the context otherwise requires:

Advertising or Marketing Communication means:

- (a) matter which is published or broadcast using any Medium in all of Australia or in a substantial section of Australia for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct; or
- (b) any activity which is undertaken by or on behalf of an advertiser or marketer for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct,

but does not include Excluded Advertising or Marketing Communications.

Advertising or Marketing Communications to Children means Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product.

Advertising Standards Board means the board appointed by the Advertising Standards Bureau from time to time, the members of which are representative of the community, to administer a public complaints system in relation to Advertising or Marketing Communications.

Children means children [14] years old or younger and **Child** means a child [14] years old or younger.

Excluded Advertising or Marketing Communications means labels or packaging for Products.

Medium means any medium whatsoever including without limitation cinema, internet, outdoor media, print, radio, telecommunications, television or other direct-to-consumer media including new and emerging technologies.

Prevailing Community Standards means the community standards determined by the Advertising Standards Board as those prevailing at the relevant time, and based on research carried out on behalf of the Advertising Standards Board as it see fit, in relation to Advertising or Marketing Communications.

Product means goods, services and facilities which are targeted toward and have principal appeal to Children.

1. Section 1

1.1 Advertising or Marketing Communications shall comply with Commonwealth law and the law of the relevant State or Territory.

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 of a competitor.
 - 1.4 Advertising or Marketing Communications shall not exploit community concerns in relation to protecting the environment by presenting or portraying distinctions in products or services advertised in a misleading way or in a way which implies a benefit to the environment which the product or services do not have.
 - 1.5 Advertising or Marketing Communications shall not make claims about the Australian origin or content of products advertised in a manner which is misleading.
- 2. Section 2**
- 2.1 Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.
 - 2.2 Advertising or Marketing Communications shall not present or portray violence unless it is justifiable in the context of the product or service advertised.
 - 2.3 Advertising or Marketing Communications shall treat sex, sexuality and nudity with sensitivity to the relevant audience and, where appropriate, the relevant programme time zone.
 - 2.4 Advertising or Marketing Communications to Children shall comply with the AANA's Code for Advertising & Marketing Communications to Children and section 2.6 of this Code shall not apply to advertisements to which AANA's Code for Advertising & Marketing Communications to Children applies.
 - 2.5 Advertising or Marketing Communications shall only use language which is appropriate in the circumstances and strong or obscene language shall be avoided.
 - 2.6 Advertising or Marketing Communications shall not depict material contrary to Prevailing Community Standards on health and safety.
 - 2.7 Advertising or Marketing Communications for motor vehicles shall comply with the Federal Chamber of Automotive Industries Code of Practice relating to Advertising for Motor Vehicles and section 2.6 of this Code shall not apply to advertising or marketing communications to which the Federal Chamber of Automotive Industries Code of Practice applies.
 - 2.8 Advertising or Marketing Communications for food or beverage products shall comply with the AANA Food & Beverages Advertising & Marketing Communications Code as well as to the provisions of this Code.

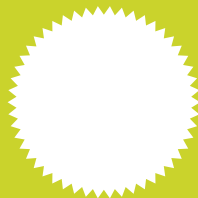
*Discrimination and Vilification
in Advertising*

Part 3

AANA Advertiser Code of Ethics

SECTION 2.1

*'Advertising or Marketing Communications shall not portray
people or depict material in a way which discriminates
against or vilifies a person or section of the community
on account of race, ethnicity, nationality, sex, age, sexual
preference, religion, disability or political belief.'*



Legal implications of advertising in relation to discrimination and vilification

Jenni Whelan

DARE
(Discrimination and Rights Education)
March 2009

1. Introduction

1.1 Rationale for the development of this research report

The Advertising Standards Bureau (ASB) administers a national system of advertising self-regulation through the Advertising Standards Board (the Board) and the Advertising Claims Boardⁱ. The Board is appointed by the ASB and consists of representative members of the community who administer a public complaints system in relation to Advertising and Marketing Communications. This public complaints system includes complaints regarding advertising which breach the AANA Advertiser Code of Ethics ('the Code'). The Code was adopted voluntarily by the AANA to 'ensure that advertisements are legal, decent, honest and truthful and that they have been prepared with a sense of obligation to the consumer and society and fair sense of responsibility to competitors'.

The Advertising Standards Bureau, as part of an ongoing research program, commissioned this research report in order to assist the Board in its determination of complaints regarding advertising which members of the public allege breaches Section 2.1 of the Codeⁱⁱ.

This research report is in four parts: an introduction; an overview of the legal concepts of discrimination and vilification in applicable Commonwealth, State and Territory legislation that are relevant to the duties of the Board; an analysis of twenty advertisements as identified in case reports supplied by the ASB in accordance with key principles that the Board should consider when reviewing advertisements; and guidelines drawing together key principles, relevant to the work of the Board, regarding the anti-discrimination and vilification proscription in the Code.

I note, at the outset, that a broad cross-section of complaints was submitted for analysis: two print, one transport, four outdoor, two radio and eleven television advertisements. There were also one each of disability, ethnicity, nationality and sexual preference complaints, two race, four age, seven gender and three religion complaints and one other (vegetarianism) complaint. Of these 20, complaints against seven advertisements were upheld and 13 were dismissed.

2. Overview of the legal concepts of discrimination and vilification in applicable Commonwealth, State and Territory legislation which are relevant to the duties of the Board

2.1 Preliminary comments regarding the interplay between the legal concepts of discrimination and vilification in applicable Commonwealth, State and Territory legislation and relevant to the duties of the Board

Section 2.1 provides that:

'Advertisements shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.' (emphasis added).

In terms of evaluating the legal concepts of discrimination and vilification in applicable Commonwealth, State and Territory legislation and drawing from, or synthesising, those concepts with the duties of the Board (most specifically to its considerations pursuant to s. 2.1) it is important to bear in mind six preliminary observations.

1. All advertisers in Australia are subject to the relevant Commonwealth and State or Territory anti-discrimination legislation in their jurisdiction and the Code imposes an additional (though voluntary) non-discrimination obligation on advertisers: the Code is not intended to replicate advertisers' non-discrimination and non-vilification obligations.

Accordingly, the terms in the Code need not (and indeed cannot) be interpreted strictly as replicating those in complex anti-discrimination legislative schema: rather the definitions should be plain English and 'stand-alone' so that they can be applied directly and considered on the face of the material before the ASB. Consequently, the legal meaning of terms used simultaneously in the Code and in anti-discrimination legislation simply provides guidance to the Board members in the exercise of their discretionary decision-making powers.

2. Advertisers' non-discrimination and non-vilification obligations under the Code are in some respects more onerous, and in some, less onerous, than the applicable legislative obligations.

For example, the Code proscribes (makes unlawful) vilification on the basis of sex, age and political opinion and no federal or State and Territory legislation have comparable vilification provisions. Conversely, the Code does not proscribe some types of discrimination that are proscribed generally in Federal and State and Territory legislation such as marital status discriminationⁱⁱⁱ, discrimination because of a person's relatives or associates^{iv}, carer's and family responsibilities discrimination^v and vilification on the grounds of HIV/AIDS^{vi}. Most significantly, the Code does not define any of the terms in Section 2.1, it does not distinguish between discrimination and vilification in the way that anti-discrimination legislation does and it does not provide for exceptions and exemptions to the operation of the Code.

3. In terms of looking towards anti-discrimination legislation, as a basis for defining the terms for the purposes of the work of the Board, as discussed above, anti-discrimination legislation in Australia does not follow one single model and so, provides a variety of approaches and definitions to consider and draw from.
4. Principles of natural justice and procedural fairness require the Board to consider advertisements against a consistent and uniform standard. Agreement on the definitions of terms in Section 2.1 of the Code is fundamental to ensuring the integrity of the decision-making of the Board because the shared understanding of the meaning of the terms by the

members of the Board becomes the benchmark against which advertising matter will be assessed. Much has been written, with respect to the judicial interpretation of anti-discrimination legislation about the difficulties that adjudicators, who have not themselves encountered discrimination, face in understanding the seriousness and impact of discrimination and vilification^{vii}. It is uncontested that adjudicators cannot be absolutely neutral or objective in the sense that we are all situated by our own experiences and understandings:

'In our society, everyone has a location in the social systems of discrimination and advantage. There is no neutral position. The best that can be done towards impartiality by those who must adjudicate such cases is to acknowledge their own location in the structure and attempt to take as broad a view as possible. Even then, unconscious identifications would still exist — true impartiality can never be achieved'^{viii}.

5. The Code does not provide any general exceptions to, or exemptions from, the prohibition of discrimination and vilification. In contrast, anti-discrimination legislation commonly provides exemptions for things done with statutory authority, religious beliefs or principles, the protection of health, safety and property, welfare measures and special needs^{ix}. Similarly, there are differing provisions which establish statutory exemptions to what would otherwise be unlawful vilification in Australian legislation^x. The types of exemptions include anything said or done "reasonably and in good faith"^{xi} if the communication is part of an artistic work, an academic and scientific work or debate, or a fair and accurate report on a matter of public interest. Such exemptions have been read broadly by the Courts^{xii}. The definitions, then, of the terms in the Code would need to be sufficiently circumscribed so as to catch only those advertisements intended to be caught by Section 2.1.
6. Section 2.1 contains four elements that must be established if a complaint is to be upheld.
 1. The portrayal of people or depiction of material.
 2. In a way which discriminates or vilifies.
 3. A person or section of the community.
 4. On account of:
 - a) race, ethnicity, nationality;
 - b) sex;
 - c) age;
 - d) sexual preference;
 - e) religion;
 - f) disability; or
 - g) political belief.

The legal concepts of discrimination are relevant to the interpretation of elements two and four only; elements one and three ought to be interpreted according to their plain English meaning. I will discuss the legal concepts of discrimination and vilification in applicable Commonwealth, State and Territory legislation that are relevant to the terms in Section 2.1 of the Code, in the following paragraphs.

Discriminates

Discrimination is generally understood to refer to notions of bias, favouritism, prejudice, unfairness, inequity, bigotry and intolerance. It is also usually understood to refer to the unfair treatment of one person, or group, because of prejudice towards that group based on a particular trait, or combinations of traits — for example, race, ethnicity, gender or religion.

In legal terms, however, not all discrimination is prohibited. Rather, the Commonwealth and all State and Territory jurisdictions have enacted legislation that proscribes specific types of discrimination in particular areas of public life^{xiii}. In order to be unlawful, the discriminatory act complained of must be of a type, and occur in a context, that is forbidden by the applicable legislation^{xiv}.

There is a broad overlapping between the types and contexts of proscribed discrimination federally and in the States and Territories^{xv}. The types of discrimination commonly prohibited under Federal and State/Territory legislation are race, disability, sex, pregnancy, marital status, homosexuality, age, who individuals are related to or associate with, carer's and family responsibilities and transgender status. The contexts of proscribed discrimination are generally, education; access to, or the provision of, goods and services; employment; accommodation; and registered clubs.

The legal meaning of the term 'discrimination' in Australia is complex. This is partly because there is not a single 'all application' definition of the legal meaning of the term^{xvi} and partly because discrimination in Australian law is conceptualised and categorised as either direct or indirect discrimination (with specific and separate components)^{xvii}. Fundamentally, direct discrimination redresses less favourable or unfavourable treatment on the basis of an attribute (such as race or sex) and indirect discrimination redresses unfavourable treatment on the basis of an attribute because of an unfair outcome or disproportionate impact of an apparently fair requirement on a particular group. Due the nature of the considerations of the Board it is unlikely that a matter would involve indirect or systemic discrimination (in the sense that the terms are used in discrimination legislation).

The complexity of the legislative definitions of discrimination has been subject to lengthy and complex judicial scrutiny and academic criticism^{xviii}.

In terms of striking a balance between the legally complex definitions of discrimination and the general understanding of the term I propose that when the Board considers complaints under Section 2.1 of the Code it ought to conceptualise the term 'discriminates' in the following way:

Discriminates

Acts with inequity, bigotry or intolerance or gives unfair, unfavourable or less favourable treatment to one person or a group because of their race, ethnicity, nationality, sex, age, sexual preference, religion, disability and/ or political belief.

Vilifies

Vilification is generally understood to refer to the making of malicious and abusive statements about an individual or a group. It encapsulates notions of disparagement, denigration and slander^{xix}.

In legal terms specific provisions making vilification unlawful^{xx} are contained, in the *Racial Discrimination Act 1975* (Cth) and in legislation enacted by all Australian States and Territories except the Northern Territory^{xxi}. The Commonwealth legislation provides only civil remedies, Western Australia provides only criminal remedies, and the rest provide both civil and criminal remedies^{xxii}.

It is important to note that vilification provisions in Federal and State/Territory legislation commonly have less coverage than the anti-discrimination provisions and that there are broader differences between jurisdictions, in terms of coverage^{xxiii}. Apart from the discrepancies regarding coverage, similarly to the legal meaning of 'discrimination' in Australian law, there is no single 'all application' definition of the legal meaning of the term 'vilification' and, in fact, the thresholds for what constitutes vilification are quite different between the Commonwealth and State jurisdictions.

Federally, Section 18C of the *Racial Discrimination Act 1975* (Cth) prohibits 'an act done otherwise than in private that *offends, insults, humiliates or intimidates* (emphasis added) another person or group because of the race of that person or group'. All that the Act requires is that the thing said or done which is the subject of a complaint must have been reasonably likely, taking account of all the circumstances, to have caused the complainant, whether as an individual or group, to feel offended, insulted, humiliated or intimidated.

In contrast, although none of the States share a common definition of the term ‘vilification’^{xxiv} they all have a higher threshold to establish vilification than the Commonwealth legislation: rather than requiring that an individual or group, feel offended, insulted, humiliated or intimidated the States require *hatred towards, serious contempt for, or severe ridicule of, a person or group* (emphasis added).

Significantly, both State and Commonwealth legislation do-not require any element of subjective intention — simply an assessment of offensiveness based on an objective consideration of the context and all the circumstances in which the act occurs.

Again, in terms of striking a balance between the legally varied definitions of vilification at the Commonwealth and State level, and the absence of any exceptions or exemptions in the Code, the concept of vilification to be applied by the Board in its consideration of complaints under Section 2.1 of the Code ought to require a higher threshold than *offends or insults* but include *humiliates and insults* as the lower end of the threshold.

Vilifies

Humiliates, intimidates, incites hatred towards, contempt for, or ridicule of one person or a group of people because of their race, ethnicity, nationality, sex, age, sexual preference, religion, disability and/or political belief.

On account of

There is a complex body of law regarding the meaning of phrases analogous to ‘on account of’ such as ‘based on’, ‘by reason of’ or ‘on the ground of’ in Australian anti-discrimination legislation^{xxv}. Apart from defining the meaning of these terms the various courts have also considered whether motive and intent are necessary and whether a person’s race, ethnicity etcetera needs to be the sole or dominant reason for the discrimination or vilification or just a substantial factor^{xxvi}.

I note that the Code is silent as to whether any motive or intent to discriminate or vilify is relevant. The courts have consistently held that conduct is unlawful if a person acts discriminatorily even without intending to and some legislation explicitly stipulates, like Section 10 of the *Equal Opportunity Act 1995* (Vic) that ‘in determining whether or not a person discriminates, the person’s motive is irrelevant’. Consequently, a suggested approach is for the Board to also regard motive to discriminate or vilify as irrelevant.

I note too that the Code is also silent about whether a person’s race, ethnicity, etcetera needs to be the only, or just a significant, reason for the discrimination. I suggest that the Board, in assessing whether an advertisement discriminates or vilifies against a person (or group), consider whether the race, ethnicity, etcetera was a significant (but not necessarily the only or dominant) factor for the portrayal or depiction of that person or group in the advertising material.

On account of

Owing to, because of, or due to (no requirement for motive).

Race, ethnicity and nationality

There are significant variations between Commonwealth and State/Territory proscriptions of acts of discrimination based on race and related grounds^{xxvii}. However, the grounds prohibited in the Code are limited to race, ethnicity and nationality.

The Courts have generally taken the view that ‘race’ as described in anti-discrimination legislation is a broad term and should be understood in the popular sense^{xxviii} as including colour, descent, or ancestry, ethnicity or ethnic origin, nationality or national origin.

The Explanatory Memorandum to the *Racial Hatred Bill 1994* (Cth) also provides the following guidance in relation to interpreting the term ‘race’:

“The term ‘race’ would include ideas of ethnicity so ensuring that many people of, for example, Jewish origin would be covered. While that term connotes the idea of a common descent, it is not necessarily limited to one nationality and would therefore extend also to other groups of people such as Muslims”^{xxix}.

The term ‘ethnic origin’ (or ethnicity) has also been interpreted broadly in a number of jurisdictions. The Court in *King-Ansell* held that Jewish people in New Zealand formed a group with common ethnic origins within the meaning of the *Race Relations Act 1971* (NZ). Richardson J stated that:

“a group is identifiable in terms of ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes

and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents^{xxx}.

Similarly, the House of Lords held in *Mandla v Dowell Lee*^{xxxi} that for a group (in that instance, Sikh people) to constitute an ethnic group for the purposes of the legislation in question, it had to regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. The House of Lords held that the following characteristics are essential: a shared history, of which the group was conscious as distinguishing it from other groups, and the memory of which it keeps alive; and a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. They also held the following characteristics are relevant, but not essential, to a finding that a group constitutes an 'ethnic group': a common geographical origin or descent from a small number of common ancestors; a common language, not necessarily peculiar to the group; a common literature peculiar to the group; a common religion different from that of neighboring groups or the general community surrounding it; and being a minority or an oppressed or a dominant group within a larger community^{xxxii}.

The term nationality has been held to refer to the status of belonging to a particular nation by origin, birth, or naturalisation: it can therefore be a 'transient status', capable of change through a person's lifetime^{xxxiii}.

In accordance with the meaning given to the terms in anti-discrimination legislation the terms race, ethnicity and nationality can be conceptualised as follows:

Race

People of a common descent or ancestral lineage.

Ethnicity

Segments of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not biologically the same race.

Nationality

The status of belonging to a particular nation by origin, birth, or naturalisation.

Sex

All Commonwealth and State and Territory legislation prohibits discrimination on the basis of sex. 'Sex' refers to the status of being a male or female and of having characteristics attributed to an individual or group because they are male or female. Illustrations of characteristics attributed to women include pregnancy, breastfeeding and child-rearing.

State and Territory legislation also variously prohibit discrimination against persons who are intersex (persons who genetically are neither male or female), trans-sexual (persons of one sex who assume the bodily characteristics of the other sex by medical or other means) and transgender (persons who identify as members of the opposite sex by living, or seeking to live, as a member of the opposite sex whether or not they have undergone sexual reassignment surgery).

Under anti-discrimination legislation sexual harassment is a type of sex discrimination however it refers to unwelcome conduct of a sexual nature in relation to an individual where that individual feels offended, humiliated, or intimidated (and a reasonable person in their shoes would feel the same). Although lewd comments or smutty jokes, asking for sex and displays of offensive material could amount to sexual harassment (and all could conceivably form the content of advertisements) there cannot be sexual harassment, in the sense that the term is understood in anti-discrimination legislation, unless the behaviour is targeting a specified individual.

In accordance with the various protections afforded to persons on the ground of sex in anti-discrimination legislation, the term sex in the Code can be conceptualised liberally:

Sex

The status of being a male, female, intersex, trans-sexual or transgender and of having characteristics attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

Age

Commonwealth and some State legislation proscribe discrimination on the basis of age where an opportunity is denied to a person because of their age, or because of characteristics generally pertaining to age, or characteristics generally imputed to people of that age, and where age is irrelevant to the person's ability to take advantage of that opportunity.

Illustrations of age discrimination could include the decision to not employ an individual simply because of their age (such as an employer assuming that an older person would not have adequate computer skills to do an office job) or the refusal to rent accommodation to a young person because the agent assumes young people will not properly maintain the property.

Age
The number of years that someone is or characteristics generally pertaining to a stage or phase in someone's life, or characteristics generally imputed to people of that stage or phase.

Sexual preference

Under the *Sex Discrimination Act* (Cth) 1984, discrimination on the grounds of sexual preference is not unlawful and there is no enforceable remedy. Complaints may be made to the Australian Human Rights Commission which will attempt to conciliate them. If these attempts are unsuccessful and discrimination is found, the Commission may recommend compensation and changes to policies and practices but there is no mechanism for enforcement. The only step is to report to the Attorney-General who is required to table the report in parliament.

Moreover, there is no uniformity among Australian States and Territories in relation to the prohibition of discrimination based on sexual preference or sexual orientation. There are significant differences between the State and Territory laws regarding what exactly is proscribed (for example, homosexuality, bisexuality, trans-sexuality or discrimination on the basis of sexual preference), the areas in which discrimination is outlawed and in the range of exceptions and exemptions^{xxxiv}.

Again, in accordance with the liberal protection afforded by the Code, 'sexual preference' in the Code ought to be conceptualised as including any discrimination on account of a person's sexual preference including homosexuality,

Sexual preference
Homosexuality, heterosexuality, bisexuality and trans-sexuality.

heterosexuality, bisexuality and trans-sexuality.

Religion

Interestingly, the Code proscribes discrimination on the basis of religion although discrimination on the basis of religious affiliation or conviction is only unlawful in Australia in WA, Tasmania and the ACT^{xxxv}. The term 'religion' should be given its plain English meaning of referring to people's beliefs and opinions concerning the existence, nature, and worship of God, a god, or gods, and divine involvement in the universe and human life or an institutionalised or a personal system of beliefs and practices relating to the divine^{xxxvi}.

Religion
People's beliefs and opinions concerning the existence, nature, and worship of God, a god, or gods, and divine involvement in the universe and human life or an institutionalised or a personal system of beliefs and practices relating to the divine.

Disability

Disability is broadly and comprehensively defined in both Commonwealth and State anti-discrimination legislation. Section 4 of the *Anti-Discrimination Act* (NSW) 1977, for example, defines "disability" to mean the total or partial loss of a person's bodily or mental functions or of a part of a person's body, or the presence in a person's body of organisms causing or capable of causing disease or illness, or the malfunction, malformation or disfigurement of a part of a person's body, or a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

In accordance with the breadth of the definition of the term 'disability' in anti-discrimination legislation, the term ought to be conceptualised broadly in the Code.

Disability
A current, past or potential physical, intellectual, psychiatric, or sensory illness, disease, disorder, malfunction, malformation, disfigurement or impairment.

Political belief

Curiously, the Code proscribes discrimination on the basis of political belief, although discrimination on the basis of political belief or conviction is only unlawful in Australia in the ACT, WA, Victoria and Tasmania^{xxvii}. Political belief refers to an individual's support for, or opposition to, government or civil administration or a particular political party^{xxviii}.

Political belief

Support for, or opposition to, government or civil administration or a particular political party.

2.2 Summary of the legal concepts of discrimination and vilification which are relevant to the duties of the Board for the purposes of Section 2.1 of the Code.

Section 2.1 AANA Code of Ethics:

Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.

Discriminates

Acts with inequity, bigotry or intolerance or gives unfair, unfavourable or less favourable treatment to one person or a group because of their race, ethnicity, nationality, sex, age, sexual preference, religion, disability and/or political belief.

Vilifies

Humiliates, intimidates, incites hatred towards, contempt for, or ridicule of one person or a group of people because of their race, ethnicity, nationality, sex, age, sexual preference, religion, disability and/or political belief.

On account of

Owing to, because of, or due to (no requirement for motive).

Race

People of a common descent or ancestral lineage.

Ethnicity

Segments of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not biologically the same race.

Nationality

The status of belonging to a particular nation by origin, birth, or naturalisation.

Sex

The status of being a male, female, intersex, trans-sexual or transgender and of having characteristics attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

Age

The number of years that someone is or characteristics generally pertaining to a stage or phase in someone's life, or characteristics generally imputed to people of that stage or phase.

Sexual preference

Homosexuality, heterosexuality, bisexuality and trans-sexuality.

Religion

People's beliefs and opinions concerning the existence, nature, and worship of God, a god, or gods, and divine involvement in the universe and human life or an institutionalised or a personal system of beliefs and practices relating to the divine.

Disability

A current, past or potential physical, intellectual, psychiatric, or sensory illness, disease, disorder, malfunction, malformation, disfigurement or impairment.

Political belief

Support for, or opposition to, government or civil administration or a particular political party.

3. Analysis of 20 advertisements as identified in case reports supplied by the Advertising Standards Bureau in accordance with key principles that the Board should consider when reviewing advertisements

Item no.	Complaint number	Media type	Advertisement description	Board determination	Category
1	193/07	Radio	Sydney Breast Enlargement and Cosmetic Centre	Upheld	Gender
2	277/07	Outdoor	Inghams — Breast Awareness Week	Upheld	Gender
3	444/07	Television	Rugby WA — 12 year old training bra	Upheld	Gender/age
4	311/07	Television	Sony Music — Kevin Bloody Wilson CD	Upheld	Race
5	453/07	Print	Herringbone — why you should never buy a shirt from a Bulgarian	Upheld	Nationality
6	448/07	Television	BSR Beta Electrical — Baby Jesus	Upheld	Religion
7	108/07	Television	Masterfoods — Starburst — Siamese Twins	Upheld	Disability
8	7/07	Transport	SBS (transport) — not everyone has less on in summer...	Dismissed	Age
9	95/08	Television	Kimberley Clarke — Kotex U — beaver	Dismissed	Gender
10	82/08	Television	Virgin Money — Everlasting Love	Dismissed	Age
11	59/08	Radio	Townsville Automotive Detailing “wogs” and “stooges”	Dismissed	Ethnicity
12	528/06	Outdoor	CUB — Immaculate Consumption	Dismissed	Religion
13	441/07	Print	Trend Micro PC — old man depicted as typical web paedophile	Dismissed	Age
14	286/07	Television	H.J.Heinz — Baked Beans — men in supermarket	Dismissed	Sexual preference
15	181/98; 193/08	Television	Mars — Dove — memory loss	Dismissed	Gender
16	13/07	Television	APIA — chat show — young people...	Dismissed	Age
17	130/08	Outdoor	Cockatoo Ridge Wines	Dismissed	Gender
18	113/08	Television	Skins compression garment — African athletes extolling their superiority	Dismissed	Race
19	123/08	Outdoor	Roads and Traffic Authority — Pinkie	Dismissed	Gender
20	214/08 (three ads)	Television	Inghams — something wrong with you if you don't like chicken	Dismissed	Other (vegetarianism)

3.1 Preliminary comments regarding the Board's duties when considering complaints relating to discrimination and vilification.

Although there is no explicit requirement for the Board to apply the principles of natural justice, such as exists for statutory decision-makers or tribunals, for example, it is clear that there is an accepted legal duty to afford procedural fairness when making administrative decisions that affect the rights, interests and legitimate expectations of persons effected by a decision-makers' authority:

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness (natural justice), in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention^{xxxix}.

Since decision-making by the Board clearly affects the rights and interests of advertisers whose advertisements have been the subject of complaint, decisions relating to whether an advertisement is discriminatory or vilificatory under Section 2.1 of the Code must be made in accordance with rules of natural justice.

The rules of procedural fairness (or natural justice) are principles that have been developed by the courts to ensure fairness of decision-making by government, statutory tribunal and administrative decision-makers. They consist broadly of three principles^{xl} which correlate with the three phases of complaint determination by the Board:

1. The decision-maker must give to a person whose interests will be adversely affected by a decision, an opportunity to present his or her case (notice and information gathering phase).

2. The decision-maker must be unbiased and must not have a personal interest in the matter to be decided, nor appear as if they bring a prejudice of mind.
3. The decision must be reasonable and must be based on the evidence provided.

Compliance with the first principle is a matter for the ASB since they are responsible for the notice and information gathering phase of the complaint receipt and preparation process. The Board, however, is responsible for ensuring compliance with the second and third principles because it is the Board that is responsible for the *assessment* and *determination* phase of the complaint process.

In relation to the *assessment* of a complaint, the Board must be unbiased and must not have a personal interest in the matter to be decided. Also, a decision-maker must not make a decision based on the directions of another person or persons: a decision-maker is obliged to exercise their own discretion and judgement.

In relation to the *determination* of the complaint, the Board is obliged to give full and proper consideration to all relevant facts or issues that are relevant to the making of the decision and to ignore any irrelevant considerations. The relevant considerations are contained in Section 2.1 of the Code. It is important to note here that the ground(s) identified by the complainants may, or may not, be the relevant ground(s) or may not be the only relevant ground(s). If a ground is, or multiple grounds are, relevant, the Board is obliged to go on to consider whether the advertisement portrays people or depicts material in a way which discriminates against or vilifies a person or section of the community on account of the ground (or multiple grounds). It is the duty of the Board to consider, in turn, each relevant ground of the Code relating to the complaint.

Further, in relation to the *determination* of the complaint, the Board is required, notwithstanding the large volume of complaints that the Board is required to consider under time pressure, to agree on and accurately record reasons for determinations so that the reasons for each and every decision of the Board have a logical basis that can be identified and sustained.

Utilising a decision-making template for each complaint that it considers assists the Board in ensuring that all relevant facts or issues that are relevant to the making of the decision are given full and proper consideration and that irrelevant considerations are not taken into account. Using a template that contains, as a matter of course, agreed definitions for the terms being applied from the Code assists

the Board in achieving consistency and rigour in decision-making by ensuring that the same objective criterion are applied to every complaint that is assessed by the Board. Finally, the use of a template setting out the steps in the assessment process (Section 2.1, relevant grounds considered and definitions used) and recording the determination (complaint upheld or dismissed), and reasons for the determination, ensure that the reasons for decisions are clearly identified and justified.

Accordingly, I have analysed each of the 20 complaints provided by the Board, in accordance with the key principles that the Board should consider, utilising the following template structure.

- i. Identify the complaint details.
- ii. Describe the advertisement.
- iii. Outline the nature of the complaints.
- iv. Give details of the advertiser's response.
- v. Note whether the complaint has been dealt with previously or whether there are any precedents which may apply.
- vi. Set out the steps in the assessment process (Section 2.1, relevant grounds considered and definitions used).
- vii. Note the determination (complaint upheld or dismissed and reasons why).
- viii. Note additional comments, if any.

The template is annexure A to this document.

4. Guidelines that draw together for the Board the key principles regarding the application of the relevant provisions in racial discrimination and vilification legislation to the work of the Board

1. Since decision-making by the Board clearly effects the rights and interests of advertisers whose advertisements have been the subject of complaint decisions relating to whether an advertisement is discriminatory or vilificatory under Section 2.1 of the Code must be made in accordance with rules of natural justice.
2. The members of the Board must be unbiased and must not have a personal interest in the matter to be decided, nor appear as if they bring a prejudice of mind to the decision-making.
3. Each decision-maker is obliged to exercise their own discretion and judgement in relation to every complaint considered by the Board.
4. Each decision of the Board must be reasonable and must be based on the evidence provided.

5. The Board must give all relevant facts or issues which are relevant to the making of the decision full and proper consideration and ignore any irrelevant considerations.
6. The relevant considerations that the Board must consider are contained in Section 2.1 of the Code and it is the duty of the Board to apply the Code to the advertisement and to consider each relevant ground of complaint in turn.
7. In relation to each complaint of potential discrimination or vilification the Board must ask itself 'does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief'? To answer question 2 the Board must identify, for itself, whether Section 2.1 applies by asking 'which if any of the grounds in section are relevant?'.
8. The ground(s) identified by the complainants may, or may not, be the relevant ground(s) or may not be the only relevant ground(s). If a ground is, or multiple grounds are, relevant, the Board ought to go on to consider whether the advertisement portrays people or depicts material in a way which discriminates against or vilifies a person or section of the community on account of the ground (or multiple grounds).
9. The Board is required, notwithstanding the large volume of complaints that the Board is required to consider under time pressure, to consider advertisements against a consistent and uniform standard. The Board is required to adhere to a consistent decision-making procedure when assessing and considering whether to uphold or dismiss each and every complaint under Section 2.1 of the Code and to agree on and accurately record reasons for determinations so that the reasons for each and every decision of the Board have a logical basis that can be identified and sustained. Accordingly, each Board member should be applying mutually agreed definitions of the terms in Section 2.1 of the Code in each of its considerations (see Annexure A).

5. Annexure A: Board decision template

1. Description of the advertisement:

2. Outline of the complaint:

3. The advertiser's response:

4. Complaint previously dealt with/relevant precedent to consider:

5. Assessment:

- i. *Which if any of the grounds in Section 2.1 of the Code are relevant?*
(If none, complaint is dismissed as misconceived).
- ii. *Consider each ground in turn (having regard to the definitions attached).*

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

(This is the threshold required by the Code to substantiate the complaint. If the answer to this question is 'yes', the complaint must be upheld. If the answer is 'no', the complaint must be dismissed).

6. Determination:

Complaint upheld

Reasons:

- i. relevant ground(s) of discrimination/vilification in the Code identified; and
- ii. the threshold required in the Code to substantiate the complaint is met.

Additional comments (if any):

OR

Complaint dismissed

Reasons:

- i. relevant ground(s) of discrimination/vilification in the Code not identified; or
- ii. the threshold required in the Code to substantiate the complaint is not met.

Additional comments (if any):

6. Endnotes

ⁱ The Advertising Claims Board determines complaints involving issues of truth, accuracy and legality.

ⁱⁱ Section 2 also states that advertisements shall not present or portray violence unless it is justifiable in the context of the product or service advertised and shall treat sex, sexuality and nudity with sensitivity to the relevant audience and, where appropriate, the relevant programme time zone. It also requires that advertisements shall only use language which is appropriate in the circumstances and that strong or obscene language is to be avoided, that advertisements shall not depict material contrary to prevailing community standards on health and safety. It requires, too, that advertisements which are directed primarily to children aged 14 years or younger and are for goods, services and facilities which are targeted toward and have principal appeal to children, to comply with the AANA's Code of Advertising to Children. Finally, it makes specific provision for advertisements for motor vehicles and for food and beverage products to comply, respectively, with the Federal Chamber of Automotive Industries Code of Practice relating to Advertising for Motor Vehicles and the AANA Food and Beverages Marketing Communications Code. These other elements of Section 2 are beyond the scope of this report.

ⁱⁱⁱ Treating someone unfairly or harassing them either because of their marital status; for example because they are single, married, divorced, living in a de facto relationship with a member of the opposite sex, or because of the particular person they are married to or in a de facto relationship with.

^{iv} Where someone is treated unfairly or harassed because of the sex, pregnancy, race, age, marital status, homosexuality, transgender or disability of one of their relatives, friends or colleagues.

^v When someone is treated unfairly or harassed because they need to care for or support a child or other immediate family member.

^{vi} Specifically, Sections 38S(1) and 38T(1) proscribe the incitement of hatred, serious contempt or severe ridicule of persons on the basis of transgender; Sections 49ZS(1) and 49ZT(1) proscribe the incitement of hatred, serious contempt or severe ridicule of persons on the basis of homosexuality; Sections 49ZXB(1) and 49ZXC(1) proscribe the incitement of hatred, serious contempt or severe ridicule of persons on the basis of HIV/AIDS. *Anti-Discrimination Act 1977* (NSW).

^{vii} See, for example, Beth Gaze, "Context And Interpretation In Anti-Discrimination Law" [2002] *MULR* 18.

^{viii} See Katherine O'Donovan, 'Fabled Explanations of Bias' in Clare McGlynn (ed), *Legal Feminisms: Theory and Practice* (1998) 49.

^{ix} See sections 69–82 *Equal Opportunity Act 1995* (VIC).

^x For example, under Sections 18D *Racial Discrimination Act 1975* (Cth) and s. 20C *Anti-Discrimination Act 1977* (NSW).

^{xi} The Explanatory Memorandum which accompanied the introduction of the amendments to the RDA commented that "... It is not the intention of that provision to prohibit a person from stating in public what may be considered generally to be an extreme view, so long as the person making the statement does so reasonably and in good faith and genuinely believes what he or she is saying." Note that some decision-makers have held that "a margin of tolerance" should be exercised in deciding what is reasonable, and that the Commission (when dealing with such complaints) should "not find the threshold of what is unreasonable conduct too readily crossed" and that "moral and ethical considerations, expressive of community standards, are relevant in determining what is reasonable" — *Bryl and Kovacevic v Nowra and Melbourne Theatre Company* (1999) HREOC 93-022 16.

^{xii} This is consistent with the presumption that a fundamental tenet of the common law is freedom of expression (*Attorney-General v Guardian Newspapers Ltd* [1990] 1 AC 109 at 283; *Brown v Classification Review Board* (1998) 154 ALR 67 at 76-77).

^{xiii} Federal laws dealing with discrimination are: the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Human Rights & Equal Opportunity Commission Act 1986* (Cth) and the *Age Discrimination Act 2004* (Cth). The relevant State and Territory laws are the *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1995* and *Racial and Religious Tolerance Act 2001* (Vic); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1996* (NT); *Equal Opportunity Act 1984* and *Racial Vilification Act 1996* (SA); and *Equal Opportunity Act 1984* and *Criminal Code* (WA).

^{xiv} In terms of the processing of complaints regarding unlawful discrimination the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) established the Human Rights and Equal Opportunity Commission (HREOC) (now known as the Australian Human Rights Commission — AHRC) as the statutory agency responsible for administering federal anti-discrimination legislation and for investigating and conciliating complaints of discrimination pursuant to the five federal substantive anti-

discrimination Acts. If complaints are not resolved by the AHRC, parties may commence proceedings in the Federal Court or Federal Magistrates Court. All State and Territory jurisdictions have similar statutory agencies responsible for administering their legislation.

^{xv} Moreover, the federal and applicable State/ Territory legislation generally both apply so individuals in each State or Territory must choose whether they want to lodge a complaint under federal or applicable State/ Territory legislation. There are also anomalies and gaps in coverage.

^{xvi} The Commonwealth legislation consists of different acts for the different types of discrimination: race, sex, age, disability. Also, some State and Territory legislation, despite having one legislative instrument, still define discrimination in terms of race or sex discrimination and not as a stand-alone definition (see, for example, Section 7 *Anti-Discrimination Act 1977* (NSW)). Even the *Equal Opportunity Act 1995* (Vic) which does define discrimination as a stand-alone provision (Section 7: 'Discrimination means direct or indirect discrimination on the basis of an attribute') still requires an understanding of the complex legal concepts of direct and indirect discrimination to be understood.

^{xvii} Generally, in Australian legislation, direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances. In contrast, South Australia and the ACT, do not follow the comparative "less favourable treatment" model: rather the *Equal Opportunity Act 1984* (SA) and the *Discrimination Act 1991* (ACT) define discrimination with the focus, instead, on "unfavourable treatment". Generally, indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice that someone with an attribute does not or cannot comply with; and that a higher proportion of people without that attribute, or with a different attribute, do or can comply with; and that is not reasonable. For discussion of discrimination in Australian law generally refer to see Chris Ronalds (2008) *Discrimination Law and Practice*, (Federation Press, Australia) and Neil Rees, Katherine Lindsay and Simon Rice (2008) *Australian Anti-Discrimination Law Text, cases and materials* (Federation Press, Australia).

^{xviii} Smith, B. (2006) 'Not The Baby And The Bathwater: Regulatory Reform For Equality Laws To Address Work-Family Conflict' *Sydney Law Review*, Dec 06 Vol 28 no.4- "the rule against discrimination retains an increasingly unsustainable distinction between direct and indirect discrimination, requiring applicants to articulate whether they have experienced differential treatment or differential impact".

^{xix} Complaints of vilification can sometimes trigger debates about the extent of freedom of speech and expression in Australia. There is no absolute statutory recognition of a freedom of opinion and expression in the Commonwealth Constitution although the High Court has recognised certain implied rights and freedoms, especially in relation to freedom of communication as to matters of government and politics. See cases such as *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104; *Cunliffe v Commonwealth* (1994) 182 CLR 272, *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

^{xx} Unless done reasonably and in good faith in certain specific circumstances which are set out in the relevant legislation.

^{xxi} The *Anti-Discrimination Act 1996* (NT) does not specifically include vilification as a form of prohibited conduct. The definition of discrimination includes harassment on the basis of an attribute which may cover more overt cases of vilification.

^{xxii} At the State and Territory level, the *Anti-Discrimination Act 1977* (NSW), the *Anti-Discrimination Act 1991* (Qld) and the *Discrimination Act 1991* (ACT) all draw a distinction between 'racial vilification', less serious behaviour with civil penalties only, and 'serious racial vilification', more serious behaviour with criminal penalties and prosecution initiated by the State. Sections 4 to 7 of the *Racial Vilification Act 1996* (SA) also provide for a criminal offence of racial vilification. The Western Australian *Criminal Code* was amended in 1991 by the *Criminal Code Amendment (Racist Harassment and Incitement of Racial Hatred) Act 1991* (WA), making it a criminal offence to possess for publication and/or publish and/or distribute or display threatening or abusive written or pictorial material in order to incite racial hatred or to harass a racial group. In contrast to the situation in New South Wales, Queensland, South Australia, Victoria and the Australian Capital Territory, the Western Australian legislation is very limited in that it addresses only written or pictorial material (not verbal comments), requires an intention to create hatred of a racial group and provides criminal sanctions only rather than any civil procedure.

^{xxiii} Part IIA of the *Racial Discrimination Act 1975* (Cth) prohibits public acts of racial hatred. South Australia and Western Australia proscribes racial vilification only. The NSW legislation provides protection against vilification on the basis of race, homosexuality, HIV/AIDS status or transgender status. The ACT legislation proscribes vilification on the basis of race, sexuality, HIV/AIDS status or trans-sexuality. The Victorian, Queensland and Tasmanian

legislation all proscribe vilification on the basis of race and religion (with Queensland also proscribing gender identity and sexuality vilification) and Tasmania proscribes vilification on the basis of race, disability, sexual orientation or lawful sexual activity and religious belief, affiliation or activity.

^{xxxiv} In NSW for example, ‘vilification’ refers to a public act inciting hatred towards, serious contempt for, or severe ridicule of, a person or group. In SA, ‘racial vilification’ refers to a public act inciting hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by threatening physical harm or inciting others to threaten physical harm. In Queensland, ‘racial vilification’ refers to a public act knowingly or recklessly inciting hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of race in a way that includes threatening physical harm or inciting others to threaten physical harm. In Victoria, racial vilification refers to conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that a person or group.

^{xxxv} While the phrases ‘by reason of’ or ‘on the ground of’ have been held judicially to require a causal connection the phrase ‘based on’ has been held to require a ‘sufficient connection’ rather than ‘causal nexus’. See *Macedonian Teachers’ Association of Victoria Inc v Human Rights & Equal Opportunity Commission* (1998) 91 FCR 8 at 33 and followed by Full Federal Court in *Bropho v Western Australia* [2008] FCAFC 100.

^{xxxvi} For example, under the *Sex Discrimination Act 1984* (Cth) (Section 8), *Racial Discrimination Act 1975* (Cth) (Section 18), and *Disability Discrimination Act 1992* (Cth) (Section 10), if an act is done for two or more reasons and a discriminatory ground is one of those reasons, then the act is regarded as having been done for the discriminatory reason, whether or not it was the dominant or substantial reason for doing the act.

^{xxxvii} The *Racial Discrimination Act 1975* (Cth) prohibits discrimination on the basis of race, colour, ethnic or national origin but not based on nationality. The ACT and Queensland proscribe discrimination on the basis of race, colour, descent, nationality and national and ethnic origin, NSW on the basis of race, colour, descent, nationality, national and ethnic origin, and ethno-religious background, Victoria on the basis of race, colour, descent, nationality, national and ethnic origin, ethnicity and ancestry and South Australia on the basis of race, colour, descent, nationality, ethnic origin, country of origin and ancestry.

^{xxxviii} *King-Ansell v Police* [1979] 2 NZLR 531

^{xxxix} Pages 2-3.

^{xxx} Ibid at 543.

^{xxxi} [1983] 2 AC 548.

^{xxxii} Ibid at 562.

^{xxxiii} For more detailed discussion see *Australian Medical Council v Wilson* (1996) 68 FCR 46 and *Ealing London Borough Council v Race Relations Board* [1972] AC 342, *Macabenta v Minister for Immigration & Multicultural Affairs* (1998) 90 FCR 202.

^{xxxiv} For example, the *Anti-Discrimination Act 1977* (NSW) prohibits discrimination based on ‘homosexuality’. The *Equal Opportunity Act 1984* (SA), the *Discrimination Act 1991* (ACT) and the *Anti-Discrimination Act 1996* (NT) prohibit discrimination based on sexuality broadly defined to include homosexuality, heterosexuality and bisexuality. The *Equal Opportunity Act 1995* (Vic) and the *Anti-Discrimination Act 1991* (Qld) prohibit discrimination based on ‘lawful sexual activity’. Although the ground of ‘lawful sexual activity’ has been interpreted to include homosexual activity, there is no precise definition of the term in either Act.

^{xxxv} However, religious vilification is prohibited in Queensland (a public act knowingly or recklessly inciting hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of religion in a way that includes threatening physical harm or inciting others to threaten physical harm) and Victoria (conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that a person or group).

^{xxxvi} Encarta dictionary.

^{xxxvii} The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) gives effect to Australia’s obligations under the *International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation* (‘ILO 111’) which includes discrimination includes the grounds of religion and political opinion. However, complaints of ILO 111 discrimination are limited to ‘employment or occupation’ and, if upheld, do not constitute unlawful discrimination.

^{xxxviii} Loc cit.

^{xxxix} *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550 at 584.

^{xl} See McKenzie, F. (2006) *Administrative Power and the Law — practitioner copy* (LexisNexis, Australia) and Allars, M. (1994) *Introduction to Australian administrative law* (Butterworths, Sydney).

Socio-ethical implications of advertising in relation to discrimination and vilification

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Introduction

1. Objectives of report

The objectives of this report are to identify the principle concepts applied to advertisements in determining their significance, meanings, uses and effects in relation to ethical standards; to consider the work of the Advertising Standards Board (the Board) in relation to relevant theories of media ethics and audiences; and to suggest provisional guidelines and a checklist for achieving a balance between endorsing creativity and mitigating harm.

By analysing a sample of advertisements that recently came before the Board, the report provides an overview of recurring issues and themes that instigated complaints and in several cases resulted in findings of breaches of Section 2 of the AANA Advertiser Code of Ethics. The report considers the Board's interpretations of the advertisements on which these determinations were based. It then offers additional interpretation, and an analysis of assumptions made regarding the connection between textual representations, their possible meanings and their socio-ethical implications. The focus of this analysis relates to the provisions of the Code concerning discrimination and vilification (Sections 2.1 and 2.3) but also includes other Sections regarding violence (2.2) and health and safety (2.6).

The report aims to offer provisional guidelines for achieving consistency in determinations and a conceptual basis for them, relating in particular to assessing the ethical risks of stereotypes, satire and what might be called wedge advertising, as well as general principles and practices to prevent discrimination.

2. Structure of report

The introduction will summarise the predominant ethical traditions that are drawn from in the professional practice of advertising as well as in media studies. It will then summarise the major theories applied in media studies when considering the relationship between texts and audiences and the ways in which meanings are accepted, resisted, negotiated and in other ways dealt with in society. This will provide a distillation of scholarship on the ethical and social effects, meanings and uses of advertising content, including its unintended socio-ethical consequences, but will not look at research on the broader socio-economic significance of advertising in relation to consumer culture and production processes more generally.

The second section of the report will look in detail at a sample of 21 advertisements that have been considered by the Advertising Standards Board on the basis of complaints over an 18 month period (January 2007 to July 2008). This section will provide a detailed interpretation of each advertisement, a summary of the Board's determination, and any departures from or additions to that decision found in this analysis.

In the third and concluding section I will investigate whether a pattern emerges from my reading of these cases and any recurring dilemmas that the Board contends with. By looking at the basis for determinations in relation to conceptual understandings of representational devices and their meanings, it may be possible to apply a consistent set of tests to each advertisement, while allowing for an interpretive flexibility that acknowledges the multiple meanings of creative texts. That is, story-telling techniques and persuasive devices used by advertisers (such as the juxtaposition of words and images in print, the use of music and lighting

in television, the tone of voice in radio, or the characterisation of individuals in positive and negative ways) can be analysed according to the ways in which they represent population groups covered by discrimination and vilification law, such as: the ways those groups are represented in relation to each other; whether or not they implicate the audience in one or other of those groups; and whether they represent those groups as 'other' or in a derogatory way, or invite audience sympathy or identification.

The conclusion provides an itemisation of issues such as these relating to existing advertising codes of ethics and prevailing community standards implicit in the Board's findings. While interpretations of creative material, of which advertising is a primary example, are often competing and at times contradictory, it may be possible to develop a checklist to assist with assessing the degree of socio-ethical risk in each advertisement. This may be of use to Board members in their determinations as well as to advertisers in the course of their creative work, to assist in avoiding breaches of the Code and the use of unethical representations more generally.

3. Scope of report

The report will focus on the ethical implications of advertising content, that is, the manner of the text as a process of making meaning, rather than its matter (the product or service advertised) or its medium (television, billboard, internet, etc). It will not consider the ethical implications of other professional practices in advertising. Instead the texts will be treated separately, on their own creative terms, as systems of signification relating to specific, designated audiences. Target audiences will be assumed on the basis of the product, the medium of the advertisement (for example, radio, television, or print) and its classification under the Commercials Advice guidelines.

The **report does not consider** ethical breaches relating to product placement, disguised advertising, obtrusive advertising/sponsorship, editorial context, advertorials, identification and authorisation, fraud, deception, and misleading or misrepresentative advertising regarding the product. However, misleading or misrepresentative advertising in relation to content, (or the manner of the advertisement), as opposed to product (or its matter), is included in this report on the grounds that it relates to stereotyping and the use of irony. While all of the above modes of advertising may contribute to a reading of a particular advertising text as unethical, they are not covered by Section 2 of the AANA Code of ethics, nor are they mentioned in any complaints or case reports.

Advertising as a persuasion process may be broken down into the following components when analysing its relationship to ethical practices and beliefs.

Its primary purpose is to produce desire for, or inspire interest in a product, service or idea, resulting in desire for the product and the decision to purchase it or the service, or to adopt the idea.

Its secondary effects may include the following:

1. To learn something new about a product or service (or idea or message);
2. To learn something new beyond a product or service (or idea or message);
3. To confirm attitudes, values or behaviours relating to purchasing decisions and general consumer behaviour;
4. To confirm attitudes, values or behaviours beyond purchasing decisions and general consumer behaviour;
5. To change attitudes, values or behaviour relating to purchasing decisions and general consumer behaviour; and
6. To change attitudes, values or behaviour beyond purchasing decisions and consumer behaviour.

These secondary effects might be regarded as some of the 'unintended consequences' of advertising (Pollay 1986), though not social marketing (community awareness campaigns), which has the primary task of changing attitudes and behaviour. This schema also brackets out the ethics of the advertising production process itself (are the conditions of advertising production and distribution ethical?) and of the product itself (is the product ethical, was it ethically produced, will it be ethically disposed of and are the meanings and effects of its use ethical?)

Instead, **this report concerns** itself with the possible effects of advertising on attitudes, values and behaviours, and focuses on the possible impact of any effects on attitudes to minority groups and the disadvantaged in particular. It also looks at representations as a mirror of existing values, rather than as texts which may promote change; and in some cases as a hall of mirrors where intentional distortions create confusion and invite debate concerning ethical standards as well as the relationship between those standards and popular culture. That is, while it considers the possible unintended consequences of advertising, it assumes that any relationship between the representation of the products and the values of consumers (and advertisers themselves) is dialectical. Representations both influence and reflect values, and the two are interrelated in complex and shifting ways.

While the framing of the advertisement within the context of programming may affect its impact and alter its meaning in subtle ways, this is also beyond the scope of the study, given that the Board's determinations are made on the basis of the advertising text in isolation. While the medium is considered as part of the framing process in terms of audience targeting, this is the extent of its consideration. Purchasing decisions may in themselves be of ethical significance, as outlined above, but the focus of this report is to consider behaviours outside specific consumption practices.

The focus is on the way in which representations in advertising may or may not affect ethical conduct more generally, and the way in which certain representations may reflect existing values that are deserving of attention.

The brief of the ASB is to determine the ethical suitability of advertising content in the context of assuming that this relationship between representation and behaviour is probable and has been demonstrated. However, this assumption is contained within certain limits, which acknowledge the multiplicity of interpretations that are possible, the suitability and sub-cultural coding of specific advertisements to their target audiences, the intentions of the advertiser as currently accommodated in the responses section of the complaints protocol, and other interpretive variables. The conceptual and theoretical difficulties with some of these systems for determining meaning, its cultural significance and ethical consequences are outlined in the following two sections.

4. Approaches to media ethics

Theories of ethics have existed at least since Aristotle in the West and Confucius in the East and can be divided into two traditions that have existed in parallel, with fluctuating degrees of popularity. These are broadly defined as deontological ethics and teleological ethics.

Deontological ethics (deriving from the Greek *deon* or duty) refers to the duties and obligations of humans in relation to an absolute moral code of behaviour. All acts contain an inherent moral value which is either upheld or transgressed. Behaviour is measured against what Kant in the 19th century described as a "categorical imperative" [which is] derived from a universal law of freedom and there are no exceptions". (Hirst and Patching 2005, p.10)

Teleological ethics (deriving from the Greek *telos* or ends) determines the ethical nature of any human act in relation

to its consequences. Hence it is sometimes referred to as consequentialist ethics. This approach is also the basis for utilitarian ethics, derived from the work of John Start Mill in the 19th century, who provided what might be called a 'calculation of utility' so as to determine 'the greatest good for the greatest number of people'. (10) Hirst and Patching advise the following in applying utilitarian principles: 'To calculate the consequences of your actions apply the following formula:

First, 'in the most conscientious manner possible' examine all possible consequences of all possible actions in a given situation.

Second, work out how much good and how much harm is created through the pursuit of your various options.

Third, follow the course that maximises the good, and creates the least amount of harm. (10–11)

This is the approach taken most often in the media industries and it provides the philosophical basis for the approach applied most frequently by the Advertising Standards Board. That is, instead of arguing for the intrinsic merit or otherwise of particular products, ideas or representations, the Board considers the social and ethical consequences that might occur as a result of the advertising. However, these consequences are not wide-ranging in the sense that it is not the Board's brief to consider the social consequences, 'for the greater good' of consumption. Nor are the efficacy of advertising and the relative value of any given product judged. Instead, the Board's role is to consider the possible socio-ethical consequences of the representations made in the advertising text itself. Just as a journalist might weigh up the individual harm caused by interviewing someone who has just witnessed a traumatic car accident, against the greater good of revealing a story in the public interest of promoting road safety, so the Board might weigh the use, in a community awareness campaign, of a negative stereotype of young men who speed, against the greater good of reducing car accidents.

At the same time, the Board does draw from deontological ethics when it considers the appropriateness of certain advertisements — violent or sexual images or abusive or indecent language, for example — against 'prevailing community standards'. This is a measurement of advertising content against ethical norms and values, which, although in some cases changing over time, are considered to be general rules of conduct that are inherently good or bad. In making such judgments, the effects of the use of the material

need not be considered, as the text is seen to be inherently acceptable or unacceptable when measured against the norms of appropriate and decent images, language and behaviour. For example, the depiction of a sexually active older couple in a life insurance advertisement might be considered in poor taste and offensive according to a particular set of norms regarding sexual decency.

However, the definition of prevailing community standards presents increasing challenges in a culturally diverse community, particularly with the growth of the internet and the prolific segmentation of audiences. The term ‘cosmopedia’ has been coined by the media theorist P. Levy who describes ‘multiple and shifting communities that share different pools of knowledge. This presents problems for regulators whose *raison d’être* is based on knowing and administering a singular, monolithic, community will’. (Beattie and Beal 2007, p. 189) Thus, although the brief of the Board is to make determinations according to ‘prevailing community standards’ it needs to be flexible so as to acknowledge differing values between specifically targeted communities. And the careful targeting of advertisements, in addition to attention to their content, needs to be included in the ethical considerations of advertisers.

Determining the greatest good for the greatest number is further supported by the existence of anti-discrimination and anti-vilification law, which combines deontological with utilitarian approaches. Predicated on the deontological view that freedom of expression is an absolute value, and that human dignity, freedom and wellbeing are universal human rights, such laws allow for utilitarian protections to prevent powerful interests from overriding those of minorities and the disadvantaged. This is similar to a branch of consequentialist ethics, developed by feminist theorists in the 1980s, regarding the avoidance of harm, through the ‘ethic of care’. Although largely based on the work of Carol Gilligan, (1982) it is also found in Confucian philosophy. As Thomas Bivins (2004) puts it, ‘The ethic of care requires, at minimum, that need be recognised as an important component of human interaction’ ... and that ‘we view ourselves as part of a network of individuals whose needs create a duty in us to respond’ (160-161). Similarly, ‘Confucians are defined by their interaction with others. [...] As Confucius points out, “[I]f I am not to be a person in the midst of others, what am I to be?”.’ (161) In a similar way in which anti-monopoly legislation protects smaller competitors within the broader context of the free market, anti-discrimination legislation protects smaller community interests, the marginalised and the disadvantaged within the broader context of free speech. In this way, consequentialist ethics is balanced by a deontological approach recognising the moral imperative of protecting the weak, together with

the consequentialist observation that healthy communities are based on caring relationships between citizens.

Recent scholarship on advertising ethics combines the ethic of care with ‘virtue ethics’, a branch of deontological ethics based on the Aristotelian ideal of a virtuous character, in which actions are measured against the virtuous disposition of the individual. ‘The central question is not “What should I do?” but rather “What sort of person should I become?”’ (Pojman 2006, quoted in Baker 237) Sherry Baker (2008) proposes that by combining the ethic of care with virtue ethics, it is possible to think of personal integrity in terms of *becoming* ethical through our actions: “When confronted with a difficult ethical dilemma, we can ask not merely, is this the right thing to do? But, which act has the most integrity in terms of the kind of person I want to become?” (Lebacqz 1985, quoted in Baker 240) Such work is echoed in the post-structuralist philosophy of Levinas, who sees the individual as being formed through his or her actions, rather than preceding them. That is, we become ethical subjects as a result of our relationships to others, rather than relating to others on the basis of pre-existing ethical positions. (Diprose 2002)

The coexistence of deontological and consequentialist ethics is common to many professional codes of ethics, which combine statements concerning absolute value, such as freedom of speech, or to always tell the truth, with statements concerning the greater good, and minimising harm. Thus in journalism it might be acknowledged that an interviewee may be viewed as a means to an end, if a story is in the public interest, which is utilitarian ethics, yet also to never distort the truth or plagiarise, which is deontological. This combination of approaches is shown in the following quote regarding advertising ethics:

‘In short, there is no justification for an advertisement that morally offends, if that means simply violating a justified moral value or norm without any other morally redeeming feature.’ (Brenkert 2008, p.153)

5. Audience reception theories

There are essentially two competing approaches in media studies to the relationship between texts and society, which may be broadly defined as ‘effects theory’ vs ‘uses and gratifications theory’. Effects theory argues that it is possible to measure particular psychological responses, behavioural changes and attitude formation to the media on the basis of the material audiences are exposed to. It assumes that audiences will agree with or absorb the content of texts in a relatively uncritical manner and be persuaded by the views espoused, much as advertising may persuade people to buy products. Therefore, it is argued, if young children

are exposed to violence on television, they are more likely to become themselves violent or to view it with tolerance. While vast amounts of research have been carried out to test the effects of certain media on audiences, it is difficult to conclude that a media text in isolation has any specific effect, given the many other variables in the lives of audiences and their viewing practices. (Lumby and Fine 2006, p.108) For example, some research shows that while there may be a positive correlation between television viewing and violence under specific testing conditions, other factors such as socio-economic background, or 'specific behavioural dispositions' may be of equal or greater importance as well as narrative contextualisation and other psycho-social variables. (Marsen 2006, p.127, 128) At the same time that it is broadly acknowledged that, since texts bear meaning, there is some kind of effect, it is regarded as a complex one that is difficult to measure. As Aeron Davis (2006) puts it, 'Consumers are increasingly adept at decoding promotional culture and, far from being directed by producers, actively choose to use promotional culture as they wish.' (158) Cultivation Theory, Social Learning Theory and the 'slow drip' effect are sub-branches of Effects Theory, arguing that over time, a repeated type of content may have some influence on the attitudes and behaviour of individuals.

In contrast, Uses and Gratifications Theory looks at the different roles that media texts play in the lives of audiences, and the variety of uses that may be applied to them, so that audiences are not viewed as passive sponges of media responding uncritically to repeated stimuli, but make use of content according to their own interests and needs. As Nick Lacy (2002) puts it, 'It suggests that audiences use the media rather than being used *by* the media. This use may help give a sense of personal identity or help gather information; alternatively it could gratify the desire for entertainment or assist social interaction.' (156)

One of the most influential texts bridging these two approaches is Stuart Hall's essay 'Encoding, Decoding' (1980) which considers the way different stages of the production and consumption process and how the relationship between them allows for different readings of a text. He identifies three ways in which texts are interpreted: the 'dominant-hegemonic position' in which the 'viewer is operating inside the dominant code' (101) and accepts the meaning to be true; the 'negotiated code' in which the viewer 'acknowledges the legitimacy of the hegemonic definitions [while] reserving the right to make a more negotiated application to "local conditions"' (102) and therefore only partly accepts the meaning; and finally the 'oppositional code' where 'it is possible for a viewer perfectly to understand both the literal and connotative inflection given by a discourse but to decode the message in a *globally* contrary way' (103) — in other

words, to completely disagree. The oppositional code is of particular relevance in advertising research as there is some interest in the degree to which viewers and audiences may dislike an advertisement, disagree with its content, or be offended by it, yet still be persuaded to buy the product or find the advertisement to be in other ways memorable. (Pollay 1986, p.23; Fam and Waller 2003) However, it could be safely assumed that most consumers who are media literate would adopt a default position of the negotiated code in relation to advertising and would be approaching the product, if not the text overall, with some degree of critical inquiry.

Another media reception theory that has gained popularity in recent years is the ethnographic approach. This looks at ways in which media is consumed and the local conditions of media reception, through participant observation, in-depth interviewing of media users and focus groups. The advantage of this approach is that it can investigate in greater detail the kinds of readings that audiences make of particular texts, the conditions under which media is received and consumed, and the uses to which it's put, or its meaningfulness in audiences' lives, and compare readings between different subcultures. A promising branch of ethnographic research considers the relationship between image and affect, adding a psychoanalytic paradigm, and focusing on emotional responses by media users, at the time of its use, taking into account both the cognitive and affective processes engaged in interpretation. (See, for example, the Affect Image Media Research Group, University of Western Sydney.)

A more sophisticated branch of effects theory, which has become popular in marketing, and includes some ethnographic and Uses and Gratifications approaches, is Diffusion of Innovations Theory developed by Everett Rogers (1995). 'His diffusion approach asked questions about what communication channels were involved in making an innovation known, how people were persuaded to adopt an innovation, and what groups of people were early or late adopters.' (Marsen 137) While this focuses on the processes by which new technologies are adopted by mass markets, it may also have implications for the broad adoption of attitudes, behaviours and values. Its contribution may be that it provides a more sophisticated segmentation of markets in terms of adoption, and stages of influence, as well as the processes by which an innovation achieves social acceptance — through 'change agents' or mass media, 'opinion leaders' or experts, and 'critical mass' or social acceptance/imitation (140). This suggests that the intervention of regulatory bodies such as the Board may be significant in managing change since its actions may implicate all three spheres of influence — through media coverage of specific cases, the expertise of Board members and the prevention or encouragement

of social acceptance based on whether complaints are upheld or dismissed.

The brief of the Advertising Standards Board is to 'provide determinations on complaints' by members of the community against particular advertisements. (ASB Overview 2008) It therefore reviews advertisements that have received complaints, calls for a response from the advertiser together with a copy of the advertisement, and makes determinations in relation to Section 2 of the AANA Code of Ethics. Section 2 concerns: discrimination and vilification; violence; sex, sexuality and nudity; language; and health and safety; and may additionally consider aspects of advertising relating to children, motor vehicles and food and beverages, all of which are covered by separate Codes.

The Board's brief is therefore predicated on the assumption that a causal relationship exists between textual representations (audio, visual and print), and their possible meanings, and the behaviour, attitudes and values of audiences in key areas to do with discrimination, social order and public health and safety. This would appear to endorse effects theory to at least some extent. However, interpretations of particular cases take into account the abilities of consumers and specifically targeted audiences to interpret the meaning of the advertisement in diverse and sometimes resistant ways. It therefore also subscribes to 'Uses and Gratifications Theory' and 'Encoding/Decoding' in particular. Additionally, the increasingly broad acceptance of the concept of competing and contradictory meanings, particularly in creative texts, means that the above theories are employed in the context of some flexibility regarding interpretive outcomes. And the relative media literacy of different target audiences allows for a greater or lesser consideration of audience resistance to dominant meanings in specific cases (Diffusion of Innovations). What can't be known through the Board process alone, is the ethnographic background to any given act of reception. While the complainant might self-identify as belonging to a particular population group, it would take detailed research to establish the various ways in which a particular advertisement under review is being interpreted more generally by its target and non-target audiences.

The Board also practices deontological ethics when it allows for the intention of the advertiser to be taken into account in case reports, since the good character of the person (the advertiser) is regarded as a guide to judging ethical behaviour. However, it needs to be kept in mind that the intentions of the producers and the possible meanings of the text may not always coincide. (Ahuvia 1998) 'Clearly, what one means by a statement can be entirely different from what the statement itself means.' (145) Intention is

also difficult to identify since advertising texts are often co-authored and produced collaboratively, and even if individually produced, 'the author may not have had a clear intention.' (145) It should be noted that intention is therefore necessary but not sufficient in relation to the production of ethical texts.

As the Board also considers the deontological appropriateness, decency or otherwise of advertising texts on the basis of generally accepted norms and values, it to some extent subscribes to 'speech act theory'. This is a theory drawn from linguistics, first developed by John L. Austin, which asserts that certain utterances, for example, 'I pronounce you man and wife' or 'I promise to repay you' show that language alone may amount to an action. It was controversially adopted from linguistics to textual analysis by Catherine MacKinnon in a famous Canadian anti-pornography case, and elaborated by Rae Langton (1993) who argued that certain sexual images were in themselves enactments of sex that were degrading to women, and therefore any projected effects on readers were redundant, since the sexual exploitation was itself enacted in and by the image. This judgment not only refers to a process of production in which a woman may have been sexually overpowered, but to the representation itself, which is seen to amount to an act of domination. This view may be implicit in judgments of advertising where images or uses of language are deemed of themselves to be disturbing regardless of any possible effects that might be measured in relation to their reception.

Upholding complaints against material that is judged to be in poor taste and without redeeming features, or in other ways 'beyond the pale', may be informed by this theoretical approach, and in those rare instances where the image or language itself may be regarded as an act of violence or discrimination.

2. Conclusion

2.1 Summary of analysis of advertisements

From a sample of 21 advertisements, complaints against seven were upheld and 14 were dismissed.

Complaints upheld

Of those complaints upheld, this analysis supports the view that six advertisements breached Section 2.1 and three advertisements breached Section 2.6. The total is greater than seven as three advertisements were found to have breached both 2.1 and 2.6 according to this analysis. In addition to the Board's findings, one advertisement was also found to have

possibly breached 2.2 and another to have breached 2.1 in relation to disability. Those advertisements in breach of 2.1 were found to have discriminated against or vilified persons on the basis of gender (3), age (1), race (1), nationality (1), religion (1) and disability (1). The analysis supported or partially supported all of the Board's determinations.

Complaints dismissed

Ethically progressive advertisements

Of the 14 cases dismissed, three were shown to be socio-ethically progressive: Kimberly-Clark U-Tamppons, Heinz Baked Beans, and Virgin Money Insurance. These advertisements actively undermined stereotypes or presented characters with a degree of complexity, while also avoiding blurring the distinction between fact and fiction. In addition to avoiding breaches, these advertisements were both creatively dynamic and socially progressive. The complaints came from socially conservative consumers who found the advertisements to be in poor taste or indecent, and objected to the metaphors for the product and/or the way in which issues were dramatised.

Unethical advertisements

One advertisement, Skins Compressions Garments, was shown to have breached Section 2.1 and possibly 2.2, and was, according to this analysis, wrongly dismissed. Two advertisements, Australian Pensioners Insurance and Trend Micro PC-Cillin, were shown to be socio-ethically risky. All three are what might be called 'wedge' advertisements, pitching one population group against another for the purposes of humour (APIA) or drama (Skins and Trend Micro), in addition to stereotyping. Two advertisements from the SBS series were shown to be ethically borderline in terms of Section 2.1. While creatively dynamic, advertisements in this group were unethical through breaches of the Code, incitement of hatred or conflict, or exploitation of community fears. Complaints were based on offensive and negative stereotyping.

Ethically neutral advertisements

Within the cases dismissed, eight were ethically neutral. Complaints were based on discriminatory stereotyping and poor taste. Two of these, for Dove Chocolate, were on the borderline of being ethically positive since they portrayed characters of some complexity and humour, however they did not actively undermine existing stereotypes.

2.2 Challenges

Advertising texts are open to multiple interpretations and represent an important category of creative work within popular culture. This openness to interpretation is part of their social and artistic value. In addition to these

interpretive challenges, there are structural challenges presented by the operation of the Board as a democratic entity, the application of legal as well as socio-ethical standards, and ambiguities within the terms of the Code itself. For example, 'prevailing community standards' are difficult to identify, especially given an increasingly diverse population. The justification of violence through 'context of the product or service' is open to dispute, and the uncertain boundary between the portrayal of an individual or stereotype and its representation of a population group is an endemic difficulty in applying discrimination standards to texts. Terms such as 'appropriate' and 'sensitive' treatment also defy precise definition or standardisation.

Despite this, there are basic tests that can be applied to ensure that artistic license is within the bounds of the Code and that minimum standards are upheld. The following guidelines are in the form of a checklist that may assist Board members in making determinations and advertisers in checking advertisements against these standards prior to distribution.

The following points concern those Sections of the Code referred to in the sample. They also include a reference to Section 1.2 of the Code since there is link between misleading or deceptive advertising and the discriminatory use of stereotyping in satire where the satire is not adequately sign-posted. The guidelines also introduce the concept of wedge advertising and means for its justification or avoidance. It concludes with a list relating to the protection of universal human rights, as the basis for anti-discrimination measures. While some of these may not be covered by the Code, the checklist might be of assistance to advertisers in assessing the ethics of their work, particularly when creating provocative or edgy scenarios.

This list is not intended to be exhaustive or comprehensive.

2.3 Checklist for socio-ethical advertising content

As with many ethical dilemmas and debates, there are no absolutely right or wrong answers, only more and less justifiable solutions to problems considered on a case-by-case basis. By addressing the questions below, it may be possible to determine if any ethical breaches or risks identified are defensible and worthwhile in terms of the possible meanings of the advertisements to their potential audiences. It may be useful to Board members in making determinations, as well as advertisers prior to the distribution of their work. This checklist does not cover Section 1 of the Code except for one interpretation of 1.2 regarding the use of irony.

2.3.1 *Discrimination and vilification*

— **Identifying and avoiding offence with regard to stereotyping, misrepresentation, vilification or satire**

Does the advertisement portray a negative stereotype that implicates a population group covered by the Code?

If so, is it done humorously and in a lighthearted way and clearly produced by people belonging to the same group?

Is the stereotype hurtful to the individual or population group to which the individual belongs?

If the stereotype is based on evidence, is the negative representation socially useful?

Is the stereotype satirising the behaviour of the individual based on choice, or is it satirising a feature of the individual over which he or she has no control?

Is the stereotype or object of fun a representative of a disadvantaged or minority group, who may or may not be covered by the Code?

Could this advertisement cause offence?

If so, is the offence caused to a minority or disadvantaged group?

2.3.2 *Violence*

— **Identifying and avoiding offence with regard to use of force, verbal abuse, threats of violence or threatening tone, manner or atmosphere**

If violence is portrayed in this advertisement, is it justifiable in the context of the product or service advertised?

Is the violence represented in such a way as to glorify or endorse the perpetrator?

Is any verbal abuse used in the advertisement justifiable in the context of the product or service advertised?

Is any verbal abuse used in such a way as to glorify or endorse the abuser?

Is the verbal abuse or use of force performed by an individual who may be a role model for sections of the community?

Is violence a social problem related to the population group represented in the advertisement?

Is this representation likely to increase this problem or reduce it?

Does the advertisement create an atmosphere that is threatening or frightening?

If so, is it justifiable in the context of the product or service advertised?

Does it serve to negatively stereotype a population group as prone to violence?

If so, is it justifiable?

Does it serve to negatively stereotype a population group prone to be victims of violence?

Is so, is it justifiable?

2.3.3 *Sensitive treatment of sex, sexuality and nudity*

— **Identifying and avoiding offence with regard to the portrayal of sex and nudity**

Can this advertisement justify the use of sex in relation to the product or service being advertised?

If the representation of sex is not directly related to the product, is it a positive portrayal of the individual, stereotype and implied population group?

Are the individuals represented sexually, treated with respect for their integrity and dignity?

Are any individuals represented sexually in positions of submission, exploitation or being overpowered?

If so, is this justifiable in terms of humour, satire, or relevance to the product or service advertised?

Are any individuals from disadvantaged or minority groups represented sexually in positions of submission, exploitation or being overpowered?

If so, is this justifiable in relation to the product or service being advertised? (Humour or satire would rarely amount to a justification in relation to the sexual overpowering of individuals from relatively disadvantaged or minority groups.)

Will this representation cause offence to cultural or religious minorities in the community?

If so, will the medium ensure that the advertisement is precisely targeted to its chosen demographic?

2.3.4 *Health and safety*

— **Identifying and avoiding offence with regard to health, safety, and undermining public health messaging**

Does the advertisement promote a dangerous or unhealthy product?

Does the advertisement represent unsafe behaviour in a positive way?

If the advertisement represents unsafe behaviour negatively, could it nevertheless be imitated, or seen by some consumers as desirable behaviour?

Is the unsafe or dangerous behaviour performed by an individual who may be a role model for sections of the community?

Does this advertisement cause harm through the representation of causing harm within the advertisement?

Does the behaviour represented in the advertisement run counter to standards and information conveyed through contemporary public health messaging?

2.3.5 *Misleading and deceptive advertising*

— Identifying and avoiding deception with regard to the fact/fiction divide and the use of irony (Please note, this is not in relation to deception regarding the product but regarding the representation used in its promotion.)

Is there an intentional or inadvertent blurring of the line between fact and fiction?

If the advertisement is based on a fictional scenario, is this obvious to all possible audiences in addition to the target audience?

Is there any other potential to deceive or mislead through the representation of the product advertised?

If irony is being used, is the scenario obviously implausible?

Have you included devices or 'hints' to assist in the interpretation of the scenario as fictional?

2.3.6 *Wedge advertising*

— Identifying and avoiding offence with regard to incitement

Could the advertisement be regarded as a form of wedge advertising?

That is:

Does the advertisement promote the interests of one population group at the expense of another group?

Could this incite hatred, contempt or conflict between those groups?

Does the advertisement include negative stereotyping that could incite hatred or contempt for a group or groups or conflict between groups?

Does the advertisement include inflammatory language or acts that could incite hatred or contempt by one group for another group, or conflict between groups?

2.3.7 *Protecting human rights, mitigating harm and benefiting broader society*

— Identifying and avoiding offence with regard to universal human rights

Does the content of the advertisement undermine understanding, tolerance and friendship?

Does the advertisement discourage full participation by any group in the cultural life of the community?

Are any violations of human rights being represented in this advertisement?

If so, is this justifiable in relation to the product or service advertised?

If the advertisement could cause offence to a population group, is it justifiable: a) as a light hearted satirical attack clearly produced by people from the same population group; b) as a politically motivated critique; c) as part of a social marketing campaign?

If the advertisement could cause offence to a population group, is it based on evidence concerning the feature being criticised?

And is that feature based on choice rather than on an inherited genetic or socio-cultural feature of the group?

Does this advertisement cause harm through the stereotyping of groups who may be regarded as disadvantaged?

Could this advertisement be viewed by audiences for whom it was not intended, and cause offence to those audiences?

Can you show that even if offensive meanings were not intended, that the possible meanings of the advertisement are not offensive?

Does the advertisement respect the individual or individuals represented?

Are the portrayals of people morally desirable?

Have you considered what 'value implications and statements' (Brenkert 153) are implied by the advertisement?

Is the advertisement in the best interests of its audience?

Does the advertisement assist consumers in making good decisions?

Is the advertisement socially responsible?

Does the advertisement offer any benefits to broader society?

2.4 Combining the approaches

In an article on sexuality and ethics in advertising, Stephen J. Gould (1994) provides a useful set of guidelines, which bring together deontological (norm-based) ethical approaches with teleological (consequentialist) approaches by combining some degree of regulation, or 'consumer protection' with libertarian 'choice enhancement.' (77-78) That is, deontologists favour regulation on the basis of norms and values, and what might be regarded as morally appropriate according to absolute principles, and consequentialists favour free speech 'unless there is evidence that [advertising] causes harm'.

Although the following quote is intended as a means for mitigating negative responses and/or effects due to the use of sex in advertising, it may equally apply to advice on the inclusion of other sensitive material, and has been edited accordingly:

'By following four guidelines, advertisers can attempt to accommodate the seemingly conflicting concerns of the two groups.

- (1) Targeting advertisements as carefully as possible to avoid unnecessary conflict and to minimise the viewing of [sensitive material] by people who might be disconcerted by them.
- (2) Heightening [advertisers'] own awareness of the impact of [sensitive material] on the public at large as well as on their market target.
- (3) Testing the effects of their advertisements, not only on their target, but also on other members of the public who might see their advertisements.
- (4) Considering the effects of their advertisements in prompting individuals, whether their target or not, to take actions that have negative consequences...' (80)

In terms of policy, Gould notes that governments and regulatory bodies can promote choice enhancement and consumer protection (78) by looking at both the supply side (the advertising industry) and the demand side (consumers) who may then be regarded as equally responsible parties. Whereas the supply approach would look to 'various forms of regulation' and the 'enforcement of indecency laws', the demand side looks to sex education and what Gould calls 'segment management', which enhances audience targeting through the classification system or other means, and which, as he points out, is 'a combination demand and supply-side measure'. He concludes that, 'both of these approaches can be seen as protecting vulnerable parties while allowing and even encouraging consumer choice' (81)

In the Australian context and given the brief of the Board, Gould's reference to sex education would need to be broadened to include education on the rights of population groups covered by discrimination law, together with media literacy more generally.

By continuing its regulatory function through the Board while enhancing programs to educate the advertising industry on the potential for unintended negative consequences, and the community at large on the multiple meanings of advertisements and media literacy, the Advertising Standards Bureau could be seen to be attending to both these approaches. This would appeal to the autonomy and responsibility of both advertisers and consumers in achieving a society that celebrates freedom of speech while protecting the vulnerable.

3. Appendix

3.1 The ethical risks of stereotyping

1. What's ethically risky with stereotyping?

By showing a limited, negative caricature of a type, the text implies that all those belonging to that population are similarly lacking. It asserts that differences between groups are exacerbated by an absence of diversity *within* groups. It justifies negative attitudes, based on the absence of complexity, to all members of that group which may impinge on their rights to freedom, dignity and well-being.

It provides an excuse for the mistreatment of or discrimination against individuals belonging to the population group.

To impute a negative attribute to a group that is not generally discriminated against may be borderline unethical, and in most cases in advertising should be avoided since it may alienate potential buyers, however, it would not be discriminatory. To avoid charges of lacking in ethics, it should be delivered humorously and be directed towards a group that is not seriously disadvantaged. The irony should be directed equally to the speaker as to the subject or object of attack. That is, self-irony should be included, and it should preferably be produced by members of the same group.

Within advertising there can be seen to be different uses and modifications of stereotypes, from the reinforcement of existing types to reversal of those types.

There are also grey areas, where stereotyping is not negative, or severely negative, and where it is difficult to distinguish between the vilification of an individual and their representativeness of a population group covered by

anti-discrimination law. (If a group of people is represented, without diversity within the group, then it can be taken to be representative.)

To avoid negative stereotyping, there should be:

- a) an element of choice in relation to the distinguishing behaviour of the individual portrayed;
- b) if there is no element of choice, it must be clear that the individual is not a representative of the population group. This would most usually require it to become a character rather than a stereotype, but may be achieved through reference to particularly well-known individuals in the public domain (however, this may be defamatory); and
- c) a distinction between the individual and the group may be drawn through reference to universal themes, which implies the stereotype is being used as a character and that the features of the group are also shared by other groups (see below);

Elements that are generally agreed to discriminate are based on physical attributes over which the individual has no control (eg skin colour), or over which there is disagreement about whether there is control (eg obesity) but may also be cultural attributes on the basis of existing disadvantage (eg illiteracy).

Stereotyping people belonging to privileged population groups: when is this discriminatory or vilifying?

There are cases when the depiction of a rich, white person for example, is shown to disadvantage, if it emphasises physical characteristics over which the individual depicted has no control (rather than clothing or other behavioural choices). Even in these cases, it is arguable that the relative power enjoyed by the population group to which the portrayed individual belongs, means that the potential for discrimination is very small. Even if it is shown to be vilifying, it is difficult to argue that discrimination will result given the real world defences through relative socio-economic advantage. It could therefore be argued that although potentially unethical, it is not discriminatory.

2. Is truth a defence in stereotyping?

Yes, except where the distinctive or defining feature of the individual or group being vilified is one over which they have no control, or limited control, or for which there are complex socio-historical reasons. For example, if short stature was represented as a negative feature of dwarves, if obesity were presented as

a negative feature of poor, white people; if alcoholism were depicted as a negative feature of indigenous Australians.

3. Is it possible to draw a boundary between the stereotype and their population group?

That is, does the lampooning or critique of an individual as a stereotype always imply the lampooning or critique of the population group to which the stereotype belongs?

In other words, to what extent is the portrayal of an individual or stereotype separable from its representation of a population group?

The following quote provides an interpretation of a Federal Court Ruling by French J in 2004:

It must be accepted that artistic works cover an infinite variety of expressions of human creativity. ... Some may satirise or lampoon aspects of human behaviour including the behaviour of particular individuals and groups. [These] may offend or insult or even humiliate or intimidate some. And such acts may have that effect in relation to people of a particular race, colour or national or ethnic origin. This does not mean that the performance, exhibition or distribution of such a work is done *'because of the race, colour or national or ethnic origin'* of the people to whom it relates. It may be a work about particular people or use the circumstances of particular people as a vehicle of artistic expression with universal themes. (quoted in Beattie and Beal, 156, italics added)

In other words, if the work made use of stereotypes from population groups covered by anti-discrimination legislation, it would need to establish that their portrayal is being used for larger themes relating to all humans regardless of background, and not only to the population group that the stereotype represents.

4. What are the ethical implications of negative stereotypes of individuals from population groups not covered by anti-discrimination law?

It is acceptable to portray a negative stereotype of a criminal since this is not a population group covered by the discrimination act? Since they are defined according to their criminality, for example, it would not be unethical to portray them in a negative manner as criminals.

However, it would be unethical to vilify a criminal for an attribute over which she or he has no control, for example a disability, or a cultural disadvantage commonly associated with criminals (for example drug addiction or illiteracy).

Nor is it ethical to stereotype certain groups as criminal if they are not based in fact, for example, stereotyping young black men as rapists or middle-age white male strangers as paedophiles.

3.2 Modifying stereotypes

1. To reverse a stereotype.

In general, to reverse a stereotype it needs to be contradicted in a non-prescriptive way.

For example:

The young woman in Kotex U tampon advertisement:

Stereotype: I have my period, I'm hiding it, I'm staying home and not having fun, I'm uncomfortable with my body.

Reversal: I have my period, I'm not hiding it, I'm going out and having fun at the beach, I care for my body.

Older couple in Virgin Money advertisement:

Stereotype: We haven't had sex for many years, we're prudish and even if we did have sex, we'd never admit it, discuss it together, or reveal our physical affection in front of others.

Reversal: We enjoy sex, we're attracted to each other, and we're not afraid to express our physical affection publicly.

Male in Heinz Baked Beans advertisement:

Stereotype: Male Gender Alignment — I'm young and gay, I'm a drag queen, I have outrageous camp mannerisms.

Reversal: I'm an ordinary looking guy, I'm middle-aged, I have regular mannerisms.

2. To own an element of a stereotype and modify or reverse its meaning.

In general, to own a negative stereotype and make it positive (eg Cockatoo advertisement, Skins advertisement) it needs to have ethical value added to it.

For example:

Negative stereotype: young women are always available for sex (Cockatoo).

Implication: women deserve to be victims of sexual assault since they're asking for it.

Positive owning and modification of stereotype:

Young women enjoy sex, but on their own terms, adding the ethical value of female self-determination and the removal of victimhood

= reversal of implication from victimhood to self-determination.

(Cockatoo Ridge successfully owned and modified this stereotype through the representation of agency, although this would have been enhanced by a first-person statement.)

Negative stereotype: young black men are dangerously strong and close to nature (Skins).

Implication: black men are criminals since they're looking for trouble.

Positive owning and modification of stereotype: young black men enjoy their strength and can use their physical attributes to be successful and achieve good, adding the ethical value of self-determination and the removal of criminality

= reversal of implication from criminality to civic duty.

(Skins owned but did not successfully modify this stereotype since there is still an implication of violence and threat in the black athletes' assertion of physical strength. Although the social good of achieving in sport has been added, the 'instinctual' 'killer mentality' of blacks is reinforced.)

3. To elaborate on a stereotype so that it becomes a character.

Another way of modifying a stereotype is to transform the type to a character, by adding elements of personality including strengths and flaws, specific relational contexts, psychological history, and production values through wardrobe, lighting, scene-development, art direction and soundtrack. In this way the figure is well-rounded and, although clearly fictional, she or he is recognisable and appeals to universal understandings about human behaviour. (eg Pam Nesia; Em Ocean).

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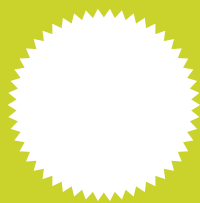
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*Discrimination and Vilification
in Advertising*

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Part 4

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Part Four — Analysis of twenty advertisements

This part includes an analysis by each consultant of 20 advertisements provided by the Advertising Standards Bureau.

Each analysis considers major issues that the Board should take into account when reviewing advertisements, and focus in particular on discrimination and vilification elements of the advertisement.

	Advertisement	Legal perspective	Socio-ethical perspective
1	Sydney Breast Enlargement and Cosmetic Centre	Page 41	Page 88
2	Inghams — Breast Awareness Week	Page 43	Page 90
3	Rugby WA — 12 year old training bra	Page 45	Page 91
4	Sony Music — Kevin Bloody Wilson CD	Page 47	Page 92
5	Herringbone — why you should never buy a shirt from a Bulgarian	Page 49	Page 93
6	BSR Beta Electrical — Baby Jesus	Page 51	Page 94
7	Masterfoods — Starburst — Siamese Twins	Page 54	Page 95
8	SBS (transport) — not everyone has less on in summer...	Page 56	Page 97
9	Kimberley Clarke — Kotex U — beaver	Page 58	Page 99
10	Virgin Money — Everlasting Love	Page 60	Page 100
11	Townsville Automotive Detailing “wogs” and “stooges”	Page 62	Page 101
12	CUB — Immaculate Consumption	Page 64	Page 102
13	Trend Micro PC — old man depicted as typical web paedophile	Page 66	Page 103
14	H.J.Heinz — Baked Beans — men in supermarket	Page 68	Page 105
15A	Mars — Dove — memory loss	Page 70	Page 106
15B	Mars — Dove — Em Ocean	Page 73	Page 108
16	APIA — chat show — young people...	Page 75	Page 109
17	Cockatoo Ridge Wines	Page 77	Page 110
18	Skins compression garment — African athletes extolling their superiority	Page 80	Page 112
19	Roads and Traffic Authority — Pinkie	Page 83	Page 114
20	Inghams — something wrong with you if you don't like chicken	Page 86	Page 115

Analysis of twenty advertisements from a legal perspective

1. Complaint reference number 193/07

A. Complaint details

Advertiser

Sydney Breast Enlargement & Cosmetic Surgery (Dr Lai)

Product

Professional services

Type of advertisement

Radio

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

10 July 2007

Board Determination

Upheld — discontinued or modified

B. Description of the advertisement

This radio advertisement features a female voiceover asking: “Do you have a belly apron from pregnancy or weight loss? That ugly, yucky, loose tummy skin covered in stretch marks. It’s red, itchy and smelly underneath. And it flops all over! You hate looking in the mirror. And you can’t hide your fatty muffin skin roll under any dress! YES there is help! You can get a flat tummy again. Just see Dr. Lai from Sydney Tummy Tuck, a senior member of the Australian Society of Plastic Surgeons.”

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

Derogatory. Loose tummies after birth or weight loss is a natural occurrence. I feel it is written to make the person with the condition feel ugly.

D. The advertiser’s response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

We are of the view that it is clear that the advertisement does not raise any issues under the Code. The complaint states that the advertisement is written to make people with loose tummies after giving birth or weight loss feel “ugly”. While the language used in the advertisement is descriptive, it is;

- 1. appropriate in the circumstances*
- 2. not strong or obscene*
- 3. does not aim to make women feel ugly but rather offers a solution for women who may feel that way.*

The language accurately describes the feelings that some women have about their stomachs after pregnancy or weight loss using colloquial and descriptive terms.

In our view the advertisement is not offensive or psychologically damaging to the broader community. The advertisement merely presents the feelings that some women have about their stomachs after giving birth or losing weight and offers them a possible way of resolving these feelings by undergoing tummy tuck surgery. The advertisement must be considered in the context that the procedure being advertised cannot be acquired on impulse or as the result of a flippant decision.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: 'Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Sex — the status of being a male, female, intersex, trans-sexual or transgender and of having characteristics attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against females on account of their sex?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of females owing to, because of, or due to their being females or having characteristics attributed to them because they are female?

By specifically stating “Do you have a belly apron from pregnancy” and “you can’t hide your fatty muffin roll under any dress!” the advertisement specifically targets females and characteristics attributed to being females (being pregnant and gaining weight during pregnancy). However, the terminology in the advertisement arguably falls just short of reflecting intolerance towards or unfair, unfavourable or less favourable treatment of females on account of having those characteristics.

(b) Does the advertisement vilify females on account of their sex?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule females owing to, because of, or due to their being female or having characteristics attributed to females?

The terminology in the text of the advertisement — “Do you have a belly apron from pregnancy” and “you can’t hide your fatty muffin roll under any dress!” — is reasonably likely to humiliate women who have not lost weight gained during pregnancy and accordingly the advertisement is vilificatory within the meaning of Section 2.1 of the Code. The language used verges on ridicule: “That ugly, yucky, loose tummy skin covered in stretch marks. It’s red, itchy and smelly underneath. And it flops all over!”. It is reasonably likely to incite contempt for or the ridicule of post partem (and overweight) women.

G. Board determination: Upheld

Consultant determination: Upheld

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of vilification on account of sex is met in relation to this complaint for the following reasons:

1. By specifically stating “Do you have a Belly Apron from pregnancy” and “you can’t hide your fatty muffin roll under any dress!” the advertisement specifically targets females and characteristics attributed to being females (being pregnant and gaining weight during pregnancy).
2. The terminology in the text of the advertisement — “Do you have a Belly Apron from pregnancy” and “you can’t hide your fatty muffin roll under any dress!” — is reasonably likely to humiliate women who have not lost weight gained during pregnancy and accordingly the advertisement is vilificatory within the meaning of Section 2.1 of the Code.
3. The language used verges on ridicule and is reasonably likely to incite contempt for or the ridicule of post partem women.

Comments

The goal of the advertisement (to offer a surgical solution to unwanted body features resulting from changes to the body following pregnancy and weight loss) could easily be achieved without using such derogatory and ridiculing language.

2. Complaint reference number 277/07

A. Complaint details

Advertiser

Inghams Enterprises Pty Ltd (Breast Awareness Week)

Product

Food & Beverages

Type of advertisement

Outdoor

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

11 September 2007

Board determination

Upheld — discontinued or modified

B. Description of the advertisement

This outdoor advertisement has the words “Breast Awareness Week” in white letters, on a red background. Underneath these words are packets of Ingham’s Breast Chipees and Breast Munchies followed by the text “Ingham snacks are now made with 100% chicken breast”.

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

This ad is distasteful, and caused me huge offense. Distasteful, as it is trying to increase their own ad awareness off the back of the high awareness that exists for breast cancer charities. Offense, as my mother died of breast cancer, and it is not a topic that I regard with any humour. I don't appreciate the suffering of my mother, or the millions of other breast cancer sufferers being marginalised by a chicken company!!!!

I am absolutely appalled by Ingham's recent Ad Campaign exploiting 'Breast Awareness Week' to sell chicken products. As I drove past a bus stop billboard last week and read the words 'Breast Awareness Week' I initially didn't think too much about it with Daffodil Day coming up. However, it wasn't until after I had passed the sign that the message within the poster sunk in, and what I was actually seeing was a repulsive marketing ploy to sell chicken. Today, after visiting the Ingham website, I discover that apart from the offensive advertising campaign, Ingham is also a "Proud supporter of the McGrath Foundation". They cannot be serious. This ad is offensive and in very poor taste. Breast cancer is a serious issue, and they are exploiting a health related slogan to advertise their products for commercial gain.

Not only is it upsetting as my sister died recently of breast cancer, but it could be construed as interfering with a public health campaign for breast cancer awareness. It is also in really bad

taste to advertise a food product especially chicken breast with text that clearly refers to campaigns carried out to promote breast awareness in women.

This is offensive to women and it has a sexual reference and particularly offensive to women who have suffered breast cancer as it is clearly targeting women and appears to be about these issues.

D. The advertiser's response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

We contend that this advertisement was never intended to nor does it breach this Code and offer the following by way of explanation:

- *At Ingham we undertake periodic consumer research to ensure we have an up-to-date perspective on what consumers are feeling and what they wish to see from our product range. Research over the last 12 months has consistently reiterated the desire for products that not only taste good (and are thus popular) but that are also “good for you”.*
- *When it comes to chicken specifically, the consumer benchmark for quality and healthiness is clearly breast meat. Consumers readily use the word breast (v thigh v leg) when discussing chicken and use exactly the same language when purchasing chicken at the supermarket or butcher. For them breast is simply best.*
- *Thus, in designing our new outdoor posters, we have deliberately chosen the same language that consumers use with us. The intent was always to keep the communication simple and to the point — to clearly communicate the key change that consumers have been asking of us for some time.*
- *Whilst we acknowledge the concern raised by consumers, it is also important to appreciate that no one brand/category has a ‘mortgage’ on a set of words. As consumers regularly tell us, the word ‘breast’ is synonymous with chicken, and, in Australia, the Ingham brand is equally synonymous with chicken. On that basis we do not believe it is inappropriate, as Australia’s leading chicken brand, to deliver a ‘breast’ message as clearly as we have.*
- *As a company, Ingham Enterprises are well aware of the seriousness of the issue of breast cancer in the Australian community. So much so, that Ingham has, and continues to be, a proud supporter of and financial contributor to the McGrath Foundation. (The McGrath Foundation is a charitable organisation set up to support the placement of breast care nurses in rural and regional Australia.)*
- *In fact, in October this year, Ingham will be changing a number of our popular products from the well known ‘red’ pack to a ‘pink’ pack to reinforce support and awareness of this important cause.*

This activity will also be supported with print advertising that has been prepared in conjunction with the McGrath Foundation. A lesser known fact is that Ingham is committed to funding a multi million dollar human medical research facility at Liverpool hospital, focussing on clinical trials, biomedical research etc.

In summary, the advertising was not intended to cause any offence or misrepresent in any way. It was simply designed using the type of language that consumers use when they are talking about chicken, and to ensure all our consumers very clearly understand that we have made the product changes they have been so keen to see from Ingham.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: 'Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Sex — The status of being a male, female, intersex, trans-sexual or transgender and of having characteristics attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against females on account of their sex?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of females owing to, because of, or due to their being females or having characteristics attributed to them because they are female?

Although certain members of the public may find the advertisement's play on breast cancer awareness terminology upsetting, distasteful or offensive, there is nothing in the advertisement that is discriminatory within the meaning

of section 2.1 of the Code. It illustrates no inequity, bigotry, intolerance or unfair, unfavourable or less favourable treatment of females.

(b) Does the advertisement vilify females on account of their sex?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule females owing to, because of, or due to their being female or having characteristics attributed to females?

The advertisement does not humiliate, intimidate, incite hatred towards, contempt for, or ridicule females. Again, although certain members of the public may find the advertisement's play on breast cancer awareness terminology upsetting, distasteful or offensive, there is nothing in the advertisement that is vilificatory within the meaning of Section 2.1 of the Code.

G. Board determination: Upheld
Consultant determination Dismissed

Reasons for consultant determination

- 1 The threshold required in the Code to substantiate the complaint of discrimination or vilification on account of sex is not met in relation to this complaint.
- 2 Although certain members of the public may find the advertisement's play on breast cancer awareness terminology upsetting, distasteful or offensive, there is nothing in the advertisement that is discriminatory within the meaning of Section 2.1 of the Code since it illustrates no inequity, bigotry, intolerance or unfair, unfavourable or less favourable treatment of females. Nor does the advertisement vilify females within the meaning of Section 2.1 of the Code because it does not humiliate, intimidate, incite hatred towards, contempt for, or ridicule females owing to, because of, or due to their being female or having characteristics attributed to females.

Comments

The Board also, appropriately, considered this complaint under Section 2.6 of the Code and considered whether the advertisement depicted material that was contrary to prevailing community standards on health and safety. The Board noted the significant work undertaken across the community by Government, the private sector and members of the community in raising awareness of and funds for breast cancer research. The Board acknowledged the good work of Ingham's in promoting breast cancer awareness but felt this advertisement was in poor taste and diluted the impact of public health campaigns by depicting material that trivialises an important public health issue. On this basis the Board determined that the advertisement breached Section 2.6 of the Code and upheld the complaints.

3. Complaint reference number 444/07

A. Complaint details

Advertiser

Rugby WA

Product

Leisure & Sport

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Discrimination or vilification Age — Section 2.1

Determination date

16 January 2008

Board determination

Upheld — discontinued or modified

B. Description of the advertisement

This television advertisement opens on a man in an office surrounded by rugby memorabilia, and a view of the Sydney skyline seen through the window behind him. He challenges: “Hey Emirates Western Force fans. I reckon there’s more support in my 12 year old daughter’s training bra than in your crowds.” In response, Western Force player Scott Fava bursts into the office, swipes the Sydney-siders desk clear, silences him with a look and growls: “Save it!” He turns towards the camera and adds: “Game!” Footage is shown of a Western Force game with the crowd of fans cheering wildly in excitement and a voiceover encourages: “We need you at Subiaco to show the eastern States how we do it!”

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

The ad refers to something or someone having “less support” than the gent’s “12-year-old daughter’s training bra.” My husband and I felt this was completely inappropriate. We have a 12 year old daughter and we know that she would have been embarrassed by the ad if she had heard it — we were cringing on her behalf. I was once a 12-year-old girl dealing with the onset of puberty and referring to a training bra is offensive and insulting.

This subject matter is not funny and men referring to it as though it is, does nothing for the bad reputation rugby and football players in general have towards women, and now it seems, towards girls. Who writes this stuff? And who deigns to approve it. We all enjoy a funny ad, but only if it doesn’t offend any vulnerable section of society, especially children. Woman and girls experience myriad body changes throughout their entire lives and it is not fodder for mainstream ridicule — we deserve more sensitive, respectable treatment.

I find it paedophilic like for a ‘father’ to be ridiculing his daughter’s sexual development to all of Western Australia, particularly as the ad was aimed at men. I do not know if this was an actor with lines or if the person concerned was really talking about his daughter (the latter was certainly the impression of the advert). Either way it is very offensive. Young women are adjusting to enormous changes in their lives at this young age and I would imagine they would be in the viewing audience at this time of the evening. I am appalled that they have made fun of such a sensitive issue and in the process they have sexually exploited a very vulnerable group in our community. I see this in the realm of sexual and child abuse.

D. The advertiser’s response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

This advertising campaign was developed in 2006 as a result of market research. The campaign asks fans/supporters to ‘Save It For The Game’, i.e bring all your emotion and energy and get behind your team. Our research shows that there are a lot of rugby supporters in WA however these people were not always converting to ticket or membership sales. The 2007/2008 campaign was designed to encourage those people to “get off the couch” and show their support for their team. It was never intended to offend anybody or to discriminate against anybody. Rugby WA sincerely apologises if any offence has been caused.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: ‘Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.’

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Sex — the status of being a male, female, intersex, transsexual or transgender and of having characteristics

attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

Age — the number of years that someone is or characteristics generally pertaining to a stage or phase in someone's life, or characteristics generally imputed to people of that stage or phase.

2. Consider discrimination and vilification on the grounds of sex and age, in turn: In this advertisement, because the complaint relates to pre-adolescence or the onset of puberty, the grounds of age and sex are intertwined.

(a) Does the advertisement discriminate against pubescent or pre-adolescent females on account of their sex?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of pubescent or pre-adolescent females owing to their being female or having characteristics attributed to them because they are female (developing breasts)?

The humour in the advertisement is created by the play on words between support for a football team and the lack of support required in a '12 year old girl's training bra'. There will definitely be occasions when advertisers can refer to puberty but the reference in the advertisement: 'I reckon there's more support in my 12 year old daughter's training bra than in your crowds' is one which draws attention to the breast development of pre-adolescent or pubescent girls at a stage in their development where they are likely to be acutely self-conscious. The comparison is humorous but completely insensitive and unnecessary. It does not however reach the threshold required for discrimination.

(b) Does the advertisement vilify pubescent or pre-adolescent females?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule pubescent or pre-adolescent females?

The statement 'I reckon there's more support in my 12 year old daughter's training bra than in your crowds' is one which explicitly draws attention to the breast development of pre-adolescent or pubescent girls at a stage in their development where they are likely to be acutely self-conscious.

A reasonable 12 year old would feel humiliated or ridiculed by the comparison.

G. Board determination: Upheld
Consultant determination: Upheld

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint is met in relation to the complaint relating to sex and age for the following reasons:

1. The statement 'I reckon there's more support in my 12 year old daughter's training bra than in your crowds' is one which explicitly draws attention to the breast development of pre-adolescent or pubescent girls at a stage in their development where they are likely to be acutely self-conscious.
2. A reasonable 12 year old would feel humiliated or ridiculed by the comparison.

4. Complaint reference number 311/07

A. Complaint details

Advertiser

Sony Music Entertainment Aust Ltd (Kevin Bloody Wilson DVD)

Product

Entertainment

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Race — Section 2.1

Determination date

11 September 2007

Board determination

Upheld — discontinued or modified

B. Description of the advertisement

This television advertisement depicts a man dressed as an Asian male promoting the latest Kevin Bloody Wilson DVD — for karaoke — describing it with the words sub-titled at the bottom of the screen. He announces “Arrr so! Farter’s Day. You buy Kevin Bloody Wilson Karaoke DVD. You can sing-a-long to your favourite Kev song “Santa Clause”, “Warnie Put Your Wanga Away”, “I Give Up Spanking”. I guarantee you bust a gut laughing. Ha Ha Ha Ha. So give your Farter a happy ending this Farter’s Day. You go buy Karaoke Kev DVD. Arrr so!”

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

The ad features a man portraying an offensive Chinese stereotype. He has thick glasses, a strong (clearly over-the-top) accent, with subtitles (misspelling the mispronounced words) even though he is speaking in English.

It’s clearly and obviously racist. It’s an outdated and offensive portrayal of Asian Australians.

I found the ad to be extremely racist towards Asian people. It was extremely stereotyped and offensive and should not be allowed on TV at any timeslot.

D. The advertiser’s response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

Kevin Bloody Wilson is one of Australia’s most successful entertainers and has been so for over 20 years. He is a multi platinum CD/DVD seller and he performs internationally on a regular basis, especially in the UK. He is a proud Australian ambassador and understands that Australia is a multi cultural society. Anybody who has been to see one of his shows will be aware that he covers everyday subjects that make people laugh and above all he also has a bit of fun with Anglo/ Celtic Australians as much as he does everyone else. Racism is a word borne out of hate and there is absolutely no way that Kevin hates anyone or any culture, he just has fun with people and contemporary issues and above all, his audiences enjoy it.

The reason the ad features a “Japanese or Asian” person is due to the perception that people in Asian markets are karaoke mad, and the character in the TV ad is meant to humorously portray just that. There was never any intention of the ad being seen as a racist shot at anyone of Asian persuasion or anybody else for that matter.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: ‘Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.’

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Race — people of a common descent or ancestral lineage.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against Asians on account of their race?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of Asian people because of, or due to their being Asian or having characteristics attributed to Asian persons?

The answer to this is possibly yes. By depicting a man dressed as an Asian with thick glasses, who can’t pronounce ‘father’

but rather says ‘farter’, and by having sub-titles at the bottom of the screen the advertisement reflects and perpetuates negative stereotypes about and intolerances towards Asian people. Again, the fact that the intended humour in the advertisement would not work, for example, if an Italian or Scottish person were substituted into the advertisement suggests less favourable treatment of Asian people.

(b) Does the advertisement vilify Asians on account of their race?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule Asians owing to, because of, or due to their being Asians or having characteristics attributed to being Asian?

The humour that the advertisement (and Kevin Wilson) seeks to create is predicated on ridiculing stereotyped characteristics of Asians. Again, it is no defence to a finding of discrimination or vilification under the Code that the advertisement reflects what Kevin Wilson depicts in his shows (the content of which is not subject to the Code).

Further, again, although the advertiser says: *“there is absolutely no way that Kevin hates anyone or any culture, he just has fun with people...”* the intent is irrelevant if the advertisement breaches the Code.

G. Board determination: Upheld
Consultant determination: Upheld

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination and vilification on account of race is met in relation to this complaint for the following reasons:

1. By depicting a man dressed as an Asian with thick glasses, who can’t pronounce ‘father’ but rather says ‘farter’, and by having sub-titles at the bottom of the screen the advertisement reflects and perpetuates negative stereotypes about and intolerances towards Asian people.

2. The humour that the advertisement (and Kevin Wilson) seeks to create is predicated on ridiculing stereotyped characteristics of Asians.
3. It is no defence to a finding of discrimination or vilification under the Code that the advertisement reflects what Kevin Wilson depicts in his shows — the content of which is not subject to the Code.
4. Nor is it a defence that *“there is absolutely no way that Kevin hates anyone or any culture, he just has fun with people...”* the intent is irrelevant if the advertisement breaches the Code.

Comments

In my view, the intent of the advertiser must be irrelevant in determining whether or not an advertisement breaches Section 2.1 of the Code because one assumes that no advertiser would aim or intend to discriminate against or vilify an individual or group.

Although this advertisement is stylised, ridiculous and unrealistic, unlike the Em Ocean and Pam Nesia advertisements, despite the advertisement’s unreality it still depicts Asian Australians in a derogatory way by mocking both their speech and culture and reinforcing traditional negative stereotypes about Asian people.

I note also that the Board upheld this complaint but dismissed the complaint against Townsville Automotive Detailing. In my view, the two advertisements similarly breach the Code by mocking the speech and culture of, and reinforcing traditional negative stereotypes regarding, other racial groups.

5. Complaint reference number 453/07

A. Complaint details

Advertiser

Herringbone Classic Clothing

Product

Clothing

Type of advertisement

Print

Nature of complaint

Discrimination or vilification Nationality — Section 2.1

Determination date

16 January 2008

Board determination

Upheld — discontinued or modified

B. Description of the advertisement

This print advertisement is headed “Why you should never buy a shirt tailored by a Bulgarian” and features photographs of a man, Henri Bouvois, who is French and has very small hands. His hands are shown sewing bespoke shirts alongside a photo of three slovenly-dressed men whose clothing is described as “Bulgarian Haute couture” and another of a laneway of crooked brick buildings described as “The typical quality of French bricklaying.” Text in explanation reads: “Hand-made shirts are only as good as the hands that make them. Precisely why Henri Bouvois is our head tailor. With a hand span that measures a meagre 6cm, only his hands come with the required agility to construct a shirt with no less than 11,347 stitches holding all 19 of its separate components together. Henri is from France, a nation of small, dainty men. They are known for refined activities like etching and playing the flute. This gentle predisposition may also explain why the French are more renowned for creating fine fashion garments than they are for say, bricklaying. It is also why Bulgarians are not known for their tailoring abilities, as they typically have fingers like large salamis. Never buy a shirt made by a Bulgarian. For the finest detail, only buy shirts made by tailors with small hands. And there is no tailor on Earth with smaller hands than our Henri.”

C. Outline of the complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

It offends the sensibilities of ordinary civilised people and is in plain breach of the AANA Advertiser Code of Ethics Section 2.1 “Advertisements shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of ... ethnicity, ... nationality.”

I believe the advertisement is racist and demeaning towards Bulgarians. The content of the advertising states “It is also why Bulgarians are not known for their tailoring abilities, as they typically have fingers like large salamis.” And “Never buy a shirt made by a Bulgarian.” Maybe this was an attempt at humour, though I fail to find the funny side and I don’t believe any race should be demeaned in such a way. I must state that I am not Bulgarian, have no connection to the country but am outraged that a nation can be portrayed in such a poor way — I honestly thought such advertising was illegal in Australia, it appears I am wrong.

I wonder whether this racist view was meant to be whimsical or amusing? I doubt if the many Australian Bulgarians would have found either the headline or the associated text declaring that Bulgarians ‘typically have fingers like large salamis’, particularly droll. As Anglo-Australians we thought them offensive.

D. The advertiser’s response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

The advertisement in question is one of a series which tells an imaginary story of a fictional tailor and is so fantastical in nature that we do not believe it could be seen by the reasonable reader as any factual depiction of French or Bulgarian people. It is written in a light-hearted, humorous way and was not intended to cause offence.

This particular advertisement was run as a one-off in the Sydney Morning Herald on Tuesday December 18th 2007, immediately after an equally fantastical and whimsical one on the Monday and followed by another on Wednesday. Seen in isolation, we do not believe the reasonable reader would be likely to take the statements about Bulgarians seriously. When seen as part of this series of ads in similar positions on consecutive days, the whimsical nature of the advertisement is further enforced.

Please also take into consideration that our advertising agency sought legal counsel for this advertisement on our behalf prior to it being published. It was the considered opinion of their media lawyers that the advertisement was fit for publication without risk of causing offence to the reasonable reader.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: 'Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Nationality — the status of belonging to a particular nation by origin, birth, or naturalisation.

2. Consider whether the advertisement discriminates or vilifies on account of nationality, in turn:

(a) Does the advertisement discriminate against Bulgarians on account of their nationality?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of Bulgarian nationals owing to, because of, or due to their being Bulgarian nationals or having characteristics attributed to Bulgarian nationals?

Undoubtedly, the answer to this is yes. In relation to the advertiser's response, that the advertisement "is written in a light-hearted, humorous way and was not intended to cause offence" the intent is irrelevant: the advertisement reveals bigotry towards Bulgarian (and French nationals) due to characteristics explicitly attributed to Bulgarian nationals.

(b) Does the advertisement vilify on account of their nationality?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule Bulgarian nationals owing to, because of, or due to their being Bulgarian nationals or having characteristics attributed to Bulgarian nationals?

The humour that the advertisement seeks to create is predicated on ridiculing Bulgarian nationals as having 'fingers like large salamis'. Accordingly, the advertisement also vilifies Bulgarians within the meaning of the Code.

G. Board determination: Upheld
Consultant determination: Upheld

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination and vilification on account of nationality is met for the following reasons:

1. The advertisement discriminates on the ground of nationality by revealing bigotry towards Bulgarian (and French nationals) due to characteristics explicitly attributed to Bulgarian nationals (and French nationals).
2. The advertisement also vilifies on the ground of nationality. The humour that the advertisement seeks to create is predicated on ridiculing Bulgarian nationals as having 'fingers like large salamis'.
3. In relation to the advertiser's response, that the advertisement "is written in a light-hearted, humorous way and was not intended to cause offence" no intent or motive to cause offence is required under the Code.

Comments

A decision by the Board could include comments here such as appear in the Board's reasons for this decision—for example:

The Board noted the complainants' concerns that the advertisement discriminated against or vilified Bulgarian people and noted that the advertiser has published a letter of apology in a prominent Sydney newspaper. The Board considered that the advertisement did denigrate physical characteristics of an identifiable group of people — i.e. Bulgarian people. The Board considered that the references to 'hands like large salamis' and no tailoring skills went beyond a light hearted poking fun in this advertisement and amounted to discrimination against people on the basis of their nationality. The Board also noted that the advertisement makes similar comments in relation to the quality of French bricklaying skills and that in the context of this advertisement this reference was also vilifying French people.

6. Complaint reference number 448/07

A. Complaint details

Advertiser

BSR Group (Betta Electrical)

Product

Retail

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Religion — Section 2.1

Determination date

16 January 2008

Board determination

upheld — discontinued or modified

B. Description of the advertisement

This television advertisement depicts a typical Christmas nativity scene with the wise men reverently offering gifts to the baby Jesus in the manger. Suddenly the gifts are thrown out of the manger, and as Joseph and Mary look at each other, text onscreen reads: “Give a better gift” and a voiceover advises: “Give a Betta Electrical gift this Christmas.”

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

I object to the advertisement because it is a blasphemous slant upon Christmas, which is the celebration of the birth of the founder of Christianity. Not only does this personally offend me, and many others I know who have seen the ad, but it is also inappropriate to use religious faith in such a bizarre manner. Particularly in the age in which we live, ‘political sensitivity and respect’ are openly encouraged in areas such as faith, gender, culture, religion. Were this same style of ad produced in relation to some other religions, the reaction would be potentially deadly! It is a sad day when companies such as Betta defiantly denounce the meaning of Christmas in this unnecessary and thoughtless way.

This is offensive to me as a Christian and also our family. It is disrespectful, blasphemous and insulting to us as Christians. If it was anything to do with a Muslim religion it would not be shown, however because it is about Christianity, our Saviour and Lord is allowed to be mocked and used as advertising material in an insulting manner saying that when people bring gifts to God, he will throw them back at you. People are making a mockery of Christmas which is celebrating the birth of Jesus.

This commercial is an insult to Christians everywhere, especially at Christmas time. I was highly offended. The gifts given to Jesus in the Bible were in that time highly valued and a sign of respect and honour and it is a disgrace that this commercial would insult God and followers of Christ in a bid to gain customers. I would expect that this commercial would be removed immediately.

I am not a particularly religious person but this ad makes a mockery of the true meaning of Christmas. Surely advertisers shouldn't be allowed to stoop to this.

I am actually writing this on behalf of my two children who were disgusted that the special story of Jesus could be so blatantly made fun of. They could not believe the disrespect of Betta Electrical to imply they would have something better to give to baby Jesus. If this ad had implications to any other religion e.g. Muslim it would never have been permitted to be shown. Advertising standards have stooped to a low level to permit such blatant disrespect for the most amazing story of the birth of Jesus. When young children have more morals than adults who create these ads it really shows what kind of standards the general public are so accepting of. The ad also displays the attitude of ungratefulness, when the presents are just thrown away. What does this portrayal to children? Christmas is a time for giving and receiving and I believe an attitude of gratefulness should be displayed.

OK — it is Jesus — the one who will never reject anyone — it is a Christian celebration being mocked shall I go on? I am deeply offended that anyone would think this is “tongue in cheek” advertising at Christmas

There is no better gift than Jesus Himself. It is ludicrous to reduce this to electrical products. This ad is totally insensitive to the whole point of Christmas which is a celebration of His birth, life and death for us. I guess 2000 years of civilisation has not changed mankind's behaviour — they mocked him then and still do. Even if the ad is done tongue in cheek it is incredibly offensive to any Christian of any denomination. I am tired of Christians being fair go in the media. There are two standards here — if it is not politically correct or too dangerous to depict Muhammad in a cartoon etc I don't think Christians should be fair game either. The vilification laws only seem to protect one faith not all faiths (not that Christians here would be incited to violence).

If this type of advertising was related to Muslims and Mohammed, heads would roll immediately. It's okay though to have a go at Christians and their beliefs in Jesus.

As a Christian I find this ad offensive and blasphemous. No advertiser would DARE create such an ad that was offensive to people such as the Muslims, yet it seems to be "open season" on those who adhere to the Christian faith. It is worth remembering that if it were not for the birth of Christ, there would be no Christmas anyway so why poke fun at and blaspheme the central figure of Christianity. This ad is plain offensive.

This advertisement insults the One I and many millions of people call Lord. It implies that God/Jesus will not accept what people have to offer, nothing is good enough. This 'message' is completely opposite to Christian teaching and in very poor taste. If this was Mohamed they were defaming we would have a 'jihad' against this company, probably against this country. I find this advertisement extremely offensive and am particularly sad that Beta Electrical should see fit to make a mockery of Jesus who is in fact 'the reason for the season' not them, not Santa Claus.

The Christian content is being denigrated. Why is it allowed? Absolutely abhorrent to the Christian tradition of Christmas. Try doing it with Muslim, Islam or Jewish faiths and see the reaction. It is highly offensive.

This is religious vilification. I find it offensive to make the 'Baby Jesus' into a spoilt brat, wanting better presents. It is offensive to change the original Christian story — it would never happen in a Muslim country why should Christians have to put up with this violation. It is also a bad example of the way children should behave. Does this mean that if a child does not like gifts it can throw them away and demand better ones? I am highly offended!!!!

If this was an objectionable reference to any of the new Religions we now have in Australia, Beta Electrical would be fighting the Vilification Law by now. Christians would not do that, however it offends me to think that a country founded on Christianity and who still celebrate the birth of Jesus, and enjoy the privilege of the Holiday that accompanies this special birth, should allow such an offensive advertisement.

D. The advertiser's response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

The aforementioned advertisement was genuinely created with no malice intended to the Christian faith. Our advertisement centres on the relevant fact that everyone has experienced a bad Christmas gift. The idea was simply to illustrate this fact.

The nativity scene was chosen as it is universally recognised as the quintessential Christmas gift giving occasion.

In our storyline, the gifts from the three wise men are simply abandoned for something more appropriate like the Gift Card. This humorous approach was in no way meant to be offensive, demean, denounce or mock Christianity.

Naturally, it is not Better Electrical's policy to discriminate on religious grounds, or any grounds for that matter. We wholeheartedly believe there is no discrimination or vilification of any person or section of the community on the basis of this ad.

Section 2.1 of the Code: Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Though we apologise if any person or persons may have been made upset, or their views disrespected, by the advertisement. The BSR Group appreciates the opportunity to express our belief that there was never intent to offend or discriminate against any community factions with this particular advertisement.

E. Complaint previously dealt with/ relevant precedent to consider: yes

F. Assessment:

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Religion — People's beliefs and opinions concerning the existence, nature, and worship of God, a god, or gods, and divine involvement in the universe and human life or an institutionalised or a personal system of beliefs and practices relating to the divine.

Consider discrimination and vilification in turn:

(a) Does the advertisement vilify Christians on account of their religion?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of Christian people due to their being Christian?

The depiction of a Christmas nativity scene with Jesus throwing the gifts from the Wise Men out of the manger cannot be said to reveal inequity, bigotry, intolerance towards or unfair treatment of Christian people due to their being Christian or having characteristics attributed to Christian persons. The advertisement could potentially be discriminatory, however, if a reasonable person would conclude that Christians are being treated unfavourably or less favourably than a group with another religious belief by the advertisement. In my view, the advertisement is close to borderline but the discriminatory threshold is not reached.

(b) Does the advertisement vilify Christians on account of their religion?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule Christians due to their being Christian?

Although some members of the public may be offended by the advertisement it does not, in my view, humiliate, intimidate, incite hatred towards, contempt for or ridicule Christians. It is certainly irreverent and displays little respect for the belief of Christians but this does not reach the threshold required for vilification.

G. Board determination: Upheld
Consultant determination: Dismissed

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination and vilification on account of religion is not met in relation to this complaint for the following reasons:

1. The depiction of a Christmas nativity scene with Jesus throwing the gifts from the Wise Men out of the manger cannot be said to reveal inequity, bigotry, intolerance towards or unfair treatment of Christian people due to their being Christian or having characteristics attributed to Christian persons. Nor could a reasonable person conclude that Christians are being treated unfavourably or less favourably than a group with another religious belief by the advertisement.
2. Although some members of the public may be offended by the advertisement it does not humiliate, intimidate, incite hatred towards, contempt for or ridicule Christians. It is certainly irreverent and displays little respect for the belief of Christians but this does not reach the threshold required for vilification.

Comments

I note the Board's comments that it had 'previously considered advertisements which make light of religious concepts. In those other cases the Board has considered that irreverent, light-hearted use of religious concepts is generally not in breach of the Code — even though the Board accepts that some members of the public are likely to be offended by such use. The Board considered the current Betta Electrical Advertisement and its depiction or suggestion of baby Jesus throwing back the gifts brought to him by the Three Wise Men. The Board considered that this depiction, and the assertion that the advertiser can provide better gifts, went beyond light-hearted irreverence and amounted to mocking of what is the quintessential image of Christmas for Christians'. The Board considered that this depiction was not merely use of a traditional religious image in an unusual context or irreverent manner, and that it amounted to a demeaning take on an important religious belief. In this case the Board considered that the demeaning take on an important Christian belief did amount to discrimination against or vilification of Christians and the Christian religion.

The Board accordingly found that the advertisement did depict material that discriminated against a section of the community on account of religion and determined that the advertisement breached Section 2.1 of the Code.

In my view, mocking is not sufficient to satisfy the threshold for vilification. This complaint is in a similar vein to the Carlton Breweries 'Immaculate consumption' advertisement. The play on words represented by "Immaculate Consumption" relates to a central tenant of Catholic belief (and indeed distinguished Catholics from other Christian faiths). Although the advertisement might be offensive to some people, including some Catholics, the Board found that the play on words did not of itself vilify or discriminate against any group. I do not see any meaningful distinction between the two advertisements in terms of discrimination and vilification on account of religion such as to justify dismissing the 'Immaculate consumption' advertisement and upholding the Betta Electrical complaint.

7. Complaint reference number 108/07

A. Complaint details

Advertiser

MasterFoods Australia (Starburst — Big Brother Key)

Product

Food & Beverages

Type of advertisement

TV

Nature of complaint

Health and safety — Section 2.6 Other — Causes alarm and distress

Determination date

10 April 2007

Board determination

Upheld — discontinued or modified

B. Description of the advertisement

This television advertisement features a montage of the life experiences of male conjoined twins from birth to today. As the backing track music ceases we see the grown twins lying beside each other on hospital beds with a blue dotted line painted down the middle of the joining skin. One twin is smiling and holding a packet of Starburst and a big golden key that has a Big Brother key ring attached, while the other appears to be unconscious on life-support. We then see one of the twins standing on the Big Brother stage set with the key and a carry bag in one hand and an intravenous drip in the other. Heavily bandaged around his mid-section, he waves to the crowd of excited Big Brother fans. A male voiceover proclaims: "Buy any specially marked pack of Starburst, win a Golden Key and ONE lucky person could become a Big Brother Housemate".

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

I found this very degrading, immoral and VERY POOR advertising.

...the depiction of "Disabled/Conjoined Twins" in such an inappropriate manner. Clearly the actors are not conjoined and the comical way in which they were portraying their "disability" was extremely offensive.

I was extremely offended and disappointed that some supposed advertising geniuses have seen fit to make a commercial that makes fun of and is insulting to these types of identical twins. It is my opinion that this ad is extremely offensive and should be taken off air immediately. The lives and struggles of conjoined

twins and their families is a serious matter, not a joke. They deserve respect.

Siamese twins are a tragic and serious medical condition not something to be made fun of for the purposes of advertising. For those parents who face this problem, separation of the twins is a serious life threatening operation not something to be made light of.

D. The advertiser's response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

The advertisement emphasises that there can be just one winner, and builds on the show's popularity with young adults, who the STARBURST® brand particularly appeals to. In developing this advertisement we took care to ensure that the twins portrayed were engaging in all the enjoyable activities that the other individuals undertook in each scene, and at no stage intended to portray them in a discriminatory way, or to cause offence to anyone.

The complainant letters submitted to the Bureau comment that conjoined twins live with a serious condition, and that for some of them surgery is a life threatening operation. One also, however, acknowledges that some live relatively normal lives and achieve incredible things.

Whilst we acknowledge that we have portrayed this small group, and their condition, in our advertising we do not believe that our advertisement does so in a way that is discriminating or vilifying to that group. It is certainly not our intent, and through the creative development process we endeavoured to ensure this did not occur.

In summary, we acknowledge that this advertising has prompted three complaints, and welcome the community's feedback in relation to it. We do, however, believe that the care we have taken to develop the advertisement has ensured it meets the provisions of the Code, and that the complaints submitted should be dismissed.

E. Complaint previously dealt with/ relevant precedent to consider: yes

F. Assessment:

Section 2.1 of the Code: 'Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Disability- A current, past or potential physical, intellectual, psychiatric, or sensory illness, disease, disorder, malfunction, malformation, disfigurement or impairment.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against conjoined twins on account of their disability?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of conjoined twins on account of their disability?

The advertisement has two actors pretending that they are conjoined twins and clearly intends to use the premise that conjoined twins are inseparable as a vehicle for humour: *“The advertisement emphasises that there can be just one winner...”*.

In relation to the advertiser’s comment *“Whilst we acknowledge that we have portrayed this small group, and their condition, in our advertising”* I note that the size of the group of persons with the disability is irrelevant in considering whether the advertisement breaches Section 2.1. Further, I note that although the advertiser asserts *“we took care to ensure that the twins portrayed were engaging in all the enjoyable activities that the other individuals undertook in each scene, and at no stage intended to portray them in a discriminatory way, or to cause offence to anyone”* an intention to discriminate or vilify is not necessary.

The advertisement is unarguably insensitive to conjoined twins and their families. In my view, it is also possible that a reasonable person could conclude that the advertisement reveals unfair treatment of conjoined twins on account of their disability because, but for the nature of their disability, conjoined twins would not have been depicted or portrayed in the advertisement — the disability was a significant reason for the depiction of conjoined twins in the advertisement.

(b) Does the advertisement vilify conjoined twins on account of their disability?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule conjoined twins on account of their disability?

The premise of the advertisement — that conjoined twins undergoing separation surgery, in order for one to compete in a game show — demeans the plight of conjoined twins who are unable to undergo separation surgery due to the high risk of death for one twin. However, the advertisement, in my view falls short of the threshold required for vilification. It does not humiliate, intimidate, incite hatred towards, contempt for, or ridicule conjoined twins on account of their disability.

G. Board determination: Upheld
Consultant determination: Upheld

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination on account of disability is met in relation to this complaint for the following reasons:

1. The advertisement has two actors pretending that they are conjoined twins and clearly intends to use the premise that conjoined twins are inseparable as a vehicle for humour: *“The advertisement emphasises that there can be just one winner...”*. A reasonable person could conclude that the advertisement reveals unfair treatment of conjoined twins on account of their disability because, but for their disability, conjoined twins would not have been depicted in the advertisement
2. In relation to the advertiser’s comment *“Whilst we acknowledge that we have portrayed this small group, and their condition, in our advertising”* the size of the group of persons with the disability is irrelevant in considering whether the advertisement breaches Section 2.1.
3. Although the advertiser asserts *“we took care to ensure that the twins portrayed were engaging in all the enjoyable activities that the other individuals undertook in each scene, and at no stage intended to portray them in a discriminatory way, or to cause offence to anyone”* an intention to discriminate or vilify is not necessary.

Comments

I note that the Board did not consider whether the advertisement was discriminatory within Section 2.1 of the Code but rather considered that the advertisement breached Section 2.6 of the Code dealing with community standards of health and safety: *“The Board agreed that the notion of undergoing separation surgery in order to be a single winner in a prize draw was against prevailing community standards of health and safety. While the Board recognised that the advertisement contained attempted humour, the Board agreed that the humour failed in the light of the sensitive nature of conjoined twins’ separations”*.

8. Complaint reference number 7/07

A. Complaint details

Advertiser
Advertiser SBS Corporation (summer programming)
Product
Media
Type of advertisement
Transport
Nature of complaint
Discrimination or vilification Age — Section 2.1
Determination date
13 February 2007
Board determination
Dismissed

B. Description of the advertisement

There are three advertisements in this series: an old couple wearing brief swimwear on sun lounges, sipping blue cocktails and glaring at the camera; an obese man wearing only shorts, socks and boots, standing in a garden behind a lawnmower; and a young very skinny male wearing baggy swimmers standing on a swimming pool diving board and looking back at the camera in trepidation. All advertisements are captioned: “Thankfully, not everyone has less on over summer”.

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

The meaning is discriminatory and derogatory. It gives the impression that elderly people, or those considered less attractive by the standards imposed by the “current standard” (the question remains as to whose standard) should preferably not “have less on this summer”.

They denigrate older people. Makes out their bodies are repulsive because they’re old. The ad with the skinny young bloke is also offensive because it mocks men who don’t apparently measure up to some idealised body image. I believe these ads are ageist. The implication is that older people’s bodies should be seen less of. Older people should not be seen wearing bikinis or swimwear because their bodies are unattractive. They have the right to swim and surf as much as their younger counterparts without being sniggered at.

The obvious inference in these ads is that people who are either older and/or not well built and conventionally beautiful should not take their clothes off in public. This is clearly a discriminatory portrayal of elder or overweight people and an example of rampant ageism and “weightism”.

D. The advertiser’s response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

The message that SBS intends to convey by the slogan is that, unlike other broadcasters, SBS maintains its commitment to the highest standards of broadcasting during the summer non-ratings period. The images used in the advertisements do not, and are not intended to, discriminate against or vilify people on the basis of their weight or age. The images are meant to work as humorous caricatures that exaggerate elements of lifestyles that could be considered to be in bad taste, with the emphasis on the characters’ state of undress providing a visual pun on the slogan.

The advertisements do not imply that all middle-aged or older people should not wear swimming costumes or sunbake. It is rather the characters in the advertisements in particular, as caricatures that enable the eye-catching visual pun to work. The characters are an exaggerated pastiche of styles meant to represent bad taste.

The image of the overweight man without a top mowing the lawn works in the same way. The exaggerated effect of the caricature provides the material for the visual pun. The advertisement does not vilify overweight people.

The third execution shows a very underweight man in bathers with the same slogan. This is not intended to discriminate against or vilify underweight people, but to humorously draw the public’s attention to the “less on” pun.

It is SBS’s view that the campaign should be viewed as a whole, parodying a wide range of lifestyles and characters and therefore cannot be seen to be discriminating or vilifying any one group.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: ‘Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.’

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

(a) Old couple wearing brief swimwear on sun lounges:
relevant ground

Age — the number of years that someone is or characteristics generally pertaining to a stage or phase in someone's life, or characteristics generally imputed to people of that stage or phase.

(b) Obese man wearing only shorts, socks and boots:
relevant ground — being overweight is not a ground under the Code (although extreme obesity may be a disability). This aspect of the complaint should be dismissed.

(c) Young very skinny male wearing baggy swimmers:
relevant ground — nil. This aspect of the complaint should be dismissed.

2. Consider whether advertisement (a) discriminates or vilifies, in turn, on account of age:

(a) Does the advertisement discriminate against elderly people on account of their age?

Does the advertisement reveal inequity, bigotry, intolerance, towards or unfair, unfavourable or less favourable treatment of elderly people owing to, because of, or due to their being a certain number of years or having characteristics generally pertaining to a stage or phase in their life?

No — the depiction of the elderly people in the advertisement wearing swimsuits and having over-tanned skin does not reach the threshold test for discrimination. The depiction of the elderly man and woman do not reveal inequity, bigotry, intolerance towards elderly people or the unfair or unfavourable treatment of elderly people due to their being elderly or having characteristics attributed to elderly people in general. The advertisement does not suggest that all elderly people have the same characteristics as the couple depicted.

(b) Does the advertisement vilify elderly people on account of age?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule elderly people owing to, because of, or due to their being a certain number of years or having characteristics generally pertaining to their stage in life.

No — again, the depiction of the elderly people in the advertisement wearing swimsuits and having over-tanned skin does not reach the threshold test for vilification. The elderly couple are not depicted in such a way that humiliates or ridicules elderly people generally. Again, the

advertisement does not suggest that all elderly people have the same characteristics as the couple depicted.

G. Board determination: Dismissed
Consultant determination: Dismissed

Reasons for consultant determination

The thresholds required in the Code to substantiate the complaints of discrimination and vilification are not met for the following reasons:

1. In relation to the advertisement depicting the overweight man wearing only shorts, socks and boots, the complaint does not identify a relevant ground under the Code.
2. In relation to the advertisement depicting the young very skinny male wearing baggy swimmers, the complaint does not identify a relevant ground under the Code.
3. In relation to the advertisement depicting the elderly people wearing swimsuits and having over-tanned skin, the complaint does identify a relevant ground under the Code, (age), but does not reach the threshold test for discrimination or vilification. The depiction of the elderly man and woman do not reveal inequity, bigotry, intolerance towards elderly people due to their being elderly or having characteristics attributed to elderly people in general. The advertisement does not suggest that all elderly people have the same characteristics as the couple depicted. Nor are the elderly couple depicted in such a way that humiliates or ridicules elderly people generally. Again, the advertisement does not suggest that all elderly people have the same characteristics as the couple depicted.

Comments

Again, the Board could include comments here, such as appear in the Board's reasons — for example:

The Board wished it noted that it considered the advertisements to be tasteless, and not in keeping with the spirit of SBS's charter, part of which is to promote diversity in Australia's community.

9. Complaint reference number 95/08

A. Complaint details

Advertiser

Kimberly-Clark Aust Pty Ltd (Kotex U — beaver)

Product

Toiletries

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

9 April 2008

Board determination

Dismissed

B. Description of the advertisement

This television advertisement opens on a young woman walking down a street holding a beaver under her arm, and as the camera pans away we see other women also clutching beavers in their arms. The young woman takes her beaver through her everyday activities, at a beauty salon, having her hair and nails done. At the beach the girl and the beaver are admiring two young men who are also admiring them. The girl and the beaver are then seen seated at a cafe where the girl presents the beaver with a gift — a box of U-tampons. A voiceover advises: “You’ve only got one. So for the ultimate care down there, make it U”.

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

The humour is extremely poor and lost on even a liberal like me.

I object to this ad because NO WOMAN WOULD EVER USE THE WORD ‘BEAVER’ to describe her vagina. ONLY MEN DO THAT. And they use it in a DEROGATORY manner. Worse still, this ad makes it sound ok to be derogatory about women’s sexual organs. AND it makes out that women are the ones doing it!

These feminine hygiene ads are unnecessary and getting more disgustingly graphic. Even my 38 year old wife, 12 and 14 year old daughters were disgusted. How long before we start seeing vaginas portrayed and referred to as ‘pussies’? My girls are broad minded, as I am. But we find making ‘fun’ out of the issue of menstruating vaginas offensive, of exceedingly poor taste, exploitative and unnecessary.

The advertisement is purporting to be funny because it uses a term of abuse for the vulva. The word “beaver” is not even in general Australian parlance, it is shocking word more associated with insult and pornography. It is disgraceful that this is on Australian television, at whatever hour.

That these advertisers feel they can insult every woman in this way on the grounds that the shock value will attract more attention, is repugnant.

The use of the term beaver relates in very colloquial, even rough, terms to a woman’s vagina. It is a derogatory term, and by using this word and depicting a beaver walking around with a girl who gives it tampons, the advertiser has created an offensive and demeaning advertisement.

“Beaver” is simply a euphemism for vagina, and not even a disguised one. It seems in bad taste to have men admiring her vagina.

I find the advert offensive in its use of a beaver to symbolise the vagina. Beaver, used in this way is not acceptable, in much the same way as if an advert featuring a male pampering a rather large rooster in a similar manner. The fact that it made me cringe.

D. The advertiser’s response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

I refer to your email dated 11 March 2008 and subsequent emails regarding complaints which the Advertising Standards Bureau has received concerning a TVC for U by Kotex® Products.

The only words spoken in the TVC are in the voice over at the end of the TVC which reads: “You’ve only got one. So for the ultimate care down there, make it U.” Also at the end of the TVC the following Super appears: “The ultimate care down there.” At no time is the word “Beaver” spoken.

At no time does the word “Beaver” appear. Given these facts we submit that complaints based on the alleged use of the term or word “Beaver” in the TVC are without foundation and should be dismissed.

Undeniably the TVC is playful and cheeky and is seen as such by the target audience which comprises young women between the ages of 18 and 24. The reaction of the viewer to the TVC is very much the result of the mindset, including in some cases

prejudices the viewer has to the advertising of feminine care products, menstruation and related matters. This is apparent from the various issues which complainants have specified in their complaints.

For instance many complainants have stated that in the beach scene the young males are "perving" at the young woman's vagina. On any objective viewing of that scene this is not the case, the woman is sitting in such a way that the relevant area of her anatomy is not exposed to view.

Any TVC which breaks new ground such as the current TVC is likely to generate complaints particularly when it advertises a product that a small minority of people feel should never be advertised. At the end of the day interested viewers assess each advertisement according to their attitudes and prejudices which vary significantly across the community. The fact that a very small number of people have complained does not mean that their views are generally shared or that their complaints are soundly based.

Considering the TVC with reference to the various Sections of the AANA Advertiser Code of Ethics we submit as follows:

There is no portrayal of people or depiction of material which discriminates against a section of the community (women) on account of sex. The TVC shows a woman in her early to mid twenties engaging in everyday activities that are usual for such a person. She is very much in control of the situation depicted in each scene in which she appears.

There is no violence portrayed in the TVC.

The TVC does not deal with sex, sexuality or nudity. If menstruation/vaginal care are regarded by some as sexuality, which we dispute, we submit the TVC is sensitive to the relevant audience and given the classification of the TVC, M, to the relevant time zone.

The TVC is not directed to children aged 14 years or younger.

As discussed above there is minimal language in the TVC and that language is neither strong nor obscene.

The TVC does not depict material contrary to prevailing community standards on health and safety. The TVC deals with neither health nor safety. The TVC does not advertise motor vehicles. The TVC does not advertise food or beverage product. We believe that the TVC complies with the AANA Advertiser Code of Ethics.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: 'Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Sex — The status of being a male, female, intersex, trans-sexual or transgender and of having characteristics attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against females on account of their sex?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of females owing to, because of, or due to their being females or having characteristics attributed to them because they are female?

The visual reference to a 'beaver' in the advertisement is clearly intended to connote the slang term or euphemism for vagina. Although some viewers may be offended by the implied connection between a beaver and female genitalia, there is nothing in the advertisement that can be said to reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of females owing to their being females or having characteristics attributed to them (having a vagina or menstruating) because they are female.

(b) Does the advertisement vilify females on account of their sex?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule females owing to, because of, or due to their being female or having characteristics attributed to females?

Although the reference to a ‘beaver’ in the advertisement is clearly intended to connote the slang term for vagina, the use of the beaver clearly targets an audience with knowledge of the use of the term as a euphemism for vagina and would be ‘over the heads’ of younger viewers.

Again, although some viewers may be offended by the implied connection between a beaver and female genitalia there is nothing in the advertisement that a reasonable person would feel humiliates, intimidates, incites hatred towards, contempt for, or ridicules females.

G. Board determination: Dismissed
Consultant determination: Dismissed

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination or vilification on account of sex is not met in relation to this complaint for the following reasons:

1. The reference to a ‘beaver’ in the advertisement is clearly intended to connote the slang term for vagina. However, there is nothing in the advertisement that can be said to reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of females owing to their being females or having characteristics attributed to them (having a vagina or menstruating) because they are female.
2. There is nothing in the advertisement that a reasonable person would feel humiliates, intimidates, incites hatred towards, contempt for, or ridicules females.

Comments

The Board also considered whether the advertisement breached Section 2.3 of the Code which relates to sex, sexuality and nudity. While Board members acknowledged that some viewers may be offended by the implied connection between a beaver and female genitalia they did not believe that the majority of viewers watching in the M time zone or the intended audience would find this offensive. The Board noted that this was a progressive way to advertise fem-care products. They considered that this is a difficult product to advertise as the advertiser cannot show the use of the product in a realistic way. The Board further noted its belief that this advertisement was a very sensitive approach to women’s needs and its aim was to promote brand loyalty in the target audience through a sense of fun. The Board determined that the advertisement did not breach 2.3 of the Code.

10. Complaint reference number 82/08

A. Complaint details

Advertiser

Virgin Money Australia Pty Ltd (Everlasting Love)

Product

Finance/Investment

Type of advertisement

TV

Nature of complaint

Portrayal of sex/sexuality/nudity — Section 2.3

Discrimination or vilification Age — Section 2.1

Determination date

12 March 2008

Board determination

Dismissed

B. Description of the advertisement

This television advertisement, with the backing track of the song “*This will be an everlasting love*” features an elderly married couple in the garden, where the woman is trimming a hedge while the husband waters the garden with a hose. As the man is distracted by something in the hedge, he accidentally turns the hose on his wife, drenching her and causing a wet T-shirt look. Admiring the view, the husband approaches his wife who is smiling suggestively at him and they commence to embrace and kiss passionately. As they disappear from view, we see a pair of man’s underpants and a bra thrown to the ground and the final scene is of two pairs of feet jutting out at ground level from behind a hedge. A female voiceover accompanies the scenes: “A home loan should be like a great relationship — the longer you’re in it, the better it should get. Virgin Money home loans come with everlasting love, which means even after years together, you’ll still find us attractive. Why not switch your home loan to Virgin Money today?” Final text on screen reads: “We’ll trim your rate”.

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

Portraying any couple engaged in sexual activity during family viewing time is tasteless. As a grandparent we are embarrassed and offended that ageing couples are portrayed in this tacky manner. Our granddaughter left the room and we changed the channel. The complaint is not to invalidate ageing couples enjoying sexual contact. How does this geriatric sex scene relate to Virgin money? Can the bar get any lower?

Advertisements can be tasteful with strong messages and we enjoy many of them. What Ad Agency would think this has any appeal?

I am writing to object to the use of sexual innuendo throughout the Virgin Money advertisement and an obvious final scene visual innuendo of sexual intercourse being carried out by a very old couple. The advertising creative with the use of older people is not only disgusting to view, not only offensive to older people; it completely misses its target market of probably 25-45 year-olds.

Most people, young and old will find this ad totally offensive and/or extremely gross and an unnecessary use of sexually based innuendo using older people to sell a money product. I am appalled the ASB allowed this to be passed. Surely our advertising standards have not been dumbed down to this level of supposed clever crudity. I could not watch it a second time and had to switch channels when it came on again. Please remove it from airing and request Virgin to develop something with a bit more style which is actually based on their money products rather than sex, no matter how clever or funny they believe it be.

Too graphic. My 8 yr son was watching the movie as a treat and we had to cover his eyes when it came on. They displayed too much 'sexuality'. It was totally inappropriate and offensive. Yes, we have to accept kissing on ads but the rest is too much and should not be shown on TV. Groping bottoms and wet t-shirts is too much. Yes it was hard to stomach seeing the older age group 'at it' but even if it were a younger couple it is too much. Also I think many children would have been watching the movie and they should not have been subjected to it.

D. The advertiser's response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

We wish to respond to the complaint and defend the integrity of the television commercial and related advertising campaign (by outlining both the television commercial's intended message and Virgin Money's internal diligence process followed in developing the campaign). By way of background, the television commercial comprises part of Virgin Money's current "Everlasting Love" advertising campaign. The campaign comprises television, print and internet advertising.

The major focus of the campaign is a real-life couple who have been happily married for 57 years. The campaign's promotional message of happy, loving, long-term relationships serves as a metaphor for the relationship Virgin Money aspires to have with its customers.

The complaint refers to both the content of the television commercial and the time of day it was broadcast. With respect to the television commercial's content, Virgin Money considers that the commercial depicts a strong and loving relationship between a husband and wife and clearly communicates the product related message and our "Everlasting Love" campaign (as shown in script).

We note that the Advertising Standards Board has previously concluded (as per October 2007 Case Report) that: the use of the older couple... "was done lovingly and affectionately"; the depiction of the couple was "affectionate and appropriate and in no way discriminatory or vilifying to women, older women or older people generally".

With respect to the timing of the broadcast, the television commercial was granted a PG rating from CAD (refer attached) which permits broadcasting from 8:30am to 4pm and 7pm to 6am weekdays and 10am to 6am weekends except during P or C programmes or adjacent to P or C periods. The time of the broadcast indicated in the complaint was Sunday 24 February 2008 at 3:20pm and was neither during, nor adjacent to, P or C programmes or periods. Accordingly, we consider that the television commercial treats sex, sexuality and nudity with sensitivity to the relevant audience and, where appropriate, the relevant programme time zone and that Virgin Money has adhered to relevant broadcasting requirements. For the reasons noted above, our view is that the television commercial does not breach the AANA Advertiser Code of Ethics (including Section 2.3).

The starring couple of the television commercial were interviewed on Today Tonight, shown 5 September 2007. They had the opportunity to discuss their experiences arising from the filming of the television commercial — their comfort with the way in which they were portrayed and the nature of the advertising campaign was made clear to viewers.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: 'Advertising or marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Age — the number of years that someone is or characteristics generally pertaining to a stage or phase in someone's life, or characteristics generally imputed to people of that stage or phase.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against elderly people on account of age?

Does the advertisement reveal inequity, bigotry, intolerance, unfair or unfavourable or less favourable treatment of an elderly married couple owing to, because of, or due to their age or phase or stage in their lifetime?

The advertisement simply portrays an elderly married couple as sexual beings — there is nothing in the advertisement that reveals inequity, bigotry, intolerance, unfair or unfavourable or less favourable treatment because of, or due to their age or phase or stage in their lifetime.

(b) Does the advertisement vilify elderly people on account of their age?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule an elderly couple owing to, because of, or due to their age or phase or stage in their lifetime?

The elderly couple in the advertisement are portrayed as playful and vibrant. The advertisement does not humiliate, intimidate, incite hatred towards, contempt for, or ridicule elderly couples.

G. Board determination: Dismissed
Consultant determination: Dismissed

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination on account of age is not met in relation to this complaint for the following reasons:

1. The advertisement simply portrays an elderly married couple as loving, affectionate and sexual beings — there is nothing in the advertisement that reveals inequity, bigotry, intolerance, unfair or unfavourable or less favourable treatment because of, or due to their age or phase or stage in their lifetime.
2. The elderly couple in the advertisement are portrayed respectfully as a playful and vibrant couple in a long term relationship. The advertisement does not humiliate, intimidate, incite hatred towards, contempt for, or ridicule elderly couples.

Comments

The Board also considered whether the advertisement breached Section 2.3 of the Code (in relation to the depiction of the couple disappearing behind the bushes) and found that the advertisement did not breach Section 2.3.

11. Complaint reference number 59/08

A. Complaint details

Advertiser

Townsville Automotive Detailing

Product

Housegoods/services

Type of advertisement

Radio

Nature of complaint

Discrimination or vilification Ethnicity — Section 2

Determination date

12 March 2008

Board determination

Dismissed

B. Description of the advertisement

This radio advertisement features a male voiceover shouting in a European accent: “Wees been in Townsville to tell youse stooges about Townsville automotive detailing, detailing fully sick cars. So let’s pull some stooges over and go through their rides. Youlleah...Pull over stooge! Exsqueeze me your royal hottiness...Where do you get done?” A female voice replies: “Are you right?” and the sound of a slap is heard. The male replies: “So much for tryin’ to pick up Townsville chicks youllaah! Townsville automotive detailing will pick your car up, and drop it back to you shiny and new. Woolcock Street. Ahh, he must be a wog, he’s got a woolly...ah, doesn’t matter. Behind McSheds. Call 4775 6630.”

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

Ad is advertising in an offensive and ridiculing manner. The person speaking uses a strange accent as if a Greek or Italian is speaking. The word wog is used. Comments are made about the police in a car. There is a police woman in the car with a pony tail, called “stooge”. This ad is not to the point in advertising about their services. It is more what one would hear in a comedy show. It is not necessary to use such a tone of voice or the word wog. I have previously made a similar complaint to this radio station about another ad which mentioned Italians. There is no need for this type of nonsense for promoting a service or business.

D. The advertiser’s response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

The only comments we have in relation to the complaint is that the ad was in no way aimed or intended to offend Greek or Italian listeners. Our target market was to attract young listeners of owner modified cars in relation to the success of the television series Fat Pizza featuring actors of Lebanese and Maltese decent who all drive around in very hot modified cars.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: 'Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Race — people of a common descent or ancestral lineage.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against Greeks/ Italians on account of their race?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of Greeks, Italians, or Lebanese persons because of, or due to their being Greek, Italian or Lebanese or having characteristics attributed to Greek, Italian or Lebanese persons?

The answer to this is possibly yes. By depicting characters with characteristics that perpetuate negative stereotypes of young Greek, Italian or Lebanese males (hooning around in modified cars and being disrespectful to women) and using the derogatory term 'wog' the advertisement reveals bigotry towards and unfavourable treatment of those races. The fact that the intended humour in the advertisement would not work, for example, if different racial groups were substituted into the advertisement suggests less favourable treatment of Greeks, Italians, or Lebanese persons.

(b) Does the advertisement vilify Greeks/ Italians on account of their race?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule Greeks or Italians owing to, because of, or due to their being Greeks or Italians or having characteristics attributed to Greeks or Italians?

The humour that the advertisement seeks to create is predicated on ridiculing Greeks or Italians similarly to the sketch show 'Fat Pizza' specifically on the basis of attributing the characteristics to them of hooning around in modified cars and being disrespectful to women. It is no defence to a finding of discrimination or vilification that the advertisement 'takes off' a TV show, the content of which is not subject to the Code. Moreover, in sketch shows where minority cultures are critiquing or lampooning the stereotypes attributed to their culture, they have an agency within the process and the consequent depictions which is absent when someone outside that cultural sub-group appropriates the depictions for another purpose.

Further, again, although the advertiser says: "*The ad was in no way aimed or intended to offend Greek or Italian listeners*" the intent is irrelevant if the advertisement breaches the Code. One assumes that no advertiser would aim or intend to discriminate against or vilify an individual or group.

G. Board determination:	Dismissed
Consultant determination	Upheld

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination and vilification on account of race is met in relation to this complaint for the following reasons:

1. By depicting characters with characteristics that perpetuate negative stereotypes of young Greek, Italian or Lebanese males (hooning around in modified cars and being disrespectful to women) the advertisement reveals bigotry towards and unfavourable treatment of those races.
2. The humour that the advertisement seeks to create is predicated on ridiculing Greeks or Italians similarly to the sketch show 'Fat Pizza' specifically on the basis of attributing the characteristics to them of hooning around in modified cars and being disrespectful to women. The fact that the intended humour in the advertisement would not work, for example, if different racial groups were substituted into the advertisement suggests less favourable treatment of Greeks, Italians, or Lebanese persons.

3. It is no defence to a finding of discrimination or vilification that the advertisement ‘takes off’ a TV show, the content of which is not subject to the Code.
4. Further, again, although the advertiser says: *“The ad was in no way aimed or intended to offend Greek or Italian listeners”* the intent is irrelevant if the advertisement breaches the Code.

Comments

I note that the Board “noted the complainant’s concerns about racial discrimination but felt that the advertisement was reminiscent of the style and humour of the SBS program Fat Pizza and would appeal to the intended target audience. It further noted that there was no intentional or unintentional discrimination along racial lines”. The Board found that the advertisement did not breach the Code and dismissed the complaint.

In my view, the intent of the advertiser must be irrelevant in determining whether or not an advertisement breaches Section 2.1 of the Code because one assumes that no advertiser would aim or intend to discriminate against or vilify an individual or group.

Further, if the advertiser removed the term ‘wog’ from the script, and the reference to the incident with the woman, as suggested below, the advertisement would no longer be discriminatory or vilificatory — it would still, in my view, be a poor play on stereotypes but probably would not reach the discrimination or vilification thresholds.

This radio advertisement features a male voiceover shouting in a European accent “Wees been in Townsville to tell youse stooges about Townsville Automotive Detailing, detailing fully sick cars. So let’s pull some stooges over and go through their rides. Youlleah...Pull over stooge!.... Townsville Automotive Detailing will pick your car up, and drop it back to you shiny and new.... Woolcock Street. Behind McSheds. Call 4775 6630.”

12. Complaint reference number 528/06

A. Complaint details

Advertiser

Carlton & United Breweries Ltd (Crown Lager)

Product

Alcohol

Type of Advertisement

Outdoor

Nature of complaint

Discrimination or vilification Religion — Section 2.1

Determination date

16 January 2007

Board determination

Dismissed

B. Description of the advertisement

This outdoor advertisement features a carton of Crown Lager with the text “Immaculate Consumption” and “Celebrate Christmas with Australia’s finest”.

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

This advertising is very offensive to many people, especially Catholics, as it is a takeoff of the Catholic Feast Day, the Immaculate Conception.

It is trivialising something that is important to Catholics and had no relation to a beer. There is no place in Australia for singling out a religious belief.

The words “Immaculate Consumption” left my friends and I offended and angry. As a Christian and a Catholic the wording was an insult to our faith.

D. The advertiser’s response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

Our aim with this advertisement was simply a play on words: the idea being that the word immaculate reflects the brand's premium position in the Australian beer market and the word consumption relates to the consumption occasion associated with celebrating Christmas, which is in line with Crown's proposition which is the celebration of "Australia's Finest" moments. It was never our intention to hinge the ad on a specific Feast Day — rather, the objective was to tap into the peak selling opportunity presented by the important Christmas trading period.

We regret that the advertisement has caused offence. However, while we concede that the advertisement was not to everybody's taste, we do not believe it is discriminatory or promotes the vilification of the Catholic community or faith. As a result we do not believe it is in breach of Section 2 of the Code.

We took all the appropriate measures to ensure this advertisement met with the relevant guidelines for alcohol advertising. However, as soon as we became aware that this ad had caused offence to some members of the community, we began the complete withdrawal of the ad rather than cause any further distress. The withdrawal of the advertisement is now complete.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Religion — People's beliefs and opinions concerning the existence, nature, and worship of God, a god, or gods, and divine involvement in the universe and human life or an institutionalised or a personal system of beliefs and practices relating to the divine.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against Christians on account of their religion?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of Christians owing to, because of, or due to their beliefs and opinions concerning a system of beliefs and practices relating to the divine?

No. The advertisement does not reach the discrimination threshold of revealing inequity, bigotry, intolerance, or the unfair, less favourable or unfavourable treatment of Christians because of their beliefs.

(b) Does the advertisement vilify Christians on account of their religion?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule Christians owing to, because of, or due to their being Christians?

No. The advertisement does not meet the vilification threshold of humiliating, intimidating, inciting hatred towards, contempt for, or ridicule of Christians owing to, because of, or due to their being Christian.

G. Board determination: Dismissed
Consultant determination: Dismissed

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint is not met for the following reason:

Although an advertisement may cause offence to certain members of the public, 'offence' is a lower threshold than that required to establish either discrimination or vilification in breach of Section 2.1 of the Code.

13. Complaint reference number 441/07

A. Complaint details

Advertiser

Trend Micro Australia (PC-cillin)

Product

Information Technology

Type of advertisement

Print

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Discrimination or vilification Age — Section 2.1

Determination date

16 January 2008

Board determination

Dismissed

B. Description of the advertisement

This print advertisement for the product “peace for parents. com.au” features the photo of an old man which is resting on a computer keyboard next to an ashtray. Text reads: “It’s every parent’s nightmare. The lurking fear that their children visit websites or chat rooms where predators wait in prey. You can protect your kids 24/7 with Trend Micro’s PC-cillin. It incorporates commercial-grade protection from viruses, spyware and internet fraud, safeguards your wireless home network from unauthorised users, offers advanced parental controls and blocks bad stuff at the source, before it even has a chance to get near you or your PC, thanks to unique Web Threat protection. Peace of mind is called Trend Micro PC-cillin. Nothing touches it.”

C. Outline of the complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

The ad has a picture of a middle/older male inferring that this is the typical computer predator. This is discrimination.

D. The advertiser’s response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

With regard to the complaint that you forwarded to me, this ad was part of a “villains” series of advertisements that we ran near the end of last year that was intended to raise awareness of various online security and safety issues — including the risk of computer viruses, credit card fraud, identity theft and exposure of children to undesirable online content. This last category was intended to build on the awareness generated by the recent Federal government advertising on this topic.

The faces chosen for the advertising were by no means intended to discriminate or vilify any section of the community. There was no implication that any specific community group might be a typical online predator. Quite the opposite, in fact, since the choice of images were intended to challenge the perception of online risks being caused by the stereotypical computer “hacker” by presenting faces of a variety of ages and appearance. As an additional note, this series of ads concluded in December of last year and no further placements will be booked.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

Section 2.1 of the Code: ‘Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.’

F. Assessment:

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Sex — the status of being a male, female, intersex, trans-sexual or transgender and of having characteristics attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

Age — the number of years that someone is or characteristics generally pertaining to a stage or phase in someone’s life, or characteristics generally imputed to people of that stage or phase.

2. Consider whether the advertisement discriminates or vilifies on account of sex or age, in turn:

a) Does the advertisement discriminate against men on account of their sex?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of men owing to, because of, or due to their being male or having characteristics attributed to them because they are male?

No — there is nothing in the advertisement that reveals inequity, bigotry, intolerance, or the unfair or unfavourable treatment of males owing to, because of, or due to their being males or having characteristics attributed to males. The advertisement does not suggest or imply that males, as a group, are likely to engage in predatory internet behaviour because of their being male or having characteristics attributed to their being male.

b) Does the advertisement vilify men on account of their sex?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule males owing to, because of, or due to their being male or having characteristics attributed to males?

No — for the reasons given above.

c) Does the advertisement discriminate against middle-aged and older men on account of age?

Does the advertisement reveal inequity, bigotry, intolerance, unfair or unfavourable or less favourable treatment of men owing to, because of, or due to their age or phase or stage in their lifetime?

No — there is nothing in the advertisement that reveals inequity, bigotry, intolerance, or the unfair or unfavourable treatment of middle-aged or older men owing to, because of, or due to their being middle-aged and older men or having characteristics attributed to middle-aged and older men. Simply, the advertisement does not suggest or imply that middle-aged and older men, as a group, are likely to engage in predatory internet behaviour because of their age.

This may have been implied if, for example, the advertisement had showed a pastiche or collage of middle aged and older men.

d) Does the advertisement vilify middle-aged and older men on account of their age?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule men owing to, because of, or due to their age or phase or stage in their lifetime?

No — for the reasons given to question (c) above.

In considering the above questions, the advertiser's response as to the diversity of the advertisements contained in the whole campaign is relevant: *"the choice of images were intended to challenge the perception of online risks being caused by the stereotypical computer "hacker" by presenting faces of a variety of ages and appearance"*. If all of the advertisements in the series had featured middle aged or older men, rather than a diverse group of individuals, then the complaint may have had some force.

G. Board determination: Dismissed
Consultant determination: Dismissed

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint is not met in relation to either age or to sex for the following reason:

The advertisement does not suggest or imply that males, as a group, are likely to engage in predatory internet behaviour because of their being male or having characteristics attributed to their being male. Nor does the advertisement suggest or imply that middle-aged and older men, as a group, are likely to engage in predatory internet behaviour because of their age. The inclusion of a picture of a person of any particular gender or race does not of itself suggest that all internet predators are the same as the person depicted.

14. Complaint reference number 286/07

A. Complaint details

Advertiser

H J Heinz Co Aust Ltd (Baked Beans — Christine)

Product

Food & Beverages

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Sexual preference — Section

2.1

Determination date: 11 September 2007

Board determination

Dismissed

B. Description of the advertisement

This television advertisement opens in a supermarket where two men in their early 50s both reach for the same can of Heinz Baked Beans. As their hands accidentally touch, one man (Chris) recognises the other from school and asks: “Ryan Phillips?!” Ryan looks at him closely, but obviously doesn’t recognise him until Chris explains: “It’s me, Christine...” Ryan now looks at him suspiciously so the Chris elaborates: “...from Rosanna High?” Suddenly Ryan has a flashback as he remembers kissing Christine behind the shelter sheds at their secondary school. Ryan, realising the implications and feeling uncomfortable replies: “Christine...?...Ha...phew... I...I...I see you still like your baked beans?” to which Chris replies: “Some things never change hey!?” He laughs as he pokes Ryan in the stomach. Ryan exhales awkwardly. Text onscreen reads: “Some things never change.”

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

The kissing scene was far too graphic... To show young youths kiss that way is inappropriate, especially when so much tongue was shown in such a distasteful way. Also the whole concept of this man having a gender change is also not appropriate for children and is just unnecessary and uncalled for.

It is about the issue of sex change and that one of these men was previously a woman.

I object most strongly to this advertisement for two reasons ... firstly it should not be necessary to show this sort of activity at all and particularly not in the time slots when children would be watching ... and secondly I wince at the thought of these particular two young girls having been directed to behave in such a fashion for the titillation of those who were watching and organising this advertisement.

This ad...shows explicit sexually arousing kissing, and indicates that it is quite normal for young people to change their gender, and indicates that it is quite normal for young boys and girls to behave this way

...the overt and overstated sexuality of the ad, both in the adolescent ‘tongue’ kiss and the issues surrounding sexuality, sex changes, which I and others in my family find distasteful, irrelevant, offensive, puerile, immature and unnecessary.

The kiss is a disgusting example of “tongue kissing” which is stomach-turning and inappropriate.

We find the implication and realisation of the man kissing the girl who is now a man offensive and disturbing...the girl who is now a man has been portrayed in a feminine and creepy way.

D. The advertiser’s response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

It was not and is not our intention to unduly upset our audience. We have a marketing objective and considerable investment to sell more Baked Beans. It would not make commercial sense for us to intentionally offend our audience. Notwithstanding this, we respect and appreciate feedback and understand that featuring teenagers kissing and a man having had a gender change may be somewhat provocative.

The primary message of the commercial is that some things never change. To communicate this point creatively, the commercial depicts a scenario that is intended to be humorous. The commercial’s message suggests that despite what else may change, some things never do. In this case, the two men still enjoy their baked beans — despite one of the men having had a gender change. The kissing scene was quite creatively deliberate. It was designed to emphasise the character’s awkwardness and help tell the story. It was not intended to be gratuitous.

With respect to the inappropriate media placement claim, we have taken great care to seek pre and final approval from FACTs. According to FACTs, the subject matter of the commercial was deemed appropriate for general viewing. It obtained a W rating. To this end, we have exercised care so as to ensure it does not appear in or adjacent to any programming promoted to children or with a substantial child audience. It is our belief that the commercial is not inappropriate for general viewing and the complainant's views do not represent the broader majority of our audience.

Heinz Australia and its agencies are strong supporters of the AANA Code of Ethics and we consequently take matters such as this very seriously. In this instance, we believe it is without foundation and anticipate our broader audience will consider the commercial and view it with the humour that was intended.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: 'Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Sexual preference — homosexuality, heterosexuality, bisexuality and trans-sexuality.

Not one of the complaints is in relation to any potential discriminatory or vilificatory depiction of a trans-sexual in the advertisements. Rather, the complaints themselves reveal bigotry and intolerance towards the depiction of trans-sexuals in advertising.

The complaints, accordingly, should be dismissed.

G. Board determination: Dismissed
Consultant determination: Dismissed

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint is not met in relation to the complaint relating to sexual preference for the following reason:

The complaints are misconceived in so far as they complain of the depiction of a gender change or the portrayal of trans-sexuals in advertising. The mere depiction of a gender change or portrayal of trans-sexuals in advertising is not a breach of the Code.

Comments

In relation to complaints that the scene of a boy and girl kissing was inappropriate, the Board considered whether this scene breached Section 2.3 of the Code. The Board found that the scene which depicts a teenage boy and teenage girl kissing awkwardly in the school playground and 'considered that the scene deliberately depicted an awkward situation intentionally reminiscent of teenage years...this depiction was a parody of teenagers kissing and was not of itself provocative or gratuitous'.

The Board also considered whether the portrayal of gender realignment breached Section 2.3 of the Code and found that 'the treatment of the issue was not done in a sexual manner and was treated with respect'. The Board noted that 'some members of the community may prefer not to view an advertisement with a theme of gender alignment, but was of the view that the references to gender realignment were sensitive to the relevant audience and not offensive'.

Finding that the advertisement did not breach the Code on other grounds, the Board dismissed the complaint.

15A. Complaint reference number 181/08 and 193/08

Advertiser

Mars Australia Pty Ltd

Product

Food & Beverages

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Portrayal of sex/sexuality/nudity — Section 2.3

Determination date

11 June 2008

Board determination

Dismissed

B. Description of the advertisement

181/08

A couple in their late twenties are sitting on a couch. The guy has a soft French accent. He talks to the camera about his girlfriend Pam.

EMILE TO CAMERA: At first Pam said she was having the chocolate to help her forget things, but I did not think it would actually erase her memory. It began with one small incident.

Cut to Pam at the Doctor. She's wearing a medical gown and lying on the table with her knees up.

After a moment a doctor pops his head up from between her knees and says.

DR: That's where I know you from. Mooroolbark High. Year 12. I was in your English class.

Pam smiles awkwardly, turns ruby red and tries to hide her face in her hand.

EMILE Voice over (VO): But then she ate the chocolate and couldn't remember a thing.

We see her eating several squares of Dove later that night. A few moments later Emile asks,

EMILE: How was the Doctor's appointment?

PAM: What appointment?

EMILE VO: It was as if nothing had happened.

EMILE TO CAMERA: If she has a little she forgets little things.

Cut to Pam standing in her kitchen, near the Dove pack.

PAM: I think I'll have a Dove.

Forgetting that she's just consumed it, she repeats herself, as if for the first time.

PAM: I think I'll have a Dove.

EMILE VO: But too much chocolate and she forgets really unusual things...

Cut to Pam sitting in her bedroom at her dresser, we see a pile of Dove wrappers scattered on the glass counter. She savours the last delicious morsel, before picking up her lipstick. She pulls off the lid, unwinds and leans into the mirror. She goes to put it on, but instead of applying it to her lips she bypasses them and draws it on her eyelids leaving bright red marks. It's as though she has completely forgotten where the lipstick actually goes.

EMILE VO: Mostly it helps her recover.

Cut to Pam at her desk. There is a photo of herself on the screen. We can't see the whole shot, but it seems like she's topless. In the subject of the email she writes: "Hey Honey, check out my piercing". She hits send and the photo of her pops up on every screen in the office. She quickly unwraps a Dove.

EMILE TO CAMERA: She says it's the smooth chocolate molecules that dissolve the memory cells. I don't know how it works, but it works.

EMILE VO: It's good for her. But for me it can be difficult.

We see Pam on the couch eating Dove. She's glancing at the wrapper when her boyfriend walks in the room holding two cups of tea. She looks up, screams and jumps up off the couch as if he were an intruder. The tea spills everywhere.

EMILE TO CAMERA: It's OK. We get by.

Cut back to them on the couch. She eats some Dove and looks at him strangely. He pulls a lanyard out from underneath her top. It has a photo of him on it with the words. "EMILE. My boyfriend." printed across it. She smiles.

Text on screen: Another Dove Individual. The advertisement fades to close up of Dove chocolate.

Text: www.doveindividuals.com

C. The complaint

181/08

A sample of comments which the complainant/s made regarding this advertisement included the following:

Trivialisation of illness/impairment and trivialisation of women.

The way the ad that was advertising the chocolate had nothing to do with the chocolate except the ending where they were holding a dove chocolate block. We don't see how a woman's legs up in the air spread apart with a man looking up her legs and then pops up and says "I know where I met you" and then it shows an email about her new body piercing which is obviously down there. It shows the lack of thought especially at the time showing. How many parents would get asked "what's that man doing mum?" by young children. My 17 year old daughter even thought it was very disturbing and inappropriate. In a day where we as parents are trying very hard to keep our young children innocent but it's very hard to do this with inappropriate ads like this one.

One of the events used to portray her loss of memory is a gynaecological examination! The viewer sees the head of her doctor between her sheet covered legs as he conducts the examination whilst recalling where he knows her from. This scene is degrading, vulgar and unnecessary. When did female disease become synonymous with chocolate consumption? I also object to the female being portrayed as stupid, speechless and forgetful.

D. The advertiser's response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

You have advised Mars Snackfood that Section 2 of the AANA Advertiser Code of Ethics covers the area of this particular complaint with reference to the Discrimination or Vilification Race — (sic)

Section 2.1. The complainant's letter indicates their specific concern relates to the trivialisation of illnesses and the trivialisation of women portrayed in our latest the Dove® campaign.

Discrimination or vilification Race — Section 2.1(sic)

We apologise for any uncomfortable and unsettling feelings consumers may have experienced due to the advertising. Our intention was never for the campaign to offend or denigrate in any way.

Through extensive research we found that chocolate advertising to women tended to be clichéd and unrealistic. It's not always about having chocolate in the bath and it's not always an indulgent moment. Mostly it's about sneaking some time at the end of the day while the kids aren't looking.

Importantly we found that women do have a sense of humour and they appreciate honesty. We really wanted our advertising to talk to them on this level. There is no denying that women's chocolate moments are varied and unique. Through this campaign we wanted to show that each woman's chocolate moment is

individual. The Dove® Individuals campaign celebrates women's special relationship with chocolate because just as Dove® chocolate comes in their own individual wrapping, so too do the women who eat them.

Both TV executions celebrate the personal moments and rituals of our characters' chocolate moments. Em Ocean only eats chocolate when she's feeling emotional and Pam Nesia eats chocolate when she wants to forget. These situations are exaggerated but they are grounded in human truths. The campaign was never developed to trivialise women or illness.

By way of background Mars is a good corporate citizen and believes in giving back to the communities in which we operate. Over the last few years, Mars Snackfood has been a major supporter and donator to the Jane McGrath Foundation in support of gaining awareness for women and breast cancer. Other programs that Mars supports from a health and well being perspective include:

- *Relay For Life — raising funds raised for Cancer Council of Victoria,*
- *Run For The Kids (running) — funds raised for Royal Children's Hospital (Melbourne),*
- *Around The Bay in a Day (Cycling), and*
- *EPA Ride To Work Challenge (Winner of 2006 regional participation award).*

We have received much positive feedback in relation to our Dove® campaign including blogging on YouTube. Although we appreciate the positive we also welcome all feedback. We hope that the explanation attached explains our intentions and approach. Accordingly we believe our Dove® advertising meets the provisions of the Code, so the complaint should be dismissed.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Sex — The status of being a male, female, intersex, trans-sexual or transgender and of having characteristics attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

Disability — A current, past or potential physical, intellectual, psychiatric, or sensory illness, disease, disorder, malfunction, malformation, disfigurement or impairment.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against females on account of their sex?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of females owing to, because of, or due to their being females or having characteristics attributed to them because they are female?

The advertisement is not discriminatory on the basis of sex because it does not simply play on stereotypes of women generally — it presents an individual stylised, exaggerated and obviously fictional character (who is identified in the advertisement as Pam Nesia) in an obviously imaginary scenario.

(b) Does the advertisement discriminate against persons suffering from a memory disorder on account of their disability?

Similarly, the advertisement is not discriminatory on the basis of disability because it does not reveal bigotry or intolerance to people with disabilities (specifically memory impairment disorders) because it presents an individual stylised, exaggerated fictional character in an obviously imaginary scenario.

(c) Does the advertisement vilify women on account of their sex?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule women on account of their sex?

Due to the fact that the advertisement is a stylised, exaggerated fictional character in an obviously imaginary scenario there is nothing in the advertisement that a reasonable person would feel humiliates, intimidates, incites hatred towards, contempt for, or ridicules females on the basis of their sex.

(d) Does the advertisement vilify persons suffering from a memory disorder on account of their disability?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule persons suffering from a memory disorder on account of their disability?

Due to the fact that the advertisement is a stylised, exaggerated fictional character in an obviously imaginary scenario there is nothing in the advertisement that a reasonable person would feel humiliates, intimidates, incites hatred towards, contempt for, or ridicules persons suffering from a memory disorder on account of their disability.

G. Board determination: Dismissed
Consultant determination: Dismissed

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination or vilification on account of sex or disability is not met in relation to this complaint for the following reasons.

1. The advertisement is not discriminatory on the basis of sex or disability because it does not simply play on stereotypes of women or persons with a disability generally — it presents an individual stylised, exaggerated and obviously fictional character that is identified in the advertisement (Pam Nesia) in an obviously imaginary and almost ridiculous scenario. Accordingly, it does not reveal bigotry or intolerance to women or people with disabilities (specifically memory impairment disorders).
2. Due to the fact that the advertisement is a stylised, exaggerated fictional character in an obviously imaginary scenario there is nothing in the advertisement that a reasonable person would feel humiliates, intimidates, incites hatred towards, contempt for, or ridicules females on account of their sex or persons suffering from a memory disorder on account of their disability.

Comments

This advertisement can be distinguished from the Townsville Automotive Detailing advertisement which I believe is vilificatory because this advertisement does not simply depict common bigoted stereotypes about women or people with disabilities. Rather, it has a complex storyline, a sophisticated play on words (Pam Nesia) and a character that is clearly fictional, unauthentic and exaggerated.

15B. Complaint reference number 193/08

A. Complaint details

Advertiser

Mars Australia Pty Ltd

Product

Food & Beverages

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

11 June 2008

Board determination

Dismissed

B. Description of the advertisement

As the advertisement begins we see a woman in her late 20s in a living room talking to a camera.

Text appears on screen 'Em Ocean'. There is an inordinate number of tissue boxes positioned around her.

The woman Em Ocean speaks to the camera: "I'm not over the top or anything. I mean I only ever eat chocolate when I'm feeling emotional".

Cut to her at a funeral crying hysterically while unwrapping a Dove. Then without warning she stops crying. Now with a very composed look on her face she scans the area. She spots another funeral in progress and walks across the cemetery toward it.

EM voiceover (VO): "I just have quite a lot of emotional things happening right now." (Her eyes dart suspiciously as if she's exaggerating).

She settles amongst the new crowd and on cue, with the other guests, unleashes another well of tears.

Cut to a wedding where she's standing in the pews crying and eating chocolate. Paying no attention to the actual ceremony, she glances down at the inside of the wrapper. Then, another guest in the church leans over and asks.

Wedding Guest: "How do you know Sam?"

Em replies: "Who?"

The woman looks befuddled.

Cut to Em standing near a vase on a display cabinet.

EM VO: "Sometimes I feel like bad luck is following me..."

Em knocks the vase off the cabinet and it smashes on the floor. She begins to cry and quickly unwraps and consumes another chocolate.

EM VO: "It's been tough lately..."

Cut to close up of Em shouting at the camera: "Please call again? Who says that? This is pointless." (We see young man she is shouting at.) It's over...(she leans in to read his name-tag) Patrick.

We see Em storming out of a sandwich bar crying and unwrapping a chocolate. As Em walks away we notice she recovers very quickly and even smiles to herself.

EM VO: "I'm as strong as the next person. It's just that occasionally unforeseen things get me down..."

Cut to Em looking at the Romance section of the DVD rental shop.

Em continues: "If I've had a rough day, I need a smooth chocolate."

Em places an enormous pile of DVD's on the counter at a video store. The man behind the counter says: You know those are all due back tomorrow? Em: Yeah

Cut to Em in her lounge watching DVD's. She starts to cry but unwraps another Dove.

EM TO CAMERA: "I'll be OK."

Text on screen: Another Dove Individual. The advertisement closes on a close up of Dove chocolate packets and text: www.doveindividuals.com

C. The complaint

Trivialisation of illness/impairment and trivialisation of women.

D. The advertiser's response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

You have advised Mars Snackfood that Section 2 of the AANA Advertiser Code of Ethics covers the area of this particular complaint with reference to the Discrimination or Vilification Race — (sic)

Section 2.1. The complainant's letter indicates their specific concern relates to the trivialisation of illnesses and the trivialisation of women portrayed in our latest the Dove® campaign.

Discrimination or vilification Race — Section 2.1(sic)

We apologise for any uncomfortable and unsettling feelings consumers may have experienced due to the advertising. Our intention was never for the campaign to offend or denigrate in any way.

Through extensive research we found that chocolate advertising to women tended to be clichéd and unrealistic. It's not always about having chocolate in the bath and it's not always an indulgent moment. Mostly it's about sneaking some time at the end of the day while the kids aren't looking.

Importantly we found that women do have a sense of humour and they appreciate honesty. We really wanted our advertising to talk to them on this level. There is no denying that women's chocolate moments are varied and unique. Through this campaign we wanted to show that each woman's chocolate moment is individual. The Dove® Individuals campaign celebrates women's special relationship with chocolate because just as Dove® chocolate comes in their own individual wrapping, so too do the women who eat them.

Both TV executions celebrate the personal moments and rituals of our characters' chocolate moments. Em Ocean only eats chocolate when she's feeling emotional and Pam Nesia eats chocolate when she wants to forget. These situations are exaggerated but they are grounded in human truths. The campaign was never developed to trivialise women or illness.

By way of background Mars is a good corporate citizen and believes in giving back to the communities in which we operate. Over the last few years, Mars Snackfood has been a major supporter and donor to the Jane McGrath Foundation in support of gaining awareness for women and breast cancer. Other programs that Mars supports from a health and well being perspective include:

- *Relay For Life — raising funds raised for Cancer Council of Victoria,*
- *Run For The Kids (running) — funds raised for Royal Children's Hospital (Melbourne),*
- *Around The Bay in a Day (Cycling), and*
- *EPA Ride To Work Challenge (Winner of 2006 regional participation award).*

We have received much positive feedback in relation to our Dove® campaign including blogging on YouTube.

Although we appreciate the positive we also welcome all feedback. We hope that the explanation attached explains our intentions and approach. Accordingly we believe our Dove® advertising meets the provisions of the Code, so the complaint should be dismissed.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Sex — the status of being a male, female, intersex, trans-sexual or transgender and of having characteristics attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

Disability — a current, past or potential physical, intellectual, psychiatric, or sensory illness, disease, disorder, malfunction, malformation, disfigurement or impairment.

2. Consider discrimination and vilification regarding each ground, in turn:

(a) Does the advertisement discriminate against females on account of their sex?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of females owing to, because of, or due to their being females or having characteristics attributed to them because they are female?

The advertisement is not discriminatory on the basis of sex because it does not seriously attribute any characteristic to women generally. It is completely stylised, exaggerated and presents an obviously fictional character (who is identified in the advertisement as Em Ocean) in an obviously imaginary scenario.

(b) Does the advertisement discriminate against persons suffering from a memory disorder on account of their disability?

Similarly, the advertisement is not discriminatory on the basis of disability because it does not reveal bigotry or intolerance to people with disabilities (specifically memory impairment disorders) because it presents an individual stylised, exaggerated fictional character in an obviously imaginary scenario.

(c) Does the advertisement vilify women on account of their sex?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule women on account of their sex?

Due to the fact that the advertisement is a stylised, exaggerated fictional character in an obviously imaginary scenario there is nothing in the advertisement that a reasonable person would feel humiliates, intimidates, incites hatred towards, contempt for, or ridicules females on the basis of their sex.

(d) Does the advertisement vilify persons suffering from a memory disorder on account of their disability?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule persons suffering from a memory disorder on account of their disability?

Due to the fact that the advertisement is a stylised, exaggerated fictional character in an obviously imaginary scenario there is nothing in the advertisement that a reasonable person would feel humiliates, intimidates, incites hatred towards, contempt for, or ridicules persons suffering from a memory disorder on account of their disability.

G. Board determination: Dismissed
Consultant determination: Dismissed

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination or vilification on account of sex or disability is not met in relation to this complaint for the following reasons:

1. The advertisement is not discriminatory on the basis of sex or disability because it does not simply play on stereotypes of women or persons with a disability generally — it presents an individual stylised, exaggerated and obviously fictional character that is identified in the advertisement (Em Ocean) in an obviously imaginary and almost ridiculous scenario. Accordingly, it does not reveal bigotry or intolerance to women or people with disabilities (specifically memory impairment disorders).
2. Due to the fact that the advertisement is a stylised, exaggerated fictional character in an obviously imaginary scenario there is nothing in the advertisement that a reasonable person would feel humiliates, intimidates, incites hatred towards, contempt for, or ridicules females on account of their sex or persons suffering from a memory disorder on account of their disability.

16. Complaint reference number 13/07

A. Complaint details

Advertiser

Australian Pensioners Insurance Agency (Chat Show)

Product

Insurance

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Age — Section 2.1

Determination date

16 January 2007

Board determination

Dismissed

B. Description of the advertisement

This television advertisement is set in a television studio and presented in the style of a TV chat show with an APIA spokeswoman (Pixie) seated behind a desk. She says: “We’ve got such an exciting series of Understanding 50 coming up. You’ll see all sorts of fun and games and some great personalities. But one thing you won’t see is APIA offering insurance to 21 year olds having all night parties, breaking stuff around the house and driving around like crazy in their cars. So if you’re not working full-time and are over 50, stay tuned. Or call 13 5050 now. For understanding, not just insurance.”

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

I find it really offensive that senior Australians can get away with stereotyping young people like that. Our age group is already looked down upon by the older generation and this is only making things worse.

It’s a rash group of generalisations.

I feel it is vastly discriminatory to describe our age group in such a way.

Those comments have typecast my age group in a negative manner.

I found it offensive because it generalises all young people as being irresponsible.

It is highly emotive and works at targeting peoples’ fears and misconceptions i.e all young people are selfish and callous.

How offensive to assume that all younger ages are immature, irresponsible and can't be trusted.

The comments were prejudice, uneducated and gratuitous.

The ad is insulting to all young people — the vast majority of whom are sensible, safe, productive members of the community.

All they are achieving is to increase generational gaps between young people and their parents/grandparents and encourage discrimination solely based on their age.

D. The advertiser's response

Firstly I would like to apologise on behalf of APLA, as the intention of our advertising is not to offend viewers. APLA places a high value on its customers and the community. The advertisement was intended to be a light-hearted way of highlighting our commitment and focus on customer service to the over 50s market.

In response to the issues raised in regard to the Code of Ethics, and in line with our mission to demonstrate understanding in all that we do, the advertisement in question has been taken off air (as of January 13, 2007) and will not be aired again. We will also take the concerns into account for future advertising.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Age — the number of years that someone is or characteristics generally pertaining to a stage or phase in someone's life, or characteristics generally imputed to people of that stage or phase.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against young people on account of age?

Does the advertisement reveal inequity, bigotry, intolerance, unfair or unfavourable or less favourable treatment of young people owing to, because of, or due to their age or phase or stage in their lifetime?

The premise of the advertisement is predicated on the fact that APIA offers insurance exclusively to persons over 50 and not working full-time and that APIA does not insure any 21 year-olds. The advertisement draws a clear nexus between this fact and the assertion that 21 year-olds "having all night parties, breaking stuff around the house and driving around like crazy in their cars". Although most viewers would be able to identify that the group of 21 year-olds depicted in the advertisement are, indeed, a subclass or deviant group within 21 year-olds generally, the advertisement does not acknowledge this but, rather, reinforces stereotypes regarding irresponsible behaviour by young people. Accordingly, the advertisement does reveal bigotry towards and unfair treatment of all 21 year-olds by characterising them all 'having all night parties, breaking stuff around the house and driving around like crazy in their cars'. Simply, the advertisement suggests explicitly that 21 year-olds, as a group, are likely to engage in wild and irresponsible behaviour purely because of their age.

(b) Does the advertisement vilify young people on account of their age?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule men owing to, because of, or due to their age or phase or stage in their lifetime?

The advertisement insults 21 year-olds but does not meet the threshold for vilification.

G. Board determination: Dismissed
Consultant determination: Upheld

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination on account of age is met in relation to this complaint for the following reasons:

1. The premise of the advertisement is predicated on the fact that APIA offers insurance exclusively to persons over 50 and not working full-time and that APIA does not insure any 21 year-olds. The advertisement draws a clear nexus between this fact and the assertion that 21 year-olds “having all night parties, breaking stuff around the house and driving around like crazy in their cars”.
2. The advertisement does not acknowledge that the group of 21 year-olds depicted in the advertisement are, indeed, a subclass or deviant group within 21 year-olds. Rather it reinforces stereotypes regarding irresponsible behaviour by young people.

Accordingly, the advertisement does reveal bigotry towards and unfair treatment of all 21 year-olds by characterising them all ‘having all night parties, breaking stuff around the house and driving around like crazy in their cars’. Simply, the advertisement suggests explicitly that 21 year-olds, as a group, are likely to engage in wild and irresponsible behaviour purely because of their age.

Comments

I note that the Board found that the advertisement did not breach Section 2.1 because “the language used in the advertisement did not vilify all young people, but singled out those who have behaved irresponsibly” and that “the language used was without malice and a level of humour was present in the tone of the advertisement”.

In my view, for the reasons outlined in paragraph 1 of the reasons above, the advertisement does not single out young people who behave irresponsibly but rather perpetuates a generalised stereotype.

Finally, it is irrelevant, if the advertisement is otherwise discriminatory, that the advertisement is humorous and without malice.

17. Complaint reference number 130/08

A. Complaint details

Advertiser

Cockatoo Ridge Wines Ltd

Product

Alcohol

Type of advertisement

Outdoor

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

9 May 2008

Board determination

Dismissed

B. Description of the advertisement

This print advertisement features a close up of the face of a young woman whose hair is swept around her face. The collar of a blue and white check garment is visible and a cockatoo is sitting on her left shoulder. To the right of the woman and cockatoo is the text: “She loves a Cockatoo” and underneath in smaller print: “Cockatoo Ridge Wines. Why wouldn’t you.” A bottle of Cockatoo Ridge wine is displayed to the right of the text.

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

I think this advertisement really shows that advertising in Australia has really lowered its standards into the gutter. Even at my age — 46 — I get the reference to the pun “She likes a cock or two”. It’s not hard to understand. I think that there is obviously ‘no code’ at all if an ad such as this is permitted. I am offended for all women, young or old. Very bad taste and not even funny. What of the advertising standards? There don’t seem to be any!

I believe this relates to the expression sometimes used to describe a female of loose morals meaning “she likes a cock or two”. Highly offensive and degrading to women and cockatoos!!!

The words are clearly meant to suggest “She loves a cock or two” and the model has been arranged to look sultry and provocative but compliant as well. I think the billboard is insulting to women and in poor taste. It also probably breaches the alcohol advertising rules about not associating sexual matters with alcohol.

Extremely sleazy and low brow. It is offensive.

Is it not obvious! It is a derogatory insinuation that the woman in the advertisement likes lots of cock! (cock is the slang/colloquial term for “penis” in Australia”). It is sexist, offensive and needs to be removed. This is 2008!

As a father of a young daughter I find the sexual innuendo and the portrayal of a young girl as a sexual object totally unacceptable. This advertisement is situated on a major road (extremely busy) and very close to two schools where young impressionable school children are exposed to this rubbish. The advertisement sign is located on top of a boundary fence directly above the primary school’s back oval.

The girl looks 18ish and is wearing blue and white gingham suggesting a school uniform. The phrase “I like a cockatoo” obviously is a double entendre meaning she would like a “cock or two”. This is posted around the corner from a primary school. This is vulgar and demeaning to women and inappropriate in its proximity to a West Pennant Hills Public School. It is obviously a play on the sexist remark “she likes a cock or two”. There is no place in the public domain for this kind of veiled misogyny.

D. The advertiser’s response

Our target market is young women who enjoy drinking our product.

The photograph depicts our model Erin McNaught (26 YO) as the face of our target market in a blue gingham shirt borrowed by our stylist from her mother for the shoot. A country girl look is what we were after. It was never intended to be a portrait or reflect a school uniform.

The line ‘She loves a cockatoo’, describes our models intent for aglass of Cockatoo Ridge wine. We are intending our brand to reflect the independence and personality of Australia women who enjoy Cockatoo Ridge Wines.

The Cockatoo on her shoulder further builds our brand recognition from the label on all our wines.

This 12 week National Billboard campaign is in its 6th week and has a number of differing captions across the photographs. The other captions are “McNaughty but nice”, referring to Erin’s media profile and the taste of the wine, and “Who’s a Cheeky Girl then”, referring to a play on our Cockatoo name and again, Erin’s media profile. These captions are interchanged across the 6 photographs used (including the attached) on a 4 week cycle. We are sorry there has been a misunderstanding of our intent as it was never our creative strategy direction to offend women of any age.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: ‘Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.’

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Sex — The status of being a male, female, intersex, trans-sexual or transgender and of having characteristics attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against females on account of their sex?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of females owing to, because of, or due to their being females or having characteristics attributed to them because they are female?

The advertisement clearly makes use of a double entendre. Notwithstanding the fact that a cockatoo is pictured on the

bottle, the advertiser is not candid in failing to acknowledge that the advertisement plays with the double meaning that the woman depicted enjoys both wine and sexual activity with males. The particular woman in the image is depicted visually as both possessing confidence about her sexuality and as having full agency. However, the language of the text: “she loves a cockatoo” (emphasis added) objectifies the woman. The resulting depiction, in my view, constructs a tension between an autonomous sexually available individual agent and a sexually available ‘every woman’. The impact of the statement on the responder would be different if the text was, for example, “I love a cockatoo”, in which case the visual image and text would both reinforce the autonomy of the individual woman depicted.

Does the advertisement imply that enjoyment of wine and sexual activity is a characteristic that can be attributed to females? Although the inclusion of a picture of a person of a particular gender does not of itself suggest that all persons of that gender are the same as the person depicted, the combination of the generic attractive female image and the text in the advertisement is open to the reading that a sufficiently broad cross-section of females (as represented by the broad demographic that the model depicts) enjoy wine and sexual activity.

Does the advertisement then reveal less favourable treatment of women because of the attribution to them of that characteristic (enjoying wine and sexual activity)? While many women would regard that characteristic as simply acknowledging women’s appropriate social and sexual agency, an equal number of more conservative women might regard the depiction as offensive or demeaning. In such ‘borderline’ cases, in order to assess whether the treatment of women is unfair, unfavourable or less favourable, it may be helpful to apply a substitution test — that is, would the advertisement work if a male was placed into the advertisement and the caption read “He loves a cockatoo”? When one applies the substitution test, I would conclude that it is open to the Board to find that the advertisement is discriminatory on account of sex, although, I would regard this advertisement as a ‘borderline’ breach.

(b) Does the advertisement vilify females on account of their sex?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule females owing to, because of, or due to their being female or having characteristics attributed to females?

The advertisement does not humiliate, intimidate, incite hatred towards, contempt for, or ridicule females owing to, because of, or due to their being female or having characteristics attributed to females. The threshold for vilification is not reached.

G. Board determination: Dismissed
Consultant determination: Upheld
 (borderline breach of the code)

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination on account of sex is met in relation to this complaint for the following reasons:

1. The advertisement clearly makes use of a double entendre by playing with the double meaning that women enjoy both wine and sexual activity. If the content of the advertisement is found to be discriminatory then it is irrelevant whether the double meaning is playful or humorous rather than literal.
2. Although the inclusion of a picture of a person of a particular gender does not of itself suggest that all persons of that gender are the same as the person depicted, the combination of the generic attractive female image and the text in the advertisement is open to the reading that a sufficiently broad cross-section of females (as represented by the broad demographic that the model depicts) enjoy wine and sexual activity.
3. The advertisement reveals inequity or unfair, unfavourable or less favourable treatment of women than men by the fact that it would be highly unlikely for a parallel campaign to be run featuring the caption “He loves a cockatoo” and showing a male in the picture.

Comments

The Board also considered the advertisement under Section 2.3 which deals with the appropriate use of sex and sexuality.

18. Complaint reference number 113/08

A. Complaint details

Advertiser
Skins Compression Garments Pty Ltd (Beyond Reason)
Product
Clothing
Type of advertisement
TV
Nature of complaint
Discrimination or vilification Race — Section 2.1
Determination date
9 April 2008
Board determination
Dismissed

B. Description of the advertisement

This television advertisement for competitive sportswear features male and female African-American athletes engaged in various sporting activities, including football, athletics, basketball, and boxing. Throughout the advertisement the athletes explain: “We’re faster, we got more skill, we got the stamina...You know, when it comes to the physicality of the sport the African-Americans have the advantage. It just comes natural to us...I mean you gotta look back at our ancestry, we were born warriors. It’s natural instinct. It’s like a killer mentality. If you look at the way a black male is built we’re more muscular, we’re stronger... You wanna be like us?” As the sound of laughter is heard the Skins logo appears on screen with the words: “Beyond Reason. Skins.net.”

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

Ad portrayed Africans as being superior in contact sports because they “Once were Warriors” and if white people wanted to compete they needed to have this product. The statement they were born to do something is incorrect i.e. in the “genes”.

It is in my opinion offensive and to a degree — racist. It implies that other races apart from Negro Americans are physically inferior.

I object to this advertisement because I find it extremely and overtly racist. African Americans as a race shouldn’t have to feel that their only contribution to society is playing sports well. Also people that aren’t African American shouldn’t be made to

feel that because they aren’t African American that they are inferior at sports. To put this into perspective I have the following hypothetical advertisements. The first an ad with some Mexicans talking about how they as a race are the best at cleaning and because they have small hands, they can get into all the nooks and crannies. There is nothing wrong with cleaning as a trade, but I ask if you think the Mexican community would be happy with that portrayal? The second ad, an ad full of businessmen of Caucasian appearance. They talk about how their race is the smartest because their ancestors created great wealth and all other races live in poverty. I believe non-Caucasians would find this offensive. The statement that Caucasians are smart because they are Caucasian and that Mexicans are good at cleaning because they are Mexican is completely absurd. I also believe that African Americans aren’t good at sport because of their race and there would be no scientific evidence to support such a claim.

Even though the ad attempts to infer that by wearing ‘black skins’ (the advertised product) one will perform better at sports, the ad is deliberately using race and generalised statements to stir racially motivated controversy. I think that this ad breaches the Code in its racially divisive comments.

This commercial is extremely racist and offensive.

I find it a little hard to believe that a commercial like this could actually be made in a world that actively tries to stamp out racial intolerance. Try to imagine if this commercial was made with Caucasian, or Asian people proclaiming to be superior? Could you imagine the controversy?

D. The advertiser’s response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

From the above we assume that those complaints will be heard under Section 2.1 of the AANA Code of Ethics relating to “Advertisements shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality...” We refute this for the following reasons:

- *West African (African American, Caribbean etc) bodies are equipped with more than the average fast-twitch fibres producing explosive bursts of energy. Slow-twitch fibres are more common to Kenyan and East African groups, allowing them to sustain muscle effort over long periods of time, as in long distance running. 47 of the top 100 marathon runners in 1999 were Kenyan.*

- Compared with their white counterparts, West Africans possess less body fat, a higher centre of gravity, narrower hips, higher testosterone and bigger muscles, including a larger chest. Kenyans have a slighter body profile, relatively longer legs, larger lung capacities and possess more energy producing enzymes in their muscles which are better able to use oxygen.
- People of West African ancestry hold more than 95% of the top times in sprinting. All 32 finalists in the last four Olympic men's 100-metre races were of West African descent.
- Black athletes make up more than 80% of American professional basketball players, 67% of American footballers, yet only 13% of the population are black. Similarly in England, which has a black population of less than 2%, 1 in 5 professional soccer players are black.

In broad terms, we wanted to demonstrate how the Skins™ product has changed the way athletes prepare, perform and recover. Our primary message was to celebrate the achievements of the world's best athletes. The brief for this television advertisement therefore was:

- To celebrate significant athletic success and bring to life some of the facts.
- To demonstrate sporting achievements and show how they can transcend social, cultural and political environments
- To allow athletes the opportunity to explain why they excel at sport in their own words (i.e. unscripted)
- To present this to a target audience that loves sport

While the advertisement is challenging and will spark discussion and consideration, it was never intended to offend. A significant number of studies, research papers and statistics relating to the superior athletic performance of black athletes. These studies highlight the fact that the unscripted comments contained in the advertisement have been made with reason, consideration and adherence to proven scientific and physiological research. As we have previously stated, the Skins™ 'Beyond Reason' advertisement is challenging and will spark discussion and consideration, and was never intended to offend. It recognises and celebrates the accomplishments of black athletes throughout the world. From a marketing viewpoint, we are encouraging consumers to put themselves in the best possible position to emulate these achievements.

We believe that this mix of marketing and social objectives has delivered a compelling and interesting TV commercial. If it pricks the conscience of consumers and makes them think about broader social issues, we believe this is an added benefit that should encourage us to deliver the advertisement to as wide an audience as possible as opposed to hiding the facts outlined in the nine pages of substantiation.

For all the reasons outlined in this letter, but more particularly the substantiation in (the) Addendum, we submit that these complaints should not be upheld.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: 'Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Race — people of a common descent or ancestral lineage.

2. Consider discrimination and vilification in turn:

This advertisement features male and female African-American athletes engaged in various sporting activities, including football, athletics, basketball, and boxing and stating:

"We're faster, we got more skill, we got the stamina... You know, when it comes to the physicality of the sport the African-Americans have the advantage. It just comes natural to us...I mean you gotta look back at our ancestry, we were born warriors. It's natural instinct. It's like a killer mentality. If you look at the way a black male is built we're more muscular, we're stronger...You wanna be like us?"

This advertisement is complex and edgy. It plays with several traditional racial stereotypes; that African-Americans are faster, stronger etc and that African-Americans are more aggressive than non African-Americans. In this sense, the advertisement could be potentially discriminatory or vilificatory against both African-Americans (being portrayed as 'warriors with a killer mentality' and non African-Americans — by implication, slower, less skilled etc).

(a) Does the advertisement discriminate against non African-Americans or African-Americans on account of their race?

Firstly, does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of non African-American people because it implies that they are slower, less-skilled etc? In my view the answer is 'no' essentially because the majority of elite American athletes in the sports depicted in the advertisement are, incontrovertibly, of African-American descent. Applying the substitution test, in my view, an advertisement showing swimmers of Anglo-descent (who are, overwhelmingly, internationally, the elite athletes in their field) saying "We're faster, we got more skill, we got the stamina... It just comes natural to us..." would not be discriminatory against persons of non-Anglo descent because the statement is indisputable.

Secondly, does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of African-American people by attributing to them the characteristics of being a 'warrior' and having a 'killer instinct'?

Significantly, unlike the Kevin Bloody Wilson advertisement, or the Townsville Automotive Detailing advertisements, the African-Americans depicted in this advertisement are not depicted as derivative caricatures possessing negative stereotypes attributed by outside cultural groups. Rather, the athletes depicted are authentic, are leaders in their sporting communities and are depicted with pride and agency. They essentially own and reframe the stereotype in the context of elite sport where being a 'warrior' and having a 'killer instinct' are highly prized, and arguably, potentially necessary attributes to succeed at that level.

However, if the stereotype were being attributed to African-Americans by a different racial group or in a different context where those attributes are not regarded as necessary or advantageous, then the depiction would be likely to be problematic and in breach of the Code.

(b) Does the advertisement vilify African-Americans or non African-Americans on account of their race?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule African-Americans (for being 'warriors') or non African-American (for being 'slower. etc')?

The advertisement is certainly problematic in that, although non-discriminatory, it does perpetuate racial distinctions. However, it cannot be said that the advertisement humiliates, intimidates, incites hatred towards, contempt for, or ridicules African-Americans because the attributed characteristic (being an assertive and uncompromising combatant) is one that is envied in the elite sporting context of the advertisement. The advertisement comes closer to the margins of vilifying non African-Americans (who by implication are 'slower, less skilled' etc). The sound of laughter is not necessary at the end of the advertisement and, in my view, brings the advertisement close to being a 'borderline' breach since it could potentially be viewed as a contemptuous laugh towards other athletes (including non African-American athletes). Given the context of the advertisement (elite sport) and the traditional power imbalance embedded in African-American and non African-American race relations a reasonable person would be unlikely to conclude that a non African-American would feel humiliated, intimidated, or ridiculed by the advertisement.

G. Board determination: Dismissed
Consultant determination: Dismissed

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination and vilification on account of race is not met in relation to this complaint for the following reasons:

1. This advertisement plays with several traditional racial stereotypes: that African-Americans are faster, stronger etc and that African-Americans are more aggressive than non African-Americans. In this sense, the advertisement could be potentially discriminatory or vilificatory against both African-Americans (being portrayed as 'warriors with a killer mentality' and non African-Americans — by implication, slower, less skilled etc).
2. The advertisement does not discriminate against non African-American people because the majority of elite American athletes in the sports depicted in the advertisement are, incontrovertibly, of African-American descent. Applying a substitution test, an advertisement showing swimmers of Anglo-descent (who are, overwhelmingly, internationally, the elite athletes in their field) saying "We're faster, we got more skill, we got the stamina... It just comes natural to us..." would not be discriminatory against persons of non-Anglo descent because the statement is indisputable.

3. The advertisement does not discriminate against African-American people by attributing to them the characteristics of being a 'warrior' and having a 'killer instinct' because the African-Americans depicted in this advertisement are not depicted as derivative caricatures possessing negative stereotypes attributed by outside cultural groups. Rather, the athletes depicted are authentic, are leaders in their sporting communities and are depicted with pride and agency. They essentially own and reframe the stereotype in the specific context of elite sport where being a 'warrior' and having a 'killer instinct' are highly prized, and arguably, potentially necessary attributes to succeed at that level.
4. The advertisement does not vilify African-Americans (for being 'warriors') because the attributed characteristic is one that is envied in the elite sporting context of the advertisement.
5. The advertisement also does not vilify non African-Americans (for being 'slower' etc) because given the specific context of the advertisement (elite sport) and the traditional power imbalance embedded in African-American and non African-American race relations, a reasonable person would be unlikely to conclude that a non African-American would feel humiliated, intimidated, or ridiculed by the advertisement.
6. Notwithstanding that the advertisement is not discriminatory and in breach of the Code, this does not mean the advertisement is otherwise unproblematic in terms of perpetuating stereotypes and racial division.

Comments

Although the Board determined that the advertisement did not breach Section 2.1 of the Code it considered that the advertisement 'did introduce concepts along racial lines that were not necessary to promote the product being advertised'.

19. Complaint reference number 123/08

A. Complaint details

Advertiser

Roads & Traffic Authority

Product

Community Awareness

Type of advertisement

Outdoor

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

11 June 2008

Board determination

Dismissed

B. Description of the advertisement

Head shot of young woman, her hair is being swept in one direction, she is looking toward her left. She is holding up her right hand with only pinkie finger extended and bent. Text reads: "Speeding. No one thinks big of you."

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

Presumed allusion to male genitals as a means of humiliation is discriminatory (any comparative reference to female body parts would not be tolerated in advertising or elsewhere).

References of this sort are potentially inflammatory in real life situations, so why should they be promoted through advertising? Implication that male drivers are the only drivers who break speed limits is wrong. In the end, this deliberately provocative advertisement could cause more problems than it solves.

D. The advertiser's response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

Speeding is the biggest road safety problem in Australia. In NSW alone from 2002 to 2006 around 200 people each year were killed in road crashes where speeding was involved. This represents about 40 per cent of the annual road toll and this proportion has changed very little over the past decade.

Speeding is predominately a male problem with 85 per cent of drivers involved in fatal speeding crashes being men. Of all speeding drivers involved in those fatal crashes between 2002 and 2006, 35 per cent were aged 17–25 years of age but that age group only account for 15 per cent of licensed drivers.

The provisional crash statistics for the year 2007 show a significant reduction in speed related fatalities. In 2007, 140 people were killed in speeding crashes compared to 197 in 2006. Importantly there was a significant reduction in speed related fatalities in the 17–24 year-old age group, they dropped from 75 fatalities in 2006 to 40 fatalities in 2007.

The current RTA anti-speeding television campaign ‘Speeding. No one thinks big of you.’ was launched on 24 June 2007. It adopted a new approach to increase the social unacceptability of speeding within the wider community. It is the first step in a multi-phased approach to change the attitudes and behaviours of all speeding drivers.

The outdoor component of the campaign was introduced in September 2007.

The concept for the campaign was extensively researched, not only against the target audience (males 17–24 years of age) but also across the wider community (males 30–55 plus years of age and females 17–55 plus years of age) in both Sydney and country areas. More than 30 per cent of the focus group participants had been booked for speeding in the past three years. The response to the campaign by the focus groups was overwhelmingly positive. Most people involved in the groups knew about the Pinkie gesture. The groups recommended that the RTA proceed with the campaign because:

- *it had the potential to change the behaviour of the target audience;*
- *it is powerful, it is different and it effectively utilises social disapproval of poor driving behaviour by peers and the wider community;*
- *it puts the issue back in to the hands of the community; and*
- *the campaign is preventative.*

Tracking of the campaign supports the formative research undertaken in developing the campaign. The latest evaluation undertaken in December 2007 among 17–24 year old males report the campaign to be believable (78%) and convincing (67%) with 74% of respondents confirming the campaign will encourage young drivers to obey the speed limit. The anti speeding message is not only becoming more salient with the target audience (92%), a deeper understanding of the subtleties of the campaign messages are growing with 81% reporting it is undermining the ‘perceived benefits’ of speeding — making it uncool.

The campaign was developed by Clemenger BBDO advertising agency.

The outdoor advertisement shows a girl doing the Pinkie gesture with the tagline ‘Speeding. No one thinks big of you.’ As the campaign has evolved the interpretation of the Pinkie gesture is more about speeding.

We reject the suggestion the advertisement is discriminatory and humiliates men. It does however discriminate against certain types of behaviour but no male image is featured in the outdoor advertisement.

We reject the suggestion the advertisement is inflammatory. The gesture is never directed at the driver, there is no confrontational element incorporated into the advertising at all.

We reject the suggestion the advertisement is sexist. It is evidenced based as discussed above. We reject the suggestion the advertisement will cause more problems than it solves. Evidence as discussed above indicates otherwise.

E. Complaint previously dealt with/ relevant precedent to consider: the board had considered the television version of this advertisement in 2007.

F. Assessment:

Section 2.1 of the Code: Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.’

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

Sex — The status of being a male, female, intersex, trans-sexual or transgender and of having characteristics attributed to an individual or group because they are male, female, intersex, trans-sexual or transgender.

2. Consider discrimination and vilification in turn:

(a) Does the advertisement discriminate against males on account of their sex?

Does the advertisement reveal inequity, bigotry, intolerance towards or unfair, unfavourable or less favourable treatment of males owing to, because of, or due to their being males or having characteristics attributed to them because they are male?

Two issues arise. Firstly, the use of the ‘pinkie’ finger sign in the advertisement and secondly, the attribution of speeding as a male characteristic.

The use of the ‘pinkie’ finger sign in the advertisement is commonly understood to mean that a man has a small penis — not in a literal sense — but in the sense that the person is demonstrating behaviour that is not considered appropriate or acceptable for a mature male. The use of the pinkie sign in the advertisement does not insinuate that all men have small penises but rather that, in conjunction with the text, that speeding is not appropriate or desirable conduct. The use of the pinkie sign, in the context of the advertisement, has no application to men generally — only to speeding men (and women).

In relation to whether the attribution of speeding as male characteristic is discriminatory, the advertiser concedes that a propensity to speed is a characteristic deliberately being attributed to males:

“Speeding is predominately a male problem with 85 per cent of drivers involved in fatal speeding crashes being men. Of all speeding drivers involved in those fatal crashes between 2002 and 2006, 35 per cent were aged 17–25 years of age but that age group only account for 15 per cent of licensed drivers”.

However the attribution of the characteristic is only discriminatory under Section 2.1 of the Code where the advertisement reveals inequity, bigotry, intolerance, unfair, unfavourable or less favourable treatment of men owing to them being attributed that characteristic. The advertisement is not discriminatory for the following reasons.

- a. The target group of the public safety campaign (male speeding drivers) are not being treated inequitably etc or unfavourably or unfairly: speeding is a behaviour that is unlawful — no individual or group in the community is allowed to speed.
- b. The text is not explicitly targeting men — it also addresses women who speed.
- c. The use of the female model in the advertisement could be replaced equally easily and effectively with a male model.

(b) Does the advertisement vilify males on account of their sex?

Does the advertisement humiliate, intimidate, incite hatred towards, contempt for, or ridicule males owing to, because of, or due to their being male or having characteristics attributed to males?

The advertisement does not humiliate, intimidate, incite hatred towards, contempt for, or ridicule males generally. The advertisement intends to humiliate and ridicule males (and females) that speed in breach of the law.

G. Board determination: Dismissed
Consultant determination: Dismissed

Reasons for consultant determination

The threshold required in the Code to substantiate the complaint of discrimination on account of sex is not met in relation to this complaint for the following reasons:

1. The advertiser concedes that a propensity to speed is a characteristic being attributed to males:

“Speeding is predominately a male problem with 85 per cent of drivers involved in fatal speeding crashes being men. Of all speeding drivers involved in those fatal crashes between 2002 and 2006, 35 per cent were aged 17–25 years of age but that age group only account for 15 per cent of licensed drivers”.

However the attribution of the characteristic is only discriminatory under Section 2.1 of the Code where the advertisement reveals inequity, bigotry, intolerance, unfair, unfavourable or less favourable treatment of men owing to them being attributed that characteristic. The advertisement is not discriminatory because the target group of the public safety campaign is not all males (or females) — it is male speeding drivers. Males are not being treated inequitably etc or unfavourably or unfairly. Speeding is a behaviour that is unlawful — no individual or group in the community is allowed to speed.

2. Moreover, I note that, notwithstanding the acknowledged target group of the advertisement, the text is not explicitly targeting men — it also addresses women who speed and the use of the female model in the advertisement could be replaced equally easily and effectively with a male model using the same gesture.
3. Nor does the advertisement vilify males generally. The advertisement intends to humiliate and ridicule males (and females) that speed in breach of the law.

20. Complaint reference number 214/08

A. Complaint details

Advertiser

Inghams Enterprises Pty Ltd

Product

Food & Beverages

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Other — Section 2.1

Violence Other — Section 2.2

Determination date

9 July 2008

Board determination

Dismissed

B. Description of the advertisement

VISION: Open on our presenter in the Ingham kitchen as she speaks to camera in an over sincere and tongue in cheek way.

PRESENTER: Ingham chicken nuggets. Made with 100% succulent breast and no artificial colours, flavours or preservatives.

VISION: Cut to a tray with a bowl of Ingham nuggets in a bowl.

PRESENTER: However, if you're one of the 0.001% of Australians who don't like chicken, then there is something wrong with you.

VISION: Cut to a board being held up with a pie chart on it.

VISION: Cut to our presenter walking into the Ingham call centre.

PRESENTER: Ingham can help you keep this abnormality a secret.

VISION: She picks up a flat pack box of Ingham breast nuggets.

PRESENTER: Simply call the Ingham helpline and we'll send you these flat pack boxes.

VISION: Cut to a woman in her kitchen. She casually opens wide the freezer door to reveal it stocked full of Ingham boxes.

PRESENTER: Just fold together, stick them in your freezer. Bingo!

VISION: Her two friends look on in admiration.

PRESENTER: Your friends think you love chicken... and are normal.

VISION: Cut back to our presenter in the Ingham call centre.

PRESENTER: Because if you don't like chicken, there's something very wrong with you.

SUPER: CALL 1300 661456

SUPER: chookme.com.au

C. The complaint

A sample of comments which the complainant/s made regarding this advertisement included the following:

The use of the strategy of saying that there is something very wrong with anyone for not liking chicken is a very tacky and immature way to advertise a product. Products should be advertised as to their merits and not by belittling the targeted clientele. This type of advertising strategy has a potential to challenge a person's self esteem or feelings of self worth if they are already vulnerable and in no way elicits a positive impression of the advertising company. This is the strategy bullies use to get their way in the school yard, or that peer group pressure ends up causing people to do things that they do not feel is right.

I find this ad incredibly offensive, not everyone likes chicken and actually, the thought of even eating the steroid-filled, tasteless meat makes me feel queasy. Every time I see this ad and get told that if you don't like chicken then there is something wrong with you I am outraged that this ad was even allowed to be made.

Children, particularly those of a pre-school age, (who at the hour I viewed the ad are most likely to be the group of children viewing the ad at home with Mum at lunchtime) as we all know are extremely vulnerable to suggestion, let alone such an authoritative direction. The ad is dangerous to children and insulting to everybody else. The ad does not say 'Chicken is good for you.' Rather, it exploits the desire of youngsters to 'belong', to not be the odd one out. Parents desiring to avoid chicken in their children's diet are being undermined by this below-the-belt suggestion. Reasons that one might not eat chicken — environmental, religious, moral, health — are ridiculed by implication. The ad implies directly that, for example, if you are a vegetarian for religious reasons 'there's something wrong with you'. The ad acts as an intensifier for all the further 'eat chicken' ads in the day, many of which are undoubtedly chickens supplied by Inghams. It flies in the face of the stated position of both the State and Federal Governments on children and the advertising of food to them.

As a vegetarian, I find the comments in this advertisement, (directed at non-chicken eaters), extremely offensive, and discriminatory towards vegetarians. I do not appreciate being referred to as having an "embarrassing disorder", nor do I appreciate being labelled as having "something wrong with you (me)", simply because I do not eat chicken.

D. The advertiser's response

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

I am writing with reference to the complaint/s regarding the current Ingham television advertising campaign, and the concern as to whether the advertisement breaches Section 2 of the Advertiser Code of Ethics.

Through the application of an obvious and simple comedic approach, the advertisements in question communicate the thought that "if you don't like chicken there is something wrong with you".

To assist the Board in their review process we would like to provide the following background information:

First and foremost, to check the validity and appropriateness of the idea at concept stage, we presented draft scripts to consumers in qualitative research. This campaign idea was 'tested' against two other ideas, with the campaign in question deemed to be the strongest, receiving unanimous endorsement from a cross section of consumers.

The elements that consumers responded so positively to were:

- *the obvious comedy value... that this was genuinely funny and definitely not to be taken seriously; it literally made them laugh out loud*
- *that it was great to see a brand not take itself too seriously... that this showed a confident brand with a willingness to have some fun at its own expense (the decrepit nature of the Ingham call centre was a clear example of this)*
- *the overall impression was of something very different in terms of regular advertising... something they felt was fresh and interesting, and thus worth watching.*

Secondly, to further ensure there was no potential misunderstanding of the comedic nature of the communication, we chose genuinely silly examples of techniques to 'help' consumers: Water cooler conversation tips; Chicken room fragrance; Ordering empty boxes from Ingham to put in your freezer.

It is also important to note that these obviously silly scenarios make up the bulk of the communication in each commercial, so in terms of emphasis, the focus remains very much on the humorous / non serious nature of our message.

The final point we took into account as we progressed was that the type of humour involved in the advertising be consistent with the type of humour Australian consumers are regularly exposed to in mainstream television based comedy.

Many of those programs regularly touch on potentially sensitive subject matter, but consumers understand that there is no malice involved, and simply enjoy it for what it is... a bit of fun.

If we were to apply the same strict measure of political correctness expressed in the complaints, to comedy on television, a large proportion of the content would be ineligible for broadcast.

Australians enjoy their humour, and are historically very good at appreciating a lighter perspective on life... a point these commercials were obviously designed to appeal to.

In summary, the advertising was not designed nor intended to cause any offence or vilify any person (or group). We believe the very clear use of humour in the commercials, both literally and tonally, strongly demonstrates this case.

E. Complaint previously dealt with/ relevant precedent to consider: n/a

F. Assessment:

Section 2.1 of the Code: 'Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.'

Does the advertisement portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of the identified ground(s)?

1. Which if any of the grounds in Section 2.1 of the Code are relevant?

None — the complaint must be dismissed.

G. Board determination: Dismissed
Consultant determination: Dismissed

Reasons for consultant determination

The Code does not proscribe the conduct complained of.

Analysis of twenty advertisements from a socio-ethical perspective

1. Complaint reference number 193/07

Complaint details

Advertiser

Sydney Breast Enlargement & Cosmetic Surgery (Dr Lai)

Product

Professional services

Type of advertisement

Radio

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

10 July 2007

Board Determination

Upheld — discontinued or modified

Description of the advertisement

This radio advertisement features a female voiceover asking: “Do you have a belly apron from pregnancy or weight loss? That ugly, yucky, loose tummy skin covered in stretch marks. It’s red, itchy and smelly underneath. And it flops all over! You hate looking in the mirror. And you can’t hide your fatty muffin skin roll under any dress! YES there is help! You can get a flat tummy again. Just see Dr. Lai from Sydney Tummy Tuck, a senior member of the Australian Society of Plastic Surgeons.”

Board’s determination — Upheld

Breach of Sections 2.1 and 2.6 based on the following:

1. “The Board considered that the advertisement used language that would incite contempt for overweight or post partum women.”

2. “The Board was particularly concerned by the reference to a loose stomach that is ‘red, itchy and smelly underneath’ ... and considered that references of this manner...[were] in extreme bad taste and did amount to vilification.”
3. “The Board considered that the references to women’s bodies post partum were particularly insensitive and extreme and likely to undermine the important positive health messages given to women following pregnancy by many public health bodies.”

Discussion and analysis

Determination supported

This radio advertisement features a middle-class woman inviting listeners to consider surgery by Dr Lai at Sydney Tummy Tuck, to remove the ‘belly apron’ resulting from pregnancy or weight loss. The voice-over describes a belly apron as ‘the ugly, yucky, loose tummy skin covered in stretch marks. It’s red, itchy and smelly underneath. And it flops all over!’ The objective of the surgery is to ‘get a flat tummy again.’

The voice of the woman and her tone is congenial and sympathetic, seeking to identify intimately but in a matter-of-fact way, woman-to-woman. Her accent might be described as neutral Anglo-Australian middle class. She therefore sounds educated without being intimidating, which brings an air of authority to the piece, while avoiding the risk of seeming to talk down to the audience. Instead there is a ‘guess what’ quality bringing a conversational style to the new information, not unlike the health-related local knowledge women routinely exchange on a social basis.

It would have perhaps been in this context that the terms ‘ugly’ and ‘yukky’, and ‘red, itchy and smelly’ would have been deemed acceptable by the advertisers, since women are not in general adverse to fairly explicit commentary on their own bodies and appearance when speaking amongst themselves in single-sex gatherings. The use of colloquial expressions would have seemed to be in a sense egalitarian, making use of the language of the subculture of mothers and middle-aged women to which the advertisement was being directed. For this reason, the terms may have been felt to not discriminate, demean or vilify women’s bodies, since it could be argued that women may themselves use such terms in their own discussions, and they would therefore be regarded as colloquially descriptive rather than derogatory.

Because this advertisement is a radio broadcast which assumes a mixed audience, the terms acquire a greater degree of sensitivity, since it could be assumed that there will be listeners who would not respond empathetically to the description of the ‘belly apron’ but would instead respond with disgust which may, as the Board noted, ‘incite contempt’. Such listeners would fall into the categories of males of all ages, younger, childless women, and women who have not experienced weight problems of any extreme kind. Quite likely these groups would constitute a majority of the audience. It could be argued that prevailing community standards, while allowing for a degree of candour about women’s bodies, continue to resist full disclosure of personal health and hygiene information in negative terms, particularly to a mixed audience. The sense of disgust engendered may in turn be linked to value judgments about mothers and older women, who are already in a position of disadvantage concerning body shape relative to dominant aesthetic standards.

Further, such listeners may attach moral importance to body shape and appearance, since the dominant cultural standard for women’s bodies emphasises slenderness, fitness, health and cleanliness. The terms ‘itchy, red and smelly’ in particular — though possibly clinically correct in extreme cases — serve to exaggerate the problem, sliding it from one of aesthetics (overweight) to ill health (dermatitis). It is therefore somewhat alarmist from a public health perspective together with making the assumption that body parts that do not conform through slenderness to the cultural ideal, should be hidden (since ‘you can’t hide [it] under any dress’). Additionally, these terms are associated with a lack of hygiene, the imputation being that women who have a ‘belly apron’ have not adequately cared for themselves, and require a surgical solution due to culpable self-neglect. Hence there is a value judgment implicit in the disgust expressed towards a physical condition or body type with the implication being

that this is to some extent due to the patient’s own fault or moral weakness. As the Board determination states, the language used may ‘incite contempt for overweight or post partum women.’ The human right of being treated as an equal regardless of gender, appearance or disability, is violated.

The contradictions this advertisement presents in relation to public health messaging for women are reinforced by the contradictions implicit in targeting mothers and previously overweight women, both of whom, through childbirth and weight loss, are normally considered to be engaged in highly valued activities. Furthermore, it could be argued that women’s negative self-descriptions can be a product of dysmorphia, particularly following childbirth and weight loss, which may be serious psychological conditions leading to anorexia and other behavioural or eating disorders. (Snellen 2005)

The crucial point regarding the determination is based on the speaker and her audience. If women choose to describe their bodies to one another in fairly unflattering ways, often denigrating their own appearance through negative self-appraisal and/or modesty, that is of course their own choice. For another woman to do this in a public arena that includes a broad audience of both male and female listeners, is a significantly different matter. The former relates to a subculture’s choice of self-expression; the latter to a dominant culture’s negative representation.

2. Complaint reference number 277/07

Complaint details

Advertiser

Inghams Enterprises Pty Ltd (Breast Awareness Week)

Product

Food & Beverages

Type of advertisement

Outdoor

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

11 September 2007

Board determination

Upheld — discontinued or modified

Description of the advertisement

This outdoor advertisement has the words “Breast Awareness Week” in white letters, on a red background. Underneath these words are packets of Ingham’s Breast Chipees and Breast Munchies followed by the text “Ingham snacks are now made with 100% chicken breast”.

Board’s determination — Upheld

Breach of Section 2.6 based on the following:

1. “The Board felt this advertisement was in poor taste and was detrimental to all the work done in the community.”
2. “The Board considered that the advertisement diluted the impact of public health campaigns by depicting material that trivialised an important public health issue.”

Discussion and analysis

Determination supported with addition of 2.1

What may at first seem to be the simple exploitation of high awareness of a public health message for commercial gain, turns out, on analysis to be more complex, playing on additional connotations relating to the word ‘breast’. The use of the words ‘Breast Awareness Week’ is near plagiarism of a public health text (Breast Cancer Awareness Week) for commercial gain, and undermines the usefulness of the words when applied in their original context. As near plagiarism, it is both unethical and tasteless, given that one in eight women in Australia suffer breast cancer, and this is a life threatening disease. It also breaches Section 2.6 of the Code regarding prevailing community standards on health and safety since it undermines the effectiveness of a successful public health campaign.

Additionally, the high level of attention drawn to the word ‘breast’ capitalises on its sexual connotations. While this may be interpreted as merely tasteless, the effect is to trivialise women’s sexuality and bodies as something that may be consumed, and is therefore discriminatory. The chicken breasts depicted are also infantilised through use of the terms ‘chipees’ and ‘munchies’. The appeal to children is obvious and logical given they are the target audience for crumbed, frozen chicken pieces. However, the conflation of the concept of the female breast with a foodstuff in an infantilised context is also in poor taste. The characters depicted on the packets of chicken are anthropomorphic, again appealing to children, as happy little men or friendly monsters inviting consumers to join them in a feast which consists of themselves. While this detracts from the double entendre of chicken breast and female human breast, there is still a conflation since human female breasts are in a sense consumed during breastfeeding and sexual foreplay. The two packets set side by side is also a visual pun on human breasts underlining the dominant double meaning.

For these reasons I would argue that this advertisement also breaches Section 2.1 of the Code in relation to discrimination or vilification of sex.

3. Complaint reference number 444/07

Complaint details

Advertiser

Rugby WA

Product

Leisure & Sport

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Discrimination or vilification Age — Section 2.1

Determination date

16 January 2008

Board determination

Upheld — discontinued or modified

Description of the advertisement

This television advertisement opens on a man in an office surrounded by rugby memorabilia, and a view of the Sydney skyline seen through the window behind him. He challenges: “Hey Emirates Western Force fans. I reckon there’s more support in my 12 year old daughter’s training bra than in your crowds.” In response, Western Force player Scott Fava bursts into the office, swipes the Sydney-siders desk clear, silences him with a look and growls: “Save it!” He turns towards the camera and adds: “Game!” Footage is shown of a Western Force game with the crowd of fans cheering wildly in excitement and a voiceover encourages: “We need you at Subiaco to show the eastern States how we do it!”

Board’s determination — Upheld

Breach of Section 2.1 on the following grounds:

1. ‘References to puberty per se are not a breach ... but any such references must be made sensitively. The Board considered that the reference, “I reckon there’s more support in my 12 year-old daughter’s training bra than in your crowds” was in very poor taste in the context of a very macho football advertisement.’
2. ‘The Board considered that this reference was not untypical ... in a sporting context [and] would be likely to be felt as demeaning to ... young women ...’
3. ‘The Board considered that the use of a reference to a 12 year-old girl, her bra and its lack of support or weakness juxtaposed with the macho strength of the football-supporting men did amount to discrimination against young women.’

Discussion and analysis

Determination supported with addition of 2.2

The determination by the Board was three-fold: that the advertisement was in poor taste, demeaning and discriminatory, amounting to a breach of Section 2.1. This was in relation principally to the comment about a training bra as a means of comparison by deflation, that is, that the small amount of support in the bra was even greater than the miniscule amount alleged to be found amongst Western Australian rugby fans. Therefore the fan base was negligible.

This was found to be in poor taste for the following reasons, some of which were not included in the determination.

1. It is delivered by a man with reference to his daughter.
2. It is delivered as a challenge between men.
3. It is targeted to a male audience.
4. It is deployed as a put-down in the context of the macho game of football, which historically sidelines women and has recently been subject to high profile press coverage due to allegations of abuse and sexual assault.

It is acknowledged that reference to training bras may be acceptable in other contexts, and if delivered by more sympathetic characters, but the context of delivery by a father in support of a football team is considered demeaning, which deprives young women of the human right to dignity.

While there are no complaints documented concerning violence, there is also a case to be made for a breach of Section 2.2 through the portrayal of violence. Rugby is well known for its aggression on the field within a framework of regulations and constraints, and the depiction of Scott Fava sweeping the Sydneysider’s desk and confronting the camera to challenge fans to attend the match, is arguably unjustifiable. A threatening stance by the footballer and confrontation to viewers could have been achieved without this act. This is at best a questionable dramatic device given the social problem of violence amongst young men, who are the target audience.

The juxtaposition of this act with the previous reference to pubescent sexuality also runs counter to public health messaging concerning domestic violence and violence against women. While the words by the desk-bound Sydney based father are being refuted through the overpowering intrusion of the football star, his method of upping the ante through escalating verbal to literal violence only serves to promote aggression as an effective masculine

approach to conflict. Furthermore, the shouting of 'Save it!' has paternalistic overtones, so that the white collar father is trumped by the celebrity father, who uses the cliché to 'save it!' as a means to shut down debate, which however inadequate or tasteless is a preferable approach to the use and/or threat of physical force. Thus there is a layering of associations over competing forces of paternalism, which are both shown in an aggressive light. For all these reasons there may also be a breach of Section 2.2.

This advertisement illustrates some of the dangers of using satirical attempts at humour. As with all attempts at dramatic humour, particularly satire, it is important to ensure that the object of attack is not an underprivileged or minority group, unless care is taken to show that they are being affectionately, and mildly ridiculed. While the overt target of satire is the white collar office worker, his demeaning reference to his daughter's undergarments implicates her in the dramatic realm of insult. Satire is renowned in this sense to have a scattershot effect. While his point of view is critiqued through being trumped by the football star as a pretender, his daughter is, by association, nevertheless demeaned in addition to having been already put down at the beginning of the scene, which it may be presumed would cause discomfort to large segments of its mainstream audience, in particular teenage girls and their parents.

4. Complaint reference number 311/07

Complaint details

Advertiser

Sony Music Entertainment Aust Ltd
(Kevin Bloody Wilson DVD)

Product

Entertainment

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Race — Section 2.1

Determination date

11 September 2007

Board determination

Upheld — discontinued or modified

Description of the advertisement

This television advertisement depicts a man dressed as an Asian male promoting the latest Kevin Bloody Wilson DVD — for karaoke — describing it with the words subtitled at the bottom of the screen. He announces "Arrr so! Farter's Day. You buy Kevin Bloody Wilson Karaoke DVD. You can sing-a-long to your favourite Kev song "Santa Clause", "Warnie Put Your Wanga Away", "I Give Up Spanking". I guarantee you bust a gut laughing. Ha Ha Ha Ha. So give your Farter a happy ending this Farter's Day. You go buy Karaoke Kev DVD. Arrr so!"

Board's determination — Upheld

The advertisement was found to breach Section 2.1 of the Code because it 'depicted Asian Australians in a derogatory way, mocking both their speech and culture'. The Board also considered that the advertisement was 'in bad taste'.

Discussion and analysis

Determination likely refuted

It could be argued that this is a racist advertisement which denigrates the mannerisms and accent of Asian Australians. However, it is similar to the advertisement by Townsville Automotive Detailing which also lampoons an ethnic minority. The defence in that case is that the parody is accepted by prevailing community standards since it belongs to the SBS style of ethnic parody. I would need to see the Sony advertisement before making a full analysis but I would be comparing it to the Townsville case. It's possible that the parody of the accent is less based in reality and more in false stereotyping of Asian Australians and that there are other visual stereotypes used here which are denigrating.

5. Complaint reference number 453/07

Complaint details

Advertiser

Herringbone Classic Clothing

Product

Clothing

Type of advertisement

Print

Nature of complaint

Discrimination or vilification Nationality — Section 2.1

Determination date

16 January 2008

Board determination

Upheld — discontinued or modified

Description of the advertisement

This print advertisement is headed “Why you should never buy a shirt tailored by a Bulgarian” and features photographs of a man, Henri Bouvois, who is French and has very small hands. His hands are shown sewing bespoke shirts alongside a photo of three slovenly-dressed men whose clothing is described as “Bulgarian Haute couture” and another of a laneway of crooked brick buildings described as “The typical quality of French bricklaying.” Text in explanation reads: “Hand-made shirts are only as good as the hands that make them. Precisely why Henri Bouvois is our head tailor. With a hand span that measures a meagre 6cm, only his hands come with the required agility to construct a shirt with no less than 11,347 stitches holding all 19 of its separate components together. Henri is from France, a nation of small, dainty men. They are known for refined activities like etching and playing the flute. This gentle predisposition may also explain why the French are more renowned for creating fine fashion garments than they are for say, bricklaying. It is also why Bulgarians are not known for their tailoring abilities, as they typically have fingers like large salamis. Never buy a shirt made by a Bulgarian. For the finest detail, only buy shirts made by tailors with small hands. And there is no tailor on Earth with smaller hands than our Henri.”

Board’s determination — Upheld

The advertisement was found to be in breach of Section 2.1 for the following reasons:

1. “The Board considered that the advertisement did denigrate physical characteristics of an identifiable group of people — ie: Bulgarian people. ... and went beyond light hearted poking fun ... [amounting] to discrimination against people on the basis of their nationality.

2. “The Board also noted ... similar comments in relation to the quality of French bricklaying skills ... also vilifying French people.’

Discussion and analysis

Determination partially supported

This is a borderline case where satire being used in a mild sense is directed at two objects of attack in an equally unrealistic way, and therefore arguably avoids being overtly racist. Since it identifies fictional limitations of two cultures, neither of which are of great cultural significance (tailoring and bricklaying respectively), it is arguable that the satire engages in affectionate ridicule that is not seriously degrading, although on legal grounds this may still amount to discrimination. And Bulgarian tailors and French bricklayers living in Australia would be in their rights to take exception to the characterisation, though it could not be said that these are stereotypes, rather they are fanciful attributes without any historical grounds for existence. One of the reasons the Board may have made a determination of discrimination is that all groups of European migrant tradespeople could be considered to be living in Australia in positions of relative disadvantage, particularly in regard to obtaining employment for which they’re qualified. It is not unknown for highly qualified migrants to have to accept unskilled work in Australia due to racist assumptions about their inferior training or education. If a similar advertisement had been framed about American and British immigrants who generally don’t encounter this resistance, the complaints might not have been upheld.

In relation to borderline cases where avoidance of discrimination through stereotyping is based on recognition of fictionality, Wheeler and Gleason (1994) recommend the application of their Qualified Expectation of Reality test (QER). This was developed to ensure that digital manipulation of images was done ethically, but can also be useful in determining the ethical uses of fiction in other media. It relies on two tests:

1. Whether or not the image is implausible and thus, readily obvious; or
 2. If not, if it is appropriately labelled.
- (Bivins 2004)

In the Herringbone case, avoidance of a determination of discrimination rests on the implausibility of the narrative. Since some readers may not be attuned to this, and may read it as a real depiction of cultural and physical differences between Bulgarians and French people, or a real opinion

concerning those differences, labelling to draw attention to the advertisement's fictionality may have been one way of avoiding this charge. Alternatively, the advertisers could make the implausibility of the piece more obvious. To play on the undecidability inherent in a masterful hoax is, according to Thomas Bivins, unethical.

Bivins sums up the ethical implications of combining fact and fiction in advertising the following way:

... although selective presentation ... may not be inherently unethical, much depends on the receiver's qualified expectation of reality. The clichéd advertising response of caveat emptor (buyer beware) covers only so much transgression. If we follow the model suggested by Wheeler and Gleason, our obligation is to remove all doubt concerning the reality of the context of our message. And although the law has already insisted on some indicators (labelling dramatisations, for instance) our goal should be to eliminate any potential for misunderstanding. *If our goal is to intentionally blur the lines between fact and fiction, we are acting unethically.* (136-7, italics added)

An additional reasoning that may be applied to this case is that if the satire is not sufficiently clear, then the audience will not 'get it' and is therefore being misled (Beattie and Beal 2007). In this case there is a breach of Section 1.2 of the Code. Beattie and Beal's advice is to 'beware of subtlety when using satire'. (140)

6. Complaint reference number 448/07

Complaint details

Advertiser

BSR Group (Betta Electrical)

Product

Retail

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Religion — Section 2.1

Determination date

16 January 2008

Board determination

upheld — discontinued or modified

Description of the advertisement

This television advertisement depicts a typical Christmas nativity scene with the wise men reverently offering gifts to the baby Jesus in the manger. Suddenly the gifts are thrown out of the manger, and as Joseph and Mary look at each other, text onscreen reads: "Give a better gift" and a voiceover advises: "Give a Betta Electrical gift this Christmas."

Board's determination — Upheld

A breach of Section 2.1 was found for the following reason:

1. "The Board considered that this depiction ... went beyond lighthearted irreverence and amounted to mocking of what is the quintessential image of Christmas for Christians ... [and] an important religious belief ... [therefore] to discrimination against or vilification of Christians and the Christian religion."

Discussion and analysis

Determination partially supported

This is another borderline example of discrimination, given that in the context shown, it is a dominant religion and arguably the object of light hearted satire. It appears to have been the decision of the Board to treat it in line with other examples of religious vilification, where the ridiculing of minority religions would be considered offensive.

As with other examples of satire, if the object of attack is in a position of dominance, there is less of a case for discrimination, particularly if the portrayal is humorous. Beattie and Beal state, for example, that in determining whether a satiric act was 'reasonably likely to offend, insult or humiliate' it is 'necessary to consider the relative historical and socio-economic situation of the group'. (157-8) On the other hand, all religious followers have the right to be treated equally and to have their faith respected, hence the decision's validity.

There are a number of arguments that could be made in defence of this decision, as follows.

1. Just as it is possible to discriminate against men despite their greater access to power relative to women, it is possible to discriminate against other categories of dominance.
2. It could also be argued that since the satire is directed to both the quality of gifts of the Three Kings and the ungracious behaviour of the baby Jesus, it goes beyond irreverence.
3. The alternative to the object of attack, or the norm being promoted in this satirical scenario is arguably one of excessive consumption, expressed through the tag line: 'Give a better gift'. This implies the need to spend more money which, while exploiting the narrative of the nativity, goes against the spirit of the occasion through the promotion of avarice and envy, hence promoting qualities that are specifically proscribed within the Christian religion.

This means that not only are the three Wise Men and Jesus being satirised, central principles of Christianity are also being undermined.

One defence of this advertisement could be based on the theory of Mikhail Bakhtin who used the concept of carnivalesque to show how sub-cultural groupings may take the opportunity from time to time to satirise the powers that be. He specifically referred to periods of time set aside for such carnivals (Sydney's annual Mardi Gras provides a contemporary example) in which royalty and dominant religions were lampooned by citizens who would in other contexts not have the resources, rights or opportunities to voice their opposition to power. Bakhtin proposed that satiric art forms could fall into this category. Taking this view, the Betta advertisement could be interpreted as an example of carnivalesque, since it satirises a dominant religion. The key issue is whether the BSR Group is in a position of disadvantage relative to organised religion generally and Christianity specifically. As the commercialisation of Christmas has long been established, this is doubtful.

7. Complaint reference number 108/07

Complaint details

Advertiser

MasterFoods Australia (Starburst — Big Brother Key)

Product

Food & Beverages

Type of advertisement

TV

Nature of complaint

Health and safety — Section 2.6 Other — Causes alarm and distress

Determination date

10 April 2007

Board determination

Upheld — discontinued or modified

Description of the advertisement

This television advertisement features a montage of the life experiences of male conjoined twins from birth to today. As the backing track music ceases we see the grown twins lying beside each other on hospital beds with a blue dotted line painted down the middle of the joining skin. One twin is smiling and holding a packet of Starburst and a big golden key that has a Big Brother key ring attached, while the other appears to be unconscious on life-support. We then see one of the twins standing on the Big Brother stage set with the key and a carry bag in one hand and an intravenous drip in the other. Heavily bandaged around his mid-section, he waves to the crowd of excited Big Brother fans. A male voiceover proclaims: "Buy any specially marked pack of Starburst, win a Golden Key and ONE lucky person could become a Big Brother Housemate".

Board's determination — Upheld

The Board found a breach of Section 2.6 on the following grounds:

1. 'The Board agreed that the notion of undergoing separation surgery in order to be a single winner in a prize draw was against prevailing community standards of health and safety.'
2. 'The Board agreed that the humour failed in the light of the sensitive nature of conjoined twins' separations.'

Discussion and analysis

Determination supported with addition of 2.1

The opening scene is of a newspaper clipping of conjoined twins with the headline, Australia's First Siamese Twins. As the soundtrack continues with swirling strings, and the

lyrics, 'As long as we've got each other...' it then proceeds through the imagined life of the brothers, with romantic, soft-focus shots showing them sharing a double ice cream cone as children; playing hopscotch as school kids; riding a bike as teenagers, while one runs along beside the other; running along the beach in white linen; being photographed in '70s outfits and teasing each other; and sitting on a couch with a girlfriend on either side. This series ends with the scene of the brothers in surgery as the brother on the right is given oxygen and the brother on the left triumphantly holds the Big Brother keyring. It then cuts to the left brother onstage at the Big Brother event, wearing shorts and a large amount of bandaging around his torso. He brandishes his key to clapping and cheering from the crowd and the voiceover, 'Win a Golden Key and ONE lucky person could become a Big Brother Housemate'.

The first half of the advertisement celebrates the life of the twins, which as the advertisers state in their response, is possibly 'relatively normal'. The tone changes abruptly as the soundtrack is scratched as though the needle on a record player had been knocked aside, and the scene cuts to the brothers on the hospital bed. The happy scenes are now replaced by the left brother triumphantly brandishing the golden key, while the right brother falls into a coma and is given oxygen in the background. The implication that a brother is prepared to kill his twin for the sake of entering the Big Brother household is unfortunate and tasteless, and the story's parallel to the name of the show underlines its negative connotations: big brother is not only watching you, he might also be plotting to have you surgically removed.

The abrupt shift between the first section of the advertisement with its nostalgic scenes of happy youth replaced by the crisis in the hospital bed, implies that the first scenes were in fact make-believe, and that the life of the brothers had been in reality unhappy. The satire in this first half is therefore being directed to the nostalgic, unrealistic account of their relationship. The 'truth' is being presented when the nostalgic record is scratched (a metaphor for the scratching of that version of the past) in favour of the competitive and murderous relationship.

There is an element of humour in the advertisement and the scenarios are clearly fictional, with the high production values in the first half, in particular, drawing attention to the satiric nature of the piece, and referencing the 2003 comedy feature film, *Stuck on You*, directed by the Farelly brothers, on the subject of conjoined twins. In the film, which was criticised by disability awareness campaigners, the twins are successfully separated but begin to miss each other at the end of the film, and decide to rejoin by sewing their clothes together.

The humour in the advertisement also builds on the well-known and commonly experienced phenomenon of sibling rivalry. However, sibling rivalry between conjoined twins is a completely different affair; and the life-threatening nature of separation surgery in reality, which is underscored by the fate of the right brother in this narrative, is an echo of a sad reality that is borne by some families. To treat this subject with ridicule is to discriminate against such families, and conjoined twins, and make light of their suffering. The advertisement is therefore in breach of Section 2.1 as it discriminates against people with disabilities.

The series of scenes in the first half also shows the left brother being relatively downtrodden. He is the one who runs while the other rides, who has his ear poked at the photo shoot and who isn't enjoying time with his girlfriend while his brother is having fun at the other end of the couch. There is an implication, therefore, of revenge being the motive for the surgical sacrifice, and the golden key provides a motive for this act. This adds to the pernicious nature of the narrative: the downtrodden brother not only wins bodily freedom, and a golden key, but finds an excuse to get rid of his dominant brother by killing him under the guise of separation surgery. It's hard to imagine why a product would want to be associated with this scenario and the values it promotes.

8. Complaint reference number 7/07

Complaint details

Advertiser

Advertiser SBS Corporation (summer programming)

Product

Media

Type of advertisement

Transport

Nature of complaint

Discrimination or vilification Age — Section 2.1

Discrimination or vilification Other — Section 2.1

Determination date

13 February 2007

Board determination

Dismissed

Description of the advertisement

There are three advertisements in this series: an old couple wearing brief swimwear on sun lounges, sipping blue cocktails and glaring at the camera; an obese man wearing only shorts, socks and boots, standing in a garden behind a lawnmower; and a young very skinny male wearing baggy swimmers standing on a swimming pool diving board and looking back at the camera in trepidation. All advertisements are captioned: “Thankfully, not everyone has less on over summer”.

Board’s determination — Dismissed

The complaint was dismissed on the following grounds:

Re older couple:

1. “The Board agreed that the advertisement was not so much making fun of the age of the couple, but rather [their] ... general accoutrements [which] were portrayed as ... tacky and unappealing.” Therefore the advertisement did not vilify an age group.

Re underweight man:

1. “The Board agreed that while the advertisement might have been considered ‘mean’ by the broader community, the advertisement was making fun of an individual’s appearance rather than an entire section of the community.” Therefore the advertisement did not vilify ‘any particular population group.’

Re overweight man:

1. “The Board agreed that while the advertisement might have been considered ‘mean’ by the broader community, [it] was making fun of an individual’s appearance rather

than an entire section of the community.” Therefore it did not vilify ‘any particular population group.’

Discussion and analysis

Determination partially supported

In these determinations a distinction is being made between ‘meanness’ and vilification, and between individuals, and their appearance, and particular population groups.

Both these distinctions are subject to debate in relation to discrimination and vilification. It is perhaps due to the individuals portrayed belonging to dominant cultural groups in positions of power relative to other groups (that is, they are white and middle class) that these determinations may be valid. I will deal with each in turn below.

1. ‘Is meanness a form of vilification?’

These advertisements fall into the category of satire, defined as a humorous form of attack (Frye 1957) and which involves ethical risks for advertisers, since it may have a scattershot effect and not be precisely targeted, despite the best intentions of the producers of the text. It can also be misunderstood and the irony not adequately conveyed.

SBS is a multi-cultural broadcaster and it could be argued that Anglo-Celtic culture is one of the many cultures it may represent in addition to being the dominant culture. Importantly, the Board ‘noted that it considered the advertisements to be tasteless, and not in keeping with the spirit of SBS’s charter, part of which is to promote diversity in Australia’s community.’ Yet it could be argued that the satire used in this advertising campaign is not at all foreign to much of the satire used in SBS programming which satirises minority cultural groups in Australia. The crucial distinction here is that the cultural satires are produced by members of their own group and can therefore be interpreted as lighthearted — that is, they are mean rather than vilifying and inspire critique but not hatred, where meanness is defined colloquially as bad-tempered or ungenerous and vilification is a more aggressive form of degradation.

Similarly, it is fair to assume that the satire used in the advertising campaign would have been produced by people close to the Anglo-Celtic culture to which these ‘types’ might be supposed to belong, since the advertising community and the management of SBS would most likely belong to this cultural group. For this reason, despite the finding of bad taste, the advertisements can be interpreted to be lighthearted lampooning of stereotypes belonging to the dominant culture. If degradation is a possible reading, the texts would

be degrading of a group that is in a position to defend itself from any ill-effects by virtue of its cultural dominance.

In conclusion, meanness may therefore be vilifying, or cause harm, if directed to a minority group, or toward a caricature of an individual belonging to a minority group.

2. Is the stereotypical representation, or caricature, of an individual separate from a satire against the population group to which the individual belongs? If it isn't separable, is it justifiable?

In each case, the individual caricatures represent respectively older people, underweight men and overweight men. While each of these representations, as noted above, are Anglo-Celtic, and therefore belong to the dominant culture in Australia, they are nevertheless population groups which may be described as relatively disadvantaged within that culture. It could therefore be argued that these stereotypes amount to vilification of these population groups. That is, older people, and those who don't conform to the ideal of male fitness and health, may be at a socio-economic disadvantage within Anglo-Celtic culture. While the overt satire is directed at their style of dress, there is an implicit criticism of their exposure of bodies that don't conform to this ideal, and this is reinforced by the tagline, 'Thankfully not everyone has less on over summer'. It is therefore disingenuous of the advertisers to claim to be 'parodying a wide range of lifestyles and characters' since the pun on 'less on' depends on the dress code of older, fatter or thinner people being violated. Rather than a 'wide range,' these three examples fall into the category of people who do not conform to the ideal of youth and fitness. The humour would not have worked if such ideal body types were depicted, since it is culturally acceptable (and in advertising desirable) for such bodies to be revealed. However, the humour would still have worked if the age and body types were more neutral, and the parody more focused on the accoutrements and clothing choices being made.

In each of the three advertisements, the satire against the older couple is the most defensible since their accoutrements are most exaggerated and it is possible to draw an interpretive line between the age of the individual's bodies and their dubious choices of clothing and lifestyle. In the other two examples, the accoutrements and clothing are less parodic and these are less ethically defensible, since there is less focus on the consumption choices of the individuals depicted. Their activities are indeed culturally valued, since they are engaged in exercise and gardening. It would have been safer to lampoon the activities of those engaged in leisure activities dependent on conspicuous consumption.

To summarise, the vilification of the population group can be avoided if the behaviour satirised can be interpreted as being based on choice rather than an inherited feature over which the individual has no control.

Secondly, the sliding of satire from individual to population group may be defensible when the individual is 'a vehicle of artistic expression with universal themes' (Beattie and Beal, 156.) In the SBS examples, the universal theme of excessive consumption is effectively satirised in the older couple image. However, the image of the underweight man portrays the universal theme of loneliness and vulnerability, which it is not ethical to satirise; and the image of the overweight man, while more benign, satirises the universal theme of a kind of suburban insouciance and kitsch, which although easy to parody, lacks any basis for social critique.

This is a borderline case since the use of satire involves ethical risks which can only be avoided if:

1. the object of satire is in a position of power;
2. the behaviour or feature being lampooned is based on free choice; and
3. the object of attack is precisely delineated so that it does not imply vilification of a population group; or, if not precisely delineated, can be defended adequately on the grounds of satirising universal themes or behaviours worthy of artistic critique.

If the object of attack is not a powerful figure or representative of a powerful group, then the onus is on the producer of the text to ensure that it is light hearted.

9. Complaint reference number 95/08

Complaint details**Advertiser**

Kimberly-Clark Aust Pty Ltd (Kotex U — beaver)

Product

Toiletries

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

9 April 2008

Board determination

Dismissed

Description of the advertisement

This television advertisement opens on a young woman walking down a street holding a beaver under her arm, and as the camera pans away we see other women also clutching beavers in their arms. The young woman takes her beaver through her everyday activities, at a beauty salon, having her hair and nails done. At the beach the girl and the beaver are admiring two young men who are also admiring them. The girl and the beaver are then seen seated at a cafe where the girl presents the beaver with a gift — a box of U-tampons. A voiceover advises: “You’ve only got one. So for the ultimate care down there, make it U”.

Board’s determination — Dismissed

The Board dismissed the complaint on the following grounds.

1. ‘While Board members acknowledged that some viewers may be offended by the implied connection between a beaver and female genitalia they did not believe that the majority of viewers watching in the M time zone or the intended audience would find this offensive.’
2. ‘The Board further noted that this advertisement was a very sensitive approach to women’s needs and its aim was to promote brand loyalty in the target audience through a sense of fun.’

Discussion and analysis***Determination supported***

The majority of complaints rest on the assertion that use of the term ‘beaver’, or its reference through the image of the beaver, is derogatory to women. While this may have been true through its association with pornography in the US in the 1970s, the term has since been used in a more neutral way, as have other slang terms for vagina; and this is borne out by the dictionary definition. Since the dramatic scenario portrayed is sympathetic to the woman, as is her treatment of her ‘pet’, the context provided for the use of the beaver concept underlines its benign significance. Interestingly, there are somewhat ambiguous gender associations around the use of the term ‘beaver’ since it can refer to both a man’s beard, and to a glove, which might be associated with femininity and the vagina (OED and Collins).

The advertisement is also interesting from the perspective of ethics since it takes a cheeky, if not overtly controversial approach to a hygiene product, the promotion of which is frowned upon in some cultures (Fam and Waller 2003) and represents creative challenges for liberal cultures as well since, ‘the advertiser cannot show the use of the product in a realistic way’ as the Board notes. The use of humour is one way around this dilemma, and the inclusion of members of the target audience, that is young women, portrayed in a playful and sympathetic light, is crucial to its success.

As with other humorous examples of recent tampon advertising, the inclusion of young men in a sympathetic and humorous light is also an ethical plus, since it allows for the illustration of intimacy being established through of an example of admiration, cooperation, and care between the sexes in relation to personal issues that have traditionally been a cause for embarrassment by, and repression of women.

10. Complaint reference number 82/08

Complaint details

Advertiser

Virgin Money Australia Pty Ltd (Everlasting Love)

Product

Finance/Investment

Type of advertisement

TV

Nature of complaint

Portrayal of sex/sexuality/nudity — Section 2.3

Discrimination or vilification Age — Section 2.1

Determination date

12 March 2008

Board determination

Dismissed

Description of the advertisement

This television advertisement, with the backing track of the song “This will be an everlasting love” features an elderly married couple in the garden, where the woman is trimming a hedge while the husband waters the garden with a hose. As the man is distracted by something in the hedge, he accidentally turns the hose on his wife, drenching her and causing a wet T-shirt look. Admiring the view, the husband approaches his wife who is smiling suggestively at him and they commence to embrace and kiss passionately. As they disappear from view, we see a pair of man’s underpants and a bra thrown to the ground and the final scene is of two pairs of feet jutting out at ground level from behind a hedge. A female voiceover accompanies the scenes: “A home loan should be like a great relationship — the longer you’re in it, the better it should get. Virgin Money home loans come with everlasting love, which means even after years together, you’ll still find us attractive. Why not switch your home loan to Virgin Money today?” Final text on screen reads: “We’ll trim your rate”.

Board’s determination — Dismissed

The Board dismissed the complaint because ‘the use of the older couple was done lovingly and affectionately, and it ‘considered that the depiction of the couple ... was not offensive.’ Instead it found that ‘the depiction of both the man and the woman was ... respectful and appropriate...’

Discussion and analysis

Determination supported

As with the complaints against the U tampon advertisement, offense was taken by some viewers at the depiction of subjects relating to sex or sexuality that have traditionally been marginalised, in this case the sexual behaviour of the elderly. Since the portrayal was, as the Board found, ‘affectionate’, ‘loving’, ‘respectful’ and ‘appropriate’ the claim that the images discriminated against older people (Section 2.1) through demeaning them or being derogatory, wasn’t convincing. Similarly the complaint that the use of sex, sexuality or nudity was not treated with sensitivity (Section 2.3), fails to stand up given that the relationship is portrayed in a loving and humorous context, with very little exposure of body parts, other than two pairs of bare feet.

Instead, it could be argued that offense was taken because these images are unusual in the public domain and the sexual behaviour of older people is rarely discussed or acknowledged.

One complaint concerned the sex being too graphic, with reference to the wet t-shirt and bottom groping. However, these are mild sexual references in the context of the broad range of sexual behaviours commonly shown during general PG viewing times, and it must be inferred that the depiction seemed more graphic because it was unusual. Indeed it could be argued that it is the complaints themselves which are discriminatory, since they imply that sex between older people, and depiction of their bodies, is ‘tasteless’. The complainants referred to the scenario as a ‘geriatric sex scene,’ and stated that ‘the use of older people is ... disgusting to view’, and ‘extremely gross’, and that ‘it was hard to stomach seeing the older age group “at it”’. All of these imply that if older people engage in sex, they should do it secretly and should not show physical affection or display sexual attractiveness to each other in public. Even domestic portrayals (as this one is, albeit in a suburban garden) should not be represented. The complainants’ views are discriminatory since they imply that older people should not have equal rights to an active sex life and public displays of affection.

11. Complaint reference number 59/08

Complaint details

Advertiser

Townsville Automotive Detailing

Product

Housegoods/services

Type of advertisement

Radio

Nature of complaint

Discrimination or vilification Ethnicity — Section 2

Determination date

12 March 2008

Board determination

Dismissed

Description of the advertisement

This radio advertisement features a male voiceover shouting in a European accent: “Wees been in Townsville to tell youse stooges about Townsville automotive detailing, detailing fully sick cars. So let’s pull some stooges over and go through their rides. Youlleah...Pull over stooge! Exsqueeze me your royal hottiness...Where do you get done?” A female voice replies: “Are you right?” and the sound of a slap is heard. The male replies: “So much for tryin’ to pick up Townsville chicks youllaeh! Townsville automotive detailing will pick your car up, and drop it back to you shiny and new. Woolcock Street. Ahh, he must be a wog, he’s got a woolly...ah, doesn’t matter. Behind McSheds. Call 4775 6630.”

Board’s determination — Dismissed

The complaint was dismissed as the Board:

1. ‘felt that the advertisement was reminiscent of the style and humour of the SBS program *Fat Pizza* and would appeal to the intended target audience’; and
2. found that ‘there was no intentional or unintentional discrimination along racial lines.’

Discussion and analysis

Determination supported

Exaggerated use of Southern European accents has long been a staple in Australian comedy, and the recent success of *Fat Pizza* has if anything, revived a tradition that goes back as far as *They’re a Weird Mob* in the 1960s. The implication of sexism in the approach to the woman in the car is effectively answered within the text itself by her response of the face slap. Although a mild form of violence, this is justified in the context of the drama, and made even milder by being purely audio. Although it is not possible to confirm whether the producers were themselves from this ethnic group, the target audience would be, and since it is executed in a lighthearted way, it is not in breach of Section 2.1 regarding vilification on grounds of ethnicity. The crucial elements here are:

1. that the satire is lighthearted through its reference to young men’s interest in sex and cars; and
2. it is directed at a minority group that has itself engaged in, and established a tradition of satire, that is already widely accepted in the Australian community.

Any implication of sexism is also refuted within the advertisement itself through the riposte provided by the female voice so that she is not represented as submissive or victimised. However, it should be noted that the Asian equivalent through the Kevin Bloody Wilson promotion was upheld as discriminating on grounds of ethnicity.

12. Complaint reference number 528/06

Complaint details

Advertiser
 Carlton & United Breweries Ltd (Crown Lager)
Product
 Alcohol
Type of Advertisement
 Outdoor
Nature of complaint
 Discrimination or vilification Religion — Section 2.1
Determination date
 16 January 2007
Board determination
 Dismissed

Description of the advertisement

This outdoor advertisement features a carton of Crown Lager with the text “Immaculate Consumption” and “Celebrate Christmas with Australia’s finest”.

Board’s determination — Dismissed

The complaints were dismissed as ‘the Board agreed that the play on words did not of itself vilify or discriminate against any group.’

Discussion and analysis

Determination supported

The complaint is made on the basis of the play on words, and the similarity between ‘consumption’ and ‘conception’. The image itself is innocuous since it merely reproduces a somewhat glossy and idealised box of Carlton beer with a red ribbon and blank gift card, lit from above, and placed on a reflective black surface. This is a fairly literal representation of the product itself and though lit from above, so that it might be interpreted as somewhat haloed in a subtle way, the image is without overt Christian references. It could be argued that the emblem of the crown itself, which illustrates the brand name, also has similarities to a halo. However the reference is more obviously to a secular regal tradition.

The play on words implies that the beer is both immaculate in being excellent, and pure (if not other worldly), with the implication that God-like powers are supplied to those who consume this brand. Since this is such an implausible, not to mention subtle claim, it is difficult to see that this is derogatory towards Catholicism.

As with the Betta Electrical advertisement it could also be argued that if any parody of Christianity or Christmas is implied, then this is an institution in a position of relative cultural power, which would not realistically or materially be disadvantaged through being represented in a playfully irreverent way. It should be noted that the equivalent Christian satire used in the Betta Electrical advertisement was upheld as discriminating on the grounds of religion.

13. Complaint reference number 441/07

Complaint details

Advertiser

Trend Micro Australia (PC-cillin)

Product

Information Technology

Type of advertisement

Print

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Discrimination or vilification Age — Section 2.1

Determination date

16 January 2008

Board determination

Dismissed

Description of the advertisement

This print advertisement for the product “peace for parents. com.au” features the photo of an old man which is resting on a computer keyboard next to an ashtray. Text reads: “It’s every parent’s nightmare. The lurking fear that their children visit websites or chat rooms where predators wait in prey. You can protect your kids 24/7 with Trend Micro’s PC-cillin. It incorporates commercial-grade protection from viruses, spyware and internet fraud, safeguards your wireless home network from unauthorised users, offers advanced parental controls and blocks bad stuff at the source, before it even has a chance to get near you or your PC, thanks to unique Web Threat protection. Peace of mind is called Trend Micro PC-cillin. Nothing touches it.”

Board’s determination — Dismissed

The complaint was dismissed as the Board found that ‘the inclusion of a picture of a middle aged man or of any person of any particular gender or race, does not of itself suggest that all predators are the same as the person depicted.’

Discussion and analysis

Determination partially supported

A single image of a white, middle-age male, in the form of a photograph resting on a computer keyboard, is being used as an example of someone who might be an online predator of children. There is some ambiguity about this image; however the advertisement is itself trading on doubt and uncertainty so this is justifiable. The other features of the image include an ashtray, also up against the computer keyboard and against which the photo also rests, and at the lower left, some smudged lines which overlap the bottom left hand corner of the photo of the man, and the surface

of the desk. It is unclear whether these lines formed part of the original advertisement or were damage caused during reproduction for the sample. If deliberately part of the design, they imply a collage effect. The ashtray is full of cigarette butts implying that the user of the computer is a chain smoker. The photograph is a Polaroid, implying that the owner of the computer is not the man in the image, but instead a police officer or detective. In other words, the image is being used in investigations and the man is a suspect in a case involving online preying on children. The first lines of the text, ‘It’s every parent’s nightmare’ underscores the sense of threat that the image is designed to convey, however there is some ambiguity in the image itself, by using the photograph rather than an image of the man himself at the keyboard.

The overall effect of this is the sense of doubt created by the several levels of mediation that are implied. No one can be sure who is using a computer, or who is watching whom, including the reader of this advertisement. And it is doubtfulness and lack of certainty that inspires parental nightmares, since it cannot be known who exists behind various online identities.

The choice of a middle-aged white man, whose image is juxtaposed against a full ashtray, may be regarded as a stereotype of the paedophile. Although the keyboard and ashtray may not belong to the man himself (but to the investigator), the association is nevertheless made, inferring someone who is single, and has untethered desires, if not addictions.

Is the use of this particular negative stereotype a form of discrimination against a population group? In this case the group is middle-aged, single Anglo-Celtic men. This is a similar question to the one raised in relation to the SBS images, where it was found that the accoutrements of the individuals depicted, rather than the individuals themselves were being lampooned, and therefore it was not discriminatory. The key issue lies in the depiction of choice. The couple in the SBS image have chosen to wear animal-print swimming costumes, to tan heavily, wear gold jewellery by the pool and drink blue cocktails. They are not being lampooned for their age, over which they have no control or choice, but for their consumption practices, which are presented as excessive and tasteless. In relation to the image of the man in this photograph, the only elements of choice in the image are the keyboard and the ashtray, implying critique of the behaviour, and the sense of being at the computer for long periods of time (although again there is some confusion over whether the man in the photograph is the user of this computer and ashtray). In this case there is an imputation of criminality in relation to these behavioural

choices, and it could be argued that it is not the stereotype of the middle-aged white male which is being identified, but of the middle-aged white male who is addicted to online computing and smoking. Therefore it is the behavioural choices that are being critiqued by the image. Interestingly, the parallel between the police officer's lifestyle and that of the criminal goes back a long way in terms of dramatic devices, from hard-boiled crime fiction (such as Raymond Chandler) to countless television crime shows and feature films, where the similarities between criminals and police implies their socio-economic and sometimes psychological interdependence. By building on this convention, the image trades on the readily recognisable features of a popular genre, and reminds the reader inadvertently that there would be no use for PC-cillin if there were no predators (which may indeed undermine its effectiveness among those better informed about the incidence and nature of paedophilia).

The other key factor in avoidance of discriminatory or vilifying stereotyping is that the type used here, the middle aged Anglo-Celtic male, belongs to a dominant culture and is in a position of power relative to other cultures contained within the target audience. If the image was of a male from a minority group, there would be potential for discrimination on account of ethnicity. There is also some statistical evidence that paedophiles who are convicted are predominantly white, at least in the US (see below), so the image may be defensible on the grounds that it is based on evidence and the behaviour being vilified is criminal.

The advertiser's response states they were deliberately avoiding the 'hacker' stereotype of the younger male. However since the text refers to fears of paedophilia, which is generally associated with older men, this defence does not hold up. They are indeed playing on a stereotype and should instead argue that this particular stereotype is not discriminatory since it is partly based in fact, the member is from a dominant cultural group, and the negative elements of the image are based on choice rather than involuntary physical and psychological features of that individual. It is therefore not unethical to depict images of paedophiles as white, middle-aged men, since this is to some extent based on the statistics and there is no protection against discrimination on the grounds of criminality. A study by the

U.S. Department of Justice states that 77 per cent of sexual assaults of young children were by adults and 96 per cent were male. Another study shows that 70 per cent of those serving time for violent crimes against children were white. (BJS Survey of State Prison Inmates, 1991). However, it should be noted that to some extent this is still a stereotype since another study shows that the age of paedophiles is often younger (71 per cent are under the age of 35) and 89 per cent of perpetrators are known to the child and therefore not strangers (www.yellodyno.com). It turns out the use of a typical hacker image — or at least of a younger white male — might have been closer to the truth. The use of an image of a man shown in relationship to a child in a domestic setting would, however, undermine the usefulness of the advertised product.

To conclude, it could be argued that this advertisement is unethical in that it exploits the fears of parents and misleadingly reinforces an image of the typical paedophile as a stranger. This could be covered by Section 1.2 of the Code against misleading or deceptive advertising and could also run counter to public health and safety (2.6). However, since many other products regularly advertised on the market — from alcohol to diets — mislead consumers in the sense that they are both unnecessary and potentially dangerous, and exploit exaggerated fears, it would not be logical to condemn this advertisement and/or product as being, relatively speaking, all that pernicious.

14. Complaint reference number 286/07

Complaint details**Advertiser**

H J Heinz Co Aust Ltd (Baked Beans — Christine)

Product

Food & Beverages

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Sexual preference — Section 2.1

Determination date: 11 September 2007

Board determination

Dismissed

Description of the advertisement

This television advertisement opens in a supermarket where two men in their early 50s both reach for the same can of Heinz Baked Beans. As their hands accidentally touch, one man (Chris) recognises the other from school and asks: “Ryan Phillips?!” Ryan looks at him closely, but obviously doesn’t recognise him until Chris explains: “It’s me, Christine...” Ryan now looks at him suspiciously so the Chris elaborates: “...from Rosanna High?” Suddenly Ryan has a flashback as he remembers kissing Christine behind the shelter sheds at their secondary school. Ryan, realising the implications and feeling uncomfortable replies: “Christine...?...Ha...phew... I...I...I see you still like your baked beans?” to which Chris replies: “Some things never change hey!?” He laughs as he pokes Ryan in the stomach. Ryan exhales awkwardly. Text onscreen reads: “Some things never change.”

Board’s determination — Dismissed

The Board dismissed the complaints on the following grounds:

1. ‘... this depiction was a parody of teenagers kissing and was not of itself provocative or gratuitous’; and
2. ‘the treatment of the issue [of sex change] was not done in a sexual manner and was treated with respect’

‘The Board determined that the advertisement treated the issue of gender alignment with sensitivity and did not breach Section 2.3 of the Code.’

Discussion and analysis***Determination supported***

The complaints were in response to the explicitness of the kiss between teenagers and the references to a sex change by a middle-aged white man, both of which were regarded as inappropriate for a general (W) audience. As with the U Tampon and the Virgin Money advertisements, the issue being dramatised is one which has been subject to repression and embarrassment in the past. While this means that it is more likely to attract complaints from more conservative members of the audience, it is not in itself unethical to dramatised these subjects. In each case, the scenario has presented the characters sympathetically and humorously, and rather than reinforcing negative stereotypes, the advertisements have served to undermine them. That is, respectively: the stereotype of the shy and retiring menstruating woman is shown to be playful and outgoing; the stereotype of the sexually inactive and prudish older couple is shown to be sexually active and carefree; and the stereotype of the sex change candidate as a drag queen or gay with overtly camp mannerisms is shown as a conventional looking man.

Regarding the degree of explicitness in the kiss, while it is unusual to see this in W classified advertising, it provides an exaggerated, therefore parodic, dramatisation of school-age kissing, which is both highly charged sexually and inexperienced. One of the complaints is directed at the ethics of the production process, stating that, ‘I wince at the thought of these particular two young girls having been directed to behave in such a fashion’. A close viewing shows that it appears to be a boy and a girl acting out the scene, and neither appears to be under the age of 16. It is also brief, so that it doesn’t linger long enough to titillate, as claimed; and having made its point, which is to heighten the embarrassment of Ryan many years later, it returns to the more innocuous supermarket scene.

With regard to Section 2.3 of the Code, it therefore treats sex ‘with sensitivity to the relevant audience’ in the sense that it playfully reminds both older and younger viewers about such encounters, in a humorous and affectionate way. The visual segue provided by Ryan removing his glasses, firstly in the supermarket to view the ‘new’ Chris more clearly, then in the playground before kissing the ‘old’ Chris many years earlier, provides a metaphor for the ways in which we view each other, (and indeed stereotype each other) and the assumptions we make about our friends and partners, even in intimate settings, which may be wrong. It creatively and subtly reinforces the tagline, ‘some things never change’, in the sense that knowing others well, even those close to us, is always fraught with difficulty — which may indeed be comic. Just as the gaze exchanged between the kissing teenagers is dewy eyed and loving, so too is it interrogatory; and nothing has changed in the sense that we cannot really know what goes on in the minds of others whether our sexuality is conventional or not. The affectionate jab by Chris of Ryan’s belly as he delivers the tag line also implies that his attraction to Ryan might still exist, implying that his sexual tastes, along with his affinity for Heinz Baked Beans, hasn’t changed either.

Like the Kimberly-Clark and Virgin Money advertisements, this advertisement is socio-ethically positive in the sense that it undermines negative stereotypes and presents an affectionate account of both adolescent relationships and gender realignment.

15A.Complaint reference number 181/08

Complaint details

Advertiser

Mars Australia Pty Ltd

Product

Food & Beverages

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Portrayal of sex/sexuality/nudity — Section 2.3

Determination date

11 June 2008

Board determination

Dismissed

Description of the advertisement

A couple in their late twenties are sitting on a couch. The guy has a soft French accent. He talks to the camera about his girlfriend Pam.

EMILE TO CAMERA: At first Pam said she was having the chocolate to help her forget things, but I did not think it would actually erase her memory. It began with one small incident.

Cut to Pam at the Doctor. She’s wearing a medical gown and lying on the table with her knees up.

After a moment a doctor pops his head up from between her knees and says.

DR: That’s where I know you from. Mooroolbark High. Year 12. I was in your English class.

Pam smiles awkwardly, turns ruby red and tries to hide her face in her hand.

EMILE Voice over (VO): But then she ate the chocolate and couldn’t remember a thing.

We see her eating several squares of Dove later that night. A few moments later Emile asks,

EMILE: How was the Doctor’s appointment?

PAM: What appointment?

EMILE VO: It was as if nothing had happened.

EMILE TO CAMERA: If she has a little she forgets little things.

Cut to Pam standing in her kitchen, near the Dove pack.

PAM: I think I’ll have a Dove.

Forgetting that she's just consumed it, she repeats herself, as if for the first time.

PAM: I think I'll have a Dove.

EMILE VO: But too much chocolate and she forgets really unusual things...

Cut to Pam sitting in her bedroom at her dresser, we see a pile of Dove wrappers scattered on the glass counter. She savours the last delicious morsel, before picking up her lipstick. She pulls off the lid, unwinds and leans into the mirror. She goes to put it on, but instead of applying it to her lips she bypasses them and draws it on her eyelids leaving bright red marks. It's as though she has completely forgotten where the lipstick actually goes.

EMILE VO: Mostly it helps her recover.

Cut to Pam at her desk. There is a photo of herself on the screen. We can't see the whole shot, but it seems like she's topless. In the subject of the email she writes: "Hey Honey, check out my piercing". She hits send and the photo of her pops up on every screen in the office. She quickly unwraps a Dove.

EMILE TO CAMERA: She says it's the smooth chocolate molecules that dissolve the memory cells. I don't know how it works, but it works.

EMILE VO: It's good for her. But for me it can be difficult.

We see Pam on the couch eating Dove. She's glancing at the wrapper when her boyfriend walks in the room holding two cups of tea. She looks up, screams and jumps up off the couch as if he were an intruder. The tea spills everywhere.

EMILE TO CAMERA: It's OK. We get by.

Cut back to them on the couch. She eats some Dove and looks at him strangely. He pulls a lanyard out from underneath her top. It has a photo of him on it with the words, "EMILE. My boyfriend." printed across it. She smiles.

Text on screen: Another Dove Individual. The advertisement fades to close up of Dove chocolate.

Text: www.doveindividuals.com

Board's determination — Dismissed

The Board dismissed the complaint, observing it to be 'a quirky and over-the-top portrayal of one woman's desire for chocolate' which was not 'a statement about all women'. Further that the content was 'not offensive and did not discriminate against people with memory loss'.

Discussion and analysis

Determination supported

As with the other Dove advertisement (15B), this is clearly a fictional account of a woman who gradually loses her memory after using chocolate to help her forget. It is a parody of women who eat chocolate to relieve stress at the end of the day, and it is also a parody of the chocolate industry's own claims, increasingly based on scientific research regarding chocolate's nutritional benefits, when it has the boyfriend character Emile say, 'she says it's the smooth chocolate molecules that dissolve the memory cells'.

The negative stereotype of the forgetful, ditzy young woman, is clearly an implausible fictional portrayal based on parodic exaggeration. Through naming in terms of a pun, she also drifts from stereotyping to a simple form of characterisation that individualises her beyond the stereotype. As with the other Dove advertisement, this is reinforced by the filmic references, its use of elaborate sets, background music, and high production values, reminiscent of European dramas about the decadent aristocracy of Italy and France. It is also an affectionate portrayal and has enough emotional realism to resonate with its target audience of young women without causing offense.

The one dubious scene, involving the gynecologist recalling her identity on the basis of his examination, is possibly over-the-top, but in the context of the drama, works well since it underscores the faulty memories of us all, and the quirky ways in which we do recall things. Since there is no explicit display of nudity, and the comic dramatisation is — although embarrassing — innocuous, it is not demeaning to women. Nor is it contrary to prevailing community standards regarding the depiction of women. One of the following scenes in which the female character Pam inadvertently emails an intimate photo to her all her colleagues again plays on the idea of sexual embarrassment in an innocuous way. Both these scenes echo recent comic treatment of young women's sexuality in films such as *Sex and the City*, *Bridget Jones*, and *Knocked Up*. The humorous depiction of Pam's relationship with Emile and his supportiveness shows the sexual politics of the advertisement in a fundamentally good light. It may also appeal to male viewers since it encapsulates the indulgent incomprehension with which men sometimes treat their partners' quirky desires, including their desire for chocolate.

These two advertisements are ethically positive since by portraying women's consumption choices in a light-hearted and affectionate way, while showing them to be positive and complex (though flawed) characters, they treat them as equals.

15B. Complaint reference number 193/08

Complaint details

Advertiser

Mars Australia Pty Ltd

Product

Food & Beverages

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

11 June 2008

Board determination

Dismissed

Description of the advertisement

As the advertisement begins we see a woman in her late 20s in a living room talking to a camera.

Text appears on screen ‘Em Ocean’. There is an inordinate number of tissue boxes positioned around her.

The woman Em Ocean speaks to the camera: “I’m not over the top or anything. I mean I only ever eat chocolate when I’m feeling emotional”.

Cut to her at a funeral crying hysterically while unwrapping a Dove. Then without warning she stops crying. Now with a very composed look on her face she scans the area. She spots another funeral in progress and walks across the cemetery toward it.

EM voiceover (VO): “I just have quite a lot of emotional things happening right now.” (Her eyes dart suspiciously as if she’s exaggerating).

She settles amongst the new crowd and on cue, with the other guests, unleashes another well of tears.

Cut to a wedding where she’s standing in the pews crying and eating chocolate. Paying no attention to the actual ceremony, she glances down at the inside of the wrapper. Then, another guest in the church leans over and asks.

Wedding Guest: “How do you know Sam?”

Em replies: “Who?”

The woman looks befuddled.

Cut to Em standing near a vase on a display cabinet.

EM VO: “Sometimes I feel like bad luck is following me...”

Em knocks the vase off the cabinet and it smashes on the floor. She begins to cry and quickly unwraps and consumes another chocolate.

EM VO: “It’s been tough lately...”

Cut to close up of Em shouting at the camera: “Please call again? Who says that? This is pointless.” (We see young man she is shouting at.) It’s over...(she leans in to read his name-tag) Patrick.

We see Em storming out of a sandwich bar crying and unwrapping a chocolate. As Em walks away we notice she recovers very quickly and even smiles to herself.

EM VO: “I’m as strong as the next person. It’s just that occasionally unforeseen things get me down...”

Cut to Em looking at the Romance section of the DVD rental shop.

Em continues: “If I’ve had a rough day, I need a smooth chocolate.”

Em places an enormous pile of DVD’s on the counter at a video store. The man behind the counter says: You know those are all due back tomorrow? Em: Yeah

Cut to Em in her lounge watching DVD’s. She starts to cry but unwraps another Dove.

EM TO CAMERA: “I’ll be OK.”

Text on screen: Another Dove Individual. The advertisement closes on a close up of Dove chocolate packets and text: www.doveindividuals.com

Board’s determination — Dismissed

The complaint was dismissed for the following reasons.

1. It was a ‘quirky and over-the-top portrayal of one woman’s desire for chocolate ... not ... a statement about all women’.
2. The actions of the woman would [not] be deemed realistic or genuine by most viewers.
3. It ‘was not offensive and did not discriminate against people who experienced difficulty in dealing with emotional situations.’

Discussion and analysis

Determination supported

Taking each determination of the Board in turn it can be argued that the stereotype of the emotional young woman, who turns to chocolate as a calming technique, does not imply denigration of all women as emotional, or of all chocolate eaters as self-medicating for anxiety or depression. There are three defences available in this case. Firstly that the negative stereotype is done playfully, and the individual is portrayed as attractive and humorous. Secondly the stereotype is based

on behavioural choices rather than physical or psychological conditions over which she has no control (see elaboration below). Thirdly, that the category of young woman represented by this stereotype is not in itself at a position of great disadvantage relative to other social groups.

While, in relation to the second point, women who suffer from emotional difficulties may not choose to be so affected, the examples dramatised in the various scenarios are treated comically and as fictional exaggerations, with the character taking pleasure in exposing herself to emotionally intense experiences, even where she has no relationship to others involved in them. She is not involuntarily exposed to misfortune, but rather wallows in opportunities to express emotion as though she had been — presumably so that she has an excuse to eat chocolate. Although it could be argued that the character Em Ocean suffers (involuntarily) from a mental illness, the implausibility of the scenarios together with the music used in the sound-track, the attention to her fashionable and ever-changing wardrobe, and other elements taken from soap operas and romances — and the fact that she is named and this is based on a pun — all underline the fictionality of the story line. This is emphasised by her direct to camera ending, 'I'll be OK' delivered in a defiant and dismissive voice that implies the whole thing is a hoax and that she is fundamentally in control. By making it clear that this is a fictional scenario and is not intending to blur the line between fact and fiction, but to draw on certain real emotional connections that women have to chocolate consumption through parodic exaggeration of universal female emotions, the advertisement avoids the pitfalls of the Herringbone advertisement which failed to make this distinction clearly. The Herringbone advertisement was not transparently implausible to all readers, and dealing with minority ethnic groups at relative disadvantage, it could not justify the negative stereotypes. Additionally, this and the following Mars advertisement, succeed in turning the figure of the stereotype into a more complex and believable, though clearly fictional, character.

16. Complaint reference number 13/07

Complaint details

Advertiser

Australian Pensioners Insurance Agency (Chat Show)

Product

Insurance

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Age — Section 2.1

Determination date

16 January 2007

Board determination

Dismissed

Description of the advertisement

This television advertisement is set in a television studio and presented in the style of a TV chat show with an APIA spokeswoman (Pixie) seated behind a desk. She says: "We've got such an exciting series of Understanding 50 coming up. You'll see all sorts of fun and games and some great personalities. But one thing you won't see is APIA offering insurance to 21 year olds having all night parties, breaking stuff around the house and driving around like crazy in their cars. So if you're not working full-time and are over 50, stay tuned. Or call 13 5050 now. For understanding, not just insurance."

Board's determination — Dismissed

The Board dismissed the complaint on two grounds:

1. that 'the advertisement did not vilify young people but singled out those who behave irresponsibly'; and
2. 'the language used was without malice and a level of humor was present in the tone of the advertisement'.

Discussion and analysis

Determination partially supported

The advertisement features the set up of a television talk show with the host promoting the show to its audience by firstly stating what exciting content they have but secondly what they won't be offering to young people. The implication is that the audience is being 'understood' in terms of its own needs, for the over 50s, without distortion by the needs of another age group, whose needs are in this case different due to their hard partying lifestyle. Although this is a negative portrayal of young people, it singles out '21 years olds having all night parties' rather than denouncing all young people. And since the behaviour being criticised by the show is based on the choices of some young people, rather than any involuntary conditions they might experience, it is not-discriminatory.

Dramatically it's a slightly odd advertisement since it pitches the content for the program portrayed (as an advertisement within an advertisement, which must be an infomercial program or shopping program) in terms of what it doesn't offer. What it then offers is 'understanding, not just insurance' implying that the package being sold is specifically targeted to the needs of the over-50s, and that the cost of the product will be reduced due to their low-risk lifestyles. The advertisement doesn't specify, beyond the acronym APIA, what kind of insurance is on offer, but implies it is property and car insurance based on the examples of what it doesn't cater for. At the same time, there is an atmosphere of excitement and entertainment on the television set and in the studio audience, which features older people, so that the target demographic is being portrayed as vibrant and sociable. It could be said that this advertisement is ethically worthwhile in promoting the diversity of older people and that the negative portrayal of young people's behaviour, while to some degree stereotypical, is borne out by the statistics which show that 18-24 year-olds rank highest among car accidents and fatalities (caradvice.com.au). This is evidence-based critique and therefore not discriminatory. As the RTA puts it in its defence of ASB Case Report 123/08, 'Of all speeding drivers involved in ... fatal crashes between 2002 and 2006, 35 per cent were aged 17-25 years of age but that age group only account for 15 per cent of licensed drivers.' Recent press coverage of teenagers' parties getting out of control and requiring police intervention, while no doubt an exaggeration of any widespread social crisis, contributes to the validity of the description. Because this characterisation of the age group is based on reality and the feature being isolated is based on choice, the advertisement is ethically defensible.

Another reason for the oddness of the advertisement from a socio-ethical perspective is that it provides positive stereotyping (of older people) at the expense of negative stereotyping (of younger people) and seduces its target audience by alienating its non-target audience. While not overtly unethical, this is a risky marketing strategy and amounts to a kind of 'wedge advertising'. While it might appeal to the jaded parent or older single person, it might also alienate parents of responsible 21 year-olds. It also has indirectly unethical implications (which lie outside the Code) through drawing attention to conflicts of interest (as well as real conflicts) between demographics. Its moral defence is unfortunately self-righteous and to the degree that young people's behaviour represents social problems it is not particularly helpful. (See concluding recommendations for an ethical checklist for advertisers below, since this is an interesting example of a text that although not stereotyping, may nevertheless cause harm through inciting inter-generational conflict. Other examples of wedge advertising in this sample include *Skins* and the RTA.)

17. Complaint reference number 130/08

Complaint details

Advertiser

Cockatoo Ridge Wines Ltd

Product

Alcohol

Type of advertisement

Outdoor

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

19 May 2008

Board determination

Dismissed

Description of the advertisement

This print advertisement features a close up of the face of a young woman whose hair is swept around her face. The collar of a blue and white check garment is visible and a cockatoo is sitting on her left shoulder. To the right of the woman and cockatoo is the text: "She loves a Cockatoo" and underneath in smaller print: "Cockatoo Ridge Wines. Why wouldn't you." A bottle of Cockatoo Ridge wine is displayed to the right of the text.

Board's determination — Dismissed

The Board considered breaches in relation to 2.1 and 2.3 and made the following determinations.

1. 'The advertisement clearly made use of a double entendre and ... should have acknowledged this in their response' however, 'the fact a cockatoo was pictured on the bottle reduced the impact'.
2. The Board was split in its decision and dismissal was carried by the chairman's vote on the basis that 'the advertisement erred on the side of humour'.

Discussion and analysis

Determination partially supported

The advertisement uses a sexual double entendre, based on a pun, together with an image of a young woman with a cockatoo on her shoulder, promoting white wine to the target market of women in their twenties. The expression 'She likes [or loves] a cockatoo' has been used in other contexts and is well-known as a sexual joke.

The Board does not mention discussing the complaint in terms of the medium (that is an outdoor billboard) which two complainants noticed was in sight of a primary school.

If it did, it could be argued that the double entendre might be over the heads of children. However this is not necessarily true given the sophistication and sense of humour of many primary school age children. The sexual reference may also be offensive to older women.

The question then follows as to whether the public representation of women's sexual desires is inappropriate, whether it is demeaning to women, and therefore vilifies them. The woman in the image is shown to be sexually available, with tousled hair, slightly parted lips, and tilted head which all can be interpreted as alluring. The cockatoo on her shoulder has its beak close to her ear and is nestled against her neck, which is bare above the gingham collar of her shirt. However, she is looking directly at the camera, and may be said to be returning the viewer's gaze, rather than being presented in a submissive way with gaze averted. An averted gaze would imply availability without agency, or expression of her own desire. Instead, the image shows a strong woman who is presumably at ease with her own sexuality. This is underscored by the close relationship with the cockatoo, which represents a combination of wildness and domesticity; and in Australia, this breed is known to be somewhat assertive and loud — not the retiring type, as it were. The strand of hair falling across her face adds to the effect of free-wheeling openness with the suggestion that she is a little untamed. Again, the image of the bird emphasises the set of associations between nature, freedom, sexuality, and some elements of domestic refinement. The gingham shirt, has, as the advertisers say, rural references, associated with freshness, domesticity (gingham table cloths) and the classic country girl: a bit of a tomboy perhaps, who is young, strong and self-reliant. Her youth and simplicity, with the focus on her physical power, based on her beauty as well as her independence, is underscored by the absence of jewellery and the 'natural' look of her makeup giving her a healthy outdoors glow.

By promoting the wine through reference to sexual desirability, if the target audience is women rather than men, then the success of this advertisement would need to lie through the appeal of the image to other women, through a process of identification. It wouldn't work, or would at least be a risky strategy, if the image implied passivity or loss of autonomy, since this would hold less appeal to women (though it might be more appealing to men who may then choose this wine when buying for their girlfriends). Instead the model is shown to be in control of her own sexuality, and at ease with her desires (as underlined by the tagline), in as close a relationship with them as she is with the bird on her shoulder. As one of the comments of the Board notes, the last decade has seen the popularisation of film and television of programs in which women's sexual

desires are unashamedly represented, often in a comic and positive way, and this image is no different. What it does do is put an Australian rural spin on the characterisation of a sexually active, autonomous younger woman. Again, there are recently produced Australian television dramas, such as *McLeod's Daughters*, and *Rainshadow*, and the film *Somersault*, which feature strong, sexually active young women characters.

This is not a negative stereotype, although it would have enhanced the agency of the woman if the tagline had been in the first person. Additionally, the medium is probably inappropriate and it would sit better in women's (and possibly men's) magazines.

18. Complaint reference number 113/08

Complaint details

Advertiser

Skins Compression Garments Pty Ltd (Beyond Reason)

Product

Clothing

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Race — Section 2.1

Determination date

9 April 2008

Board determination

Dismissed

Description of the advertisement

This television advertisement for competitive sportswear features male and female African-American athletes engaged in various sporting activities, including football, athletics, basketball, and boxing. Throughout the advertisement the athletes explain: “We’re faster, we got more skill, we got the stamina...You know, when it comes to the physicality of the sport the African-Americans have the advantage. It just comes natural to us...I mean you gotta look back at our ancestry, we were born warriors. It’s natural instinct. It’s like a killer mentality. If you look at the way a black male is built we’re more muscular, we’re stronger... You wanna be like us?” As the sound of laughter is heard the Skins logo appears on screen with the words: “Beyond Reason. Skins.net.”

Board’s determination — Dismissed

The Board’s dismissal was based on the following.

1. ‘The sportsmen were exulting in their heritage and engaging in self promotion’.
2. Although ‘the claims could be seen as promoting racial superiority ... in this context ... were part of a broader positive statement about athletic ability’.
3. While the advertisement did not breach Section 2.1 ... it did introduce concepts along racial lines that were not necessary to promote the product’.

Discussion and analysis

Determination refuted

The advertisement is presented in a documentary style following elite athletes in training, using a hand-held camera, with frequent scene-changes, and interspersing either direct-to-camera statements or voiceovers by a

selection of the athletes. It has the feel of a New York street scene, or rap music clip, with constant movement and high energy editing, providing an edgy feel: these athletes may be somewhat tamed but they’re potentially dangerous. The advertisement is shot at night time, adding to the film noir, threatening atmosphere. The delivery belongs to the conventional style of sporting challenges between competitors, for example the Haka shown at the start of All Blacks rugby games, the taunting boxers engage in prior to fights, and other ritual forms of psychological warfare. There is no suggestion of humour or parody in the advertisement, instead it is produced as a serious, intense and authoritative self-portrayal by black athletes. As with the tone, which treads a line between civility and aggression, the words also tread a fine line between athletic self-aggrandisement and racist denigration through the implication of relative superiority. In a competitive sporting context, this is acceptable, given the constraints provided by the rules of the game. In a cultural advertising context this is a dangerous and unethical path to follow. As with the Rugby WA example, it takes on-field sentiments off-field, which in the context of the social problem of young male violence in particular, is difficult to justify. It is an example of wedge advertising, which has the potential to alienate groups from the product, as well as from each other.

Regardless of any scientific evidence relating to the superiority in particular skills or ability for particular races, there is an implicit incitement to hatred in the delivery, particularly the statement, ‘It’s like a killer mentality’ which is inflammatory. Additionally, the characterisation of young black men as having a ‘killer mentality’ and its being ‘natural instinct’ is doing them no favours in relation to their broader socio-economic conditions. Considering that the prevalence of African Americans in elite sports may also be based on the ways in which working and education opportunities for young black men are structured in the US, the use of race to focus on power differences between those who use a certain product, is a step backwards in the cause for civil liberties.

If they were to delete the text, ‘It just comes natural to us, ... I mean you gotta look back at our ancestry, we were born warriors. It’s natural instinct. It’s like a killer mentality,’ the defence of advertisers would be more valid since the other spoken text relates purely to physical differences, rather than historically determined, socio-cultural or psychological ones.

There is a further contradiction in the advertiser’s defence regarding the use of the tagline, ‘it’s beyond reason.’ This may be used to emphasise the reference to black physicality as being ‘natural instinct’, however it undermines the advertiser’s defence that the advertisement is based on a reasoned account of scientific evidence. While that may

be true, the context in which that evidence is presented is indeed 'beyond reason' since it works at an emotional level to persuade young white men that they could become more like young black men through wearing Skins garments. This is clearly 'beyond reason' if the basis of black sporting superiority is genetic. A reasonable position, based on the evidence provided, would be for white people to take up sports management. It is the advertisement, and its racism, that is beyond reason.

Although point two of the Board's determination conceded racist claims, it then dismissed their significance since they were interpreted to be 'part of a broader statement about athletic ability'. In fact the advertisers are making a specific statement focusing on athletic ability as grounds for their claim to racial superiority, which is a form of eugenics. Any broader statement being made is even more racist since it aligns black individuals with nature, warrior culture and killer mentality, all of which are negative stereotypes. If the advertisement had confined itself to the specifics of physicality it would have more defensible.

From the perspective of a black pride argument, the advertisement could be shown to be building on the ritual of competitive sports psychology to insist on the value and strength of black people. Showing blacks in positions of success may be regarded as an attempt to undermine negative stereotypes, which portray blacks as incompetent, under-employed, and engaged in crime. Unfortunately, this advertisement builds on another negative stereotype of the black aggressor, more closely aligned to nature than white people, less civilised, and a potential threat to civil society.

This is also the stereotype found in gangsta rap, and the connection is reinforced by the similar editing style used in the advertisement. If the stereotype were being undermined through depiction of elite black athletes showing physical superiority in socially valued contexts outside of sport (engaging in assistance during natural disasters, for example; or other heroic feats requiring physical strength and endurance alongside socially valued behaviours), then the existing negative stereotypes would have been undermined. Instead, the dominant negative stereotype is being reproduced, with the twist being that the population group it vilifies is owning certain elements of it so as to win at sport. The vilification is therefore twofold: toward African Americans and Caucasians. This is racial incitement, it is inflammatory; and as the Board points out, it is 'not necessary to promote the product'. Given the complexity of race relations and the potential for conflict to go off-field during sporting events, this advertisement is unethical. I would suggest that the Code be amended to include specific references forbidding incitement on any grounds

covered by the discrimination act, and drawing attention to the dangers of wedge advertising.

A parallel example in advertising that comes to mind, using the category of women, broadcast several years ago, in which milk was advertised by showing a woman in a store hitting someone over the head with the milk container to prevent a hold-up. Although undermining the stereotype of the defenceless, submissive woman, it uses an act of violence (and is therefore in breach of Section 2.2) and reinforces another negative female stereotype regarding emotional volatility and unpredictability. For the stereotype to be adequately undermined it would have to show the competence, independence, quick-thinking and strength of the woman in a way that was both ethical and illustrated that she continued to remain in control of her emotions throughout the event. Similarly, the undermining of any stereotype in the Skins advertisement by blacks taking on their opponents through verbal competition in sport, is incomplete since it continues to draw on a range of other negative stereotypes including that blacks are closer to nature, and hence more volatile and threatening.

The possible defence that can be made in both these examples is that the underprivileged population group is being presented as 'fighting back', and is therefore not discriminatory, since it shows them in a position of relative power that is clearly unrealistic. However, the global popularity (at least in the West) of African-American culture, its success in marketing music and fashion internationally, indicates that despite their socio-economic disadvantage within the States, this population group has access to considerable cultural power. The last line of spoken text, 'You wanna be like us?' testifies to this dominance.

Section 2.2 is also breached if 'violence' can be interpreted to include verbal threats as well as physical ones.

19. Complaint reference number 123/08

Complaint details

Advertiser

Roads & Traffic Authority

Product

Community Awareness

Type of advertisement

Outdoor

Nature of complaint

Discrimination or vilification Gender — Section 2.1

Determination date

11 June 2008

Board determination

Dismissed

Description of the advertisement

Head shot of young woman, her hair is being swept in one direction, she is looking toward her left. She is holding up her right hand with only pinkie finger extended and bent. Text reads: “Speeding. No one thinks big of you.”

Board’s determination — Dismissed

The Board dismissed the complaint on the following grounds.

1. That ‘it is legitimate for the campaign to focus on young men’ since this is based on evidence that they are the section of the community most likely to speed and be involved in car accidents (based on evidence provided by the RTA). Because based in fact, ‘the Board considered that this was not ... discriminatory or vilifying of young men’.
2. That the use of the sign in this advertisement was consistent with the message that the driving behaviour demonstrated is not ‘cool’ or desirable. The sign is not demeaning to men generally.

Discussion and analysis

Determination supported

Although the sign depicted by the woman’s little finger implies a judgment on penis size, the implication of the sign is a judgment against men who speed, rather than all men, and that this is a voluntary, illegal behaviour deserving of widespread social condemnation. The hand gesture referring to penis size is a metaphor for ‘smallness of character’ rather than literal commentary on physical attributes which are not anyway visible. This meaning is reinforced by the tagline: ‘no one thinks big of you,’ a well-known expression referring to generosity or courage. Since the stereotyping of young men is based in fact, and the behaviour being vilified is based on choice, it is not unethical.

The image of the woman by the roadside shows her hair being swept back, suggesting the force of wind created by a speeding car. The simple white dress, absence of jewellery, and her expression, though wry, all suggest a degree of vulnerability. Given that young women are often the victims in car accidents resulting from reckless driving, it is appropriate that an image of a young woman is used since she is a representative of a relatively underprivileged group who has traditionally been disadvantaged by the behaviour of the relatively privileged group that is being critiqued. Although this could be an example of ‘fighting back’ described in the *Skins* case, the population group — young women — is not traditionally associated with violence or aggression, unlike the population group of young black men. It is nevertheless an example of wedge advertising and therefore needs to be used with caution.

20. Complaint reference number 214/08

Complaint details**Advertiser**

Inghams Enterprises Pty Ltd

Product

Food & Beverages

Type of advertisement

TV

Nature of complaint

Discrimination or vilification Other — Section 2.1

Violence Other — Section 2.2

Determination date

9 July 2008

Board determination

Dismissed

Description of the advertisement

VISION: Open on our presenter in the Ingham kitchen as she speaks to camera in an over sincere and tongue in cheek way.

PRESENTER: Ingham chicken nuggets. Made with 100% succulent breast and no artificial colours, flavours or preservatives.

VISION: Cut to a tray with a bowl of Ingham nuggets in a bowl.

PRESENTER: However, if you're one of the 0.001% of Australians who don't like chicken, then there is something wrong with you.

VISION: Cut to a board being held up with a pie chart on it.

VISION: Cut to our presenter walking into the Ingham call centre.

PRESENTER: Ingham can help you keep this abnormality a secret.

VISION: She picks up a flat pack box of Ingham breast nuggets.

PRESENTER: Simply call the Ingham helpline and we'll send you these flat pack boxes.

VISION: Cut to a woman in her kitchen. She casually opens wide the freezer door to reveal it stocked full of Ingham boxes.

PRESENTER: Just fold together, stick them in your freezer. Bingo!

VISION: Her two friends look on in admiration.

PRESENTER: Your friends think you love chicken... and are normal.

VISION: Cut back to our presenter in the Ingham call centre.

PRESENTER: Because if you don't like chicken, there's something very wrong with you.

SUPER: CALL 1300 661456

SUPER: chookme.com.au

Board's determination — Dismissed

No grounds are provided for the Board's dismissal other than it 'did not breach the Code on other grounds'.

Discussion and analysis**Determination supported**

The three advertisements in this series begin with a woman addressing the camera in an industrial kitchen, alongside the chicken product being featured. She is informing viewers that people who don't like chicken are in a minority and have something 'very wrong' with them. The delivery is comic-serious, with the hokey use of a pie chart showing the tiny percentage of people who allegedly don't eat chicken emphasising the mock seriousness of the observation. The following scenarios are also clearly comic and based on fabrications. They involve a scene in a run-down and untidy call centre, where the staff have nothing to do and the Ingham representative again addresses the camera while advising those who don't like chicken of the solution.

The three solutions across the series involve empty boxes to store in your freezer, a fragrance spray so that your house or car smells like chicken, and a suggested conversation by the water cooler in an office corridor. The exaggerated gestures used in the first of these, with three women dressed in animal print outfits and heavily made up nodding seriously to each other; the second showing a wealthy man spraying his Rolls Royce and the stairway in his mansion, and nodding happily when the delivery man notices the smell; and the lameness of the exchange between the two office workers in the third, are all clearly fabrications and parodies. The style of delivery by the woman telling viewers that, 'if you don't like chicken there's something very wrong with you,' is also an exaggeration of a kindly, female adviser who is also patronising. Her delivery emphasises the word 'very' which also draws attention to this being a spoof.

It's possible that vegetarians may be offended by this advertisement since it states that people who don't eat chicken have something wrong with them, or are in some way disabled. However, the tongue-in-cheek production and style of delivery makes it clear that this is not a serious claim and the use of evidence in the form of the pie chart is also clearly presented as inauthentic, as is the call centre, which shows the Ingham's company in a poor light. As a population group, vegetarians could not be said to be underprivileged or discriminated against generally speaking, or regarded as disabled, so it is unlikely that this advertisement could be held to be part of a larger cultural phenomenon of vilification against it.

It could also be argued that people who don't like chicken are not necessarily vegetarians, but just dislike this type of meat. If however, the imputation is that vegetarians are being demeaned, if anything, they are regarded with respect in our culture and it is becoming an increasingly acceptable diet. While it might be argued that there is an indirect critique against those religions which are vegetarian, this is a long bow to draw, especially since the satire is directed as much at the company, its ideas and its employees, as it is against people who don't like chicken. This is another example of wedge advertising but as it is a light hearted satire, it has fewer ethical risks beyond those represented by the use of satire in advertising generally.

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*Discrimination and Vilification
in Advertising*

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Part 5

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Peer Review

We refer to the research reports that we have prepared for the Advertising Standards Bureau (*Socio-ethical implications of advertising in relation to discrimination and vilification* by Fiona Giles) and (*Legal Concepts of discrimination and vilification relevant to the duties of the Board* by Jenni Whelan).

We have read each other's reports and noted areas of general agreement in relation to the Board's determinations (Sydney Breast Enlargement, Rugby WA, Sony Music, Masterfoods, Kimberley- Clark, Virgin Money, H J Heinz, Mars Australia, RTA and Ingham's nuggets) with few exceptions, notwithstanding that Jenni was applying an essentially strict legal reading of Section 2.1 and Fiona was considering the complaints through a socio-ethical lens.

We note, that where Jenni would have made a determination contrary to that of the Board (Cockatoo Ridge, BSR Group, APIA, Betta Electrical) Fiona also partially accepted the Board's determination (apart from the Townsville Automotive Dealing advertisement complaint which Jenni would have upheld and Fiona would have dismissed and the Inghams Breast Awareness which Jenni would have dismissed, under Section 2.1, and Fiona would have upheld). The advertisements where Jenni would have made a decision in accordance with that of the Board, but Fiona disagreed with or partially supported the Board's determination, were the Skins Compression Garments, PC-cillin, CUB (Immaculate consumption), SBS and Herringbone advertisements.

It was agreed that the different conceptual frameworks that law and socio-ethics bring to bear on the cases means that inevitably there will be some differences of opinion. The narrower and more precise tests that can be applied legally sometimes do not account for possible broader and even divergent interpretations of the texts that can be made socio-ethically. We agreed this is a systemic challenge faced by the Board, although not necessarily a weakness, since both conceptual frameworks are complementary. However we noted that the current wording of the Code does not allow the Board to uphold a complaint on ethical grounds alone. Rather, it is required to apply the legal standards as a base-line for considering complaints of discrimination or vilification and then to have regard to additional socio-ethical considerations (which will have the most work to do in borderline cases). To this end, we thought it may be helpful to annex the definitions of discrimination and vilification as outlined in Jenni's report to the Board's Determination Template so that they can be easily accessible to the Board.

We also noted that there was some discordance regarding where to draw the line between levels of lighthearted or 'affectionate' ridicule or degrees of meanness in satirical advertising and vilification. This dissonance was revealed both within some of the decisions of the Board (the SBS advertisements, the Townsville Automotive Detailing advertisement, and the Sony Music-Kevin Bloody Wilson advertisement), and in our respective reports. We concluded that a challenge for the Board is to apply a consistent 'line in the sand' between what is tolerable meanness or a lack of generosity and what is vilification in breach of the Code. We noted that the consistent application of the definition of 'vilification' would be helpful.

We noted, too, that the advertiser's intention is irrelevant from both socio-ethical and legal perspectives (although it may be necessary but not sufficient from an ethical perspective); and although advertisers may currently include reference to intention in their responses, this is not sufficient to ensure dismissal of complaints. The Board might like to consider disallowing references to intention in advertiser responses.

We were uncertain about the scope of the application of the test of 'prevailing community standards'. Based on our observation of the Board meeting that we attended, we formed the view that advertisements generally were gauged against 'community standards' but note that the phrase 'prevailing community standards' is mentioned only in Section 2.6 of the Code. Although Section 2.2 requires an assessment of justifiability in relation to violence, Section 2.3 requires sensitivity in relation to the treatment of sex and Section 2.5 requires consideration of whether language used is appropriate, there is no such moderator in clause 2.1 which states simply: "Advertising or Marketing Communications **shall not....**" (emphasis added).

If all advertisements are to be interpreted through a lens of 'prevailing community standards' then, in our view, this needs to be made explicit within Section 2.1 of the Code itself. The danger with this approach is that some discrimination and vilification may be, in fact, embedded in prevailing cultural assumptions or accepted community practices and so the application of the un-moderated test ('shall not') is more effective at preventing the perpetuating of those discriminatory assumptions or practices.

Fiona Giles
March 2009

Jenni Whelan
March 2009

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