



Case Report

1	Case Reference	15 ACB 1
2	Advertiser	The NSW Taxi Council
3	Complainant	Uber Australia Pty Ltd
4	Product	Taxi Services
5	Type of Advertisement/Media	Various
6	Advertising Claims Board Panel Members	Andrew Christopher, Webb Henderson (Chair) Karen Hayne, Addisons Kirsten Webb, Clayton Utz
7	Date of Determination	5 April 2016
8	DETERMINATION	Complaints upheld as to breaches of sections 1.2 and 1.3 of the Code in relation to a number of advertisements as identified in the Determination below.

1. Introduction

- 1.1 A complaint was lodged on 14 December 2015 (the Complaint) with the Advertising Claims Board (Claims Board) by Uber Australia Pty Ltd (Complainant) against the NSW Taxi Council (Advertiser) regarding the Advertiser's advertising of taxi services. A panel of legal practitioners was convened to consider the complaint in accordance with the Claims Board's procedural guidelines (Guidelines).
- 1.2 The Complainant and the Advertiser were given an opportunity to make submissions in accordance with the Guidelines. These submissions and the Claims Board's determination are detailed below.

2. Issues raised by complaint

- 2.1 The Complaint raises issues under Sections 1.2 and 1.3 of the Australian Association of National Advertisers Code of Ethics (Code), which provide:
- (a) Advertising or Marketing Communications shall not be misleading or deceptive or be likely to mislead or deceive.
 - (b) Advertising or Marketing Communications shall not contain a misrepresentation, which is likely to cause damage to the business or goodwill of a competitor.

3. Description of advertising or marketing communication

The material which is the subject of the Complaint comprises the advertisements described in Annexures A, B, C and D, forming part of the second phase of a broader campaign conducted by the Advertiser against ridesharing services.

4. Complaint

- 4.1 The Complainant submitted that the advertisements make an overarching representation that ridesharing services are not safe (Key Representation). The Complainant also submitted that the advertisements made the following specific representations:
- (a) The representation (made in the first and second advertisements) that there is no insurance cover for rideshare passengers, so that in the event of some accidents, the passenger could be personally liable for the financial consequences;
 - (b) The representations (made in the third and fourth advertisements) that:
 - (i) the methods implemented by smartphone ridesharing services are inadequate to protect the safety of rideshare passengers;
 - (ii) all methods implemented by smartphone ridesharing services to protect the safety of rideshare passengers can be rendered ineffective by the driver unilaterally switching off his or her smartphone;
 - (iii) no driver checks are conducted by smartphone ridesharing services; and
 - (iv) rideshare drivers can keep driving in all cases where they have been charged with a serious criminal offence.
- 4.2 The Complainant submitted that the Key Representation is misleading, because ridesharing services are safe and that the specific representations are also misleading for the following reasons:
- (i) The representation in the first and second advertisements regarding insurance is misleading, because all uberX rideshare driver partners in NSW are required to maintain compulsory third party (CTP) insurance and third party property damage insurance for their vehicle.
 - (ii) The representation in paragraph (b)(i) above is misleading because the safety of uberX rideshare passengers is protected by methods implemented via Uber BV's technology and smartphone application.
 - (iii) The representation in paragraph (b)(ii) above is misleading because the methods implemented with respect to Uber BV's technology and smartphone application to protect the safety of passengers cannot be rendered ineffective by the driver partner unilaterally switching off his or her smartphone.
 - (iv) The representations in paragraphs (b)(iii) and (iv) above are misleading because all new uberX rideshare driver partners in NSW must undergo a criminal history police check and it is Uber's policy that it will suspend a driver partner upon becoming aware that the driver partner has been charged or convicted of a serious criminal offence.
- 4.3 The Complainant also submitted that the advertisements will likely cause significant harm to ridesharing services like uberX which compete with taxi service providers represented by

the Advertiser, as consumers could be misled into thinking that ridesharing services are not safe and therefore may stop using ridesharing services if the misleading representations are believed to be true.

5. Advertiser's response

5.1 The Advertiser's responses to the Complaint are considered in more detail below. As a threshold issue, the Advertiser submitted that the Complaint should be rejected as outside the Claims Board's remit, for the reasons outlined at paragraph 6. Alternatively, the Advertiser submitted that the Complaint should be rejected because:

- (a) the representations which the Complainant alleges have been made pay insufficient regard to the content of the Advertisements; and
- (b) each of the representations made in the advertisements can be reasonably substantiated by reference to objective facts.

6. Jurisdictional challenge

6.1 A preliminary issue has been raised by the Advertiser concerning the Claims Board's power or jurisdiction to determine the Complaint. Shortly stated, the Advertiser submits that the Complaint relates to advertising that had ceased to be published or broadcast in radio and print media prior to the Complainant making its original Complaint. The Advertiser also submits that, to the extent the advertisements were accessible to the public after withdrawal from print and media, they were only available via the Council's website. As such, they constituted excluded public relations communications and have, in any case, since been removed.

6.2 The AANA Code of Ethics (Code) which applied up to 1 January 2016 provided that: *"Excluded Advertising or Marketing Communications means labels or packaging for products, public relations communications (corporate or consumer) and related activities and, in the case of broadcast media, any material which promotes a program or programs to be broadcast on that same channel or station"*.

6.3 The Code was updated on 1 January 2016 and now provides that Advertising or Marketing Communications means: *"any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, over which the advertiser or marketer has a reasonable degree of control, and that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct, but does not include labels or packaging for products, corporate reports including corporate public affairs messages in press releases and other media statements, annual reports, statements on matters of public policy and the like"*

6.4 The relevant chronology in so far as the jurisdictional issue is concerned, is as follows:

- (a) The two radio advertisements were broadcast at various times prior to 6 December 2015. The 2 newspaper advertisements were published in the general media up to 9 November 2015.

- (b) Uber lodged its complaint with the Board about the above advertisements on 14 December 2015.
- (c) A press release embodying the advertisements was available for public viewing up until at least 3 February 2016 at which time they were voluntarily removed on a without admissions basis by the Advertiser.

6.5 The Procedural Guidelines governing the complaints process relevantly provide as follows:

1.2 Claims Board scope

The Claims Board determines complaints...with reference to Section 1 of the AANA Advertiser Code of Ethics.

It does not usually consider trivial issues or complaints involving:

- *material that does not constitute an advertising or marketing communication for the purposes of the Code*
- *advertising that has been withdrawn or discontinued before challenge*

2.4 Eligibility of complaint for consideration by Claims Board

The Bureau will consider whether the complaint is within scope of the Claims Board (as set out in Clause 1.3 of these Guidelines). If the Bureau determines that the complaint is not eligible for consideration by the Claims Board, the Bureau will notify the Complainant in writing setting out the reasons for this decision.[our emphasis added]

6.6 The Board notes that the Bureau has not determined the complaint is ineligible for consideration pursuant to clause 2.4

6.7 The Advertiser submits that:

- (i) The 4 advertisements had ceased to be published or broadcast prior to the Complaint being made.
- (ii) To the extent the advertisements or parts of them were available to the public after broadcast or publication ceased, they were available only through its website and as such were “public relations (corporate or consumer) and related activities” and thus excluded from the scope of the complaints process. On this issue, the Advertiser has submitted that the version of the Code applicable to the Complaint is that subsisting as at the date the advertisements were created and the Complaint was made, namely the pre January 2016 version.
- (iii) In any case the Advertiser has decided not to continue with the advertisements in the future and there is no basis to conclude that the advertisements would be re-run. If contrary to this, the advertisements were re-run, the Complainant could instigate a fresh complaint.

- (iv) There is no practical utility in the parties submitting to the complaints process even if there is residual discretion to determine the complaint under clause 1.3 as any determination would be moot.

6.8 The Complainant submits that:

- (i) The advertisements continued to be broadcast or published until at least 3 February, being a date after the date on which it made its complaint or made its “challenge” within the meaning of clause 1.3 of the Guidelines. The publication or broadcast was via the Advertiser’s website.
- (ii) The Guidelines do not prohibit the determination of complaints made after advertisements are discontinued or withdrawn but rather leave it to the Board’s discretion.
- (iii) There is utility in determining the complaint as the Council has not unequivocally ruled out re-running the same or similar advertisements.

7. Determination of preliminary question

7.1 It is the Board’s view that the Complaint is properly able to be determined as within jurisdiction.

7.2 The Guidelines confer discretion on the Board and are not mandatory. Clause 1.3 states the Board “does not usually consider advertisements that have been discontinued before challenge”. Thus, there are instances where the Board may properly consider discontinued advertisements and a departure from the “usual” approach is adopted. The Board considers the prior determinations cited by the parties do not decisively point the Board in one direction or another on the question of jurisdiction, given the particular facts of this case. Even if the advertisements were entirely discontinued before challenge, which is contrary to the facts of this case, there are valid reasons for the Board to depart from any usual practice and determine the Complaint, including for the reasons outlined below.

7.3 First, the chronology of events reveal that the advertisements, or parts of them, were available for public viewing via the Advertiser’s website until well after the Complaint was lodged. Whilst the advertisements may not have been broadcast on radio or published in newspapers after the Complaint was made, the advertisements were “published”, as such expression is commonly understood, on the Advertiser’s website and were thus available to the public. Second, the Board has given consideration to the public relations exclusion from the definition of “advertising” and determined that it does not apply in these circumstances. The transitional operation of the amendments to the Code is not entirely clear in this case as the public relations exclusion was amended after the Advertisements were first published and the complaint was made but during the currency of their publication by the Advertiser. For the purposes of this determination, the Board has accepted the Advertiser’s submission and applied the Code in force at 14 December 2015, the date of the Complaint.

7.4 The exclusion for “public relations communications (corporate or consumer) and related activities” seems to be directed to material in the form of public statements or commentary by an advertiser, rather than advertisements per se. Public relations activities

would normally relate to the Advertiser's own services or activities rather than a rivals. This exception also seems to be directed to the substantive content and intention of the statements or activities rather than to the mode or media by which they are communicated or how they come to be seen by the public. In this case the actual advertisements were published and made accessible via the Advertiser's website and there were links to the Advertisements themselves. The fact that these Advertisements may have been accessible through a part of the Advertiser's website that included other public relations statements and activities does not in the Board's view exempt the Advertisements themselves which are targeted to consumers and relate to the Complainant's activities. Accordingly the public relations exception as it operated on 14 December 2015 does not apply.

- 7.5 Third, the parties have already directed their attention and resources to contesting and debating the jurisdictional issue and have also addressed the substance of the complaint in their submissions so there is no additional time, money or resources to be saved by refusing to determine the Complaint. This factor informs any discretionary considerations.
- 7.6 Fourth, a determination of the Complaint will assist the parties by providing guidance into the future. The Board notes that the advertisements were withdrawn on a no-admissions basis. Whilst the Advertiser has stated that it has resolved not to continue the advertisements, there is at least the potential for further advertisements that use similar messaging, or themes, to be used in the future. This factor also informs any discretionary considerations.

8. Consideration of substantive questions

8.1 In response to the substantive issues (the jurisdictional issue having been dealt with already above) the Advertiser submitted that the Complaint should be rejected because:

- The representations which the Complainant alleges have been made are sufficiently qualified and pay insufficient regard to the content of the Advertisements; and
- Each of the representations made in the Advertisements can be reasonably substantiated by reference to objective facts.

8.2 Specifically in response to the Complainant's allegations, the Advertiser submits the following:

Representation likely to damage the business or goodwill of a competitor

8.3 The Advertiser contends that for the Board to be satisfied of any breach of clause 1.3 of the Code, it would need to be satisfied that the Advertisements were likely to cause damage to the Complainant. In this regard, the Advertiser also contends that the Complainant has not provided evidence to substantiate this matter and that any claim under clause 1.3 of the Code should be dismissed.

Alleged No Insurance Representation

Representation Contended for by Advertiser has not been made-

- 8.4 The Advertiser states that the representation contended for by the Complainant (made in the first and second Advertisements) that *"there is no insurance cover for rideshare passengers, so that in the event of some accidents, the passenger could be personally liable for the financial consequences"* does not arise and is at odds with the text of each of the first and second Advertisements. The Advertiser points to the following text in respect of the relevant Advertisements it says supports this view:

"(a) the first (radio) advertisement contained the words:

Without the correct insurance, there is no insurance cover, meaning in the event of some accidents it could be you paying the bills.

(b) the second (print) advertisement contained the following :

WITHOUT THE CORRECT INSURANCE

YOU MAY NOT BE COVERED.

... Without the correct insurance, you could be paying the bills in the event of some accidents.

[Underlining added for emphasis]".

- 8.5 It is further contended that that use of the terms *"correct"*, *"some"*, *"could"* and *"may"*, in the context of the relevant Advertisements, provides qualification and highlights a possibility of some risk and uncertainty as to the effectiveness of insurance arrangements for some ride sharing services, but not to all users. The Advertiser contends that the relevant Advertisements *"create the overall impression to a listener or a reader that there are some possible risks if the correct insurance is not in place"* which arises from the absence of regulations requiring ridesharing services and drivers to maintain adequate insurance. In summary, the Advertiser contends that any representation made in relation to adequate insurance in the first and second advertisements, at its highest, is that there are risks with incorrect insurance coverage that might arise in some instances of an accident.

Representation Contended for by Advertiser can be Substantiated

- 8.6 Understood on the above basis, the Advertiser contends that such representation, if made, can be substantiated. In summary, the Advertiser points to gaps in coverage in compulsory third party insurance; the possibility of relevant insurance contracts being ineffective due to the unlawful nature of the services offered by rideshare drivers, the fact that the Complainant's over-riding insurance contract it relies upon is not publically available so should be disregarded in the contexts of this matter, and the limitation of liability provisions contained in the Complainant's terms and conditions.

Alleged Ineffective Safety Protection Representations and Vehicle Tracking Representation

Representation Contended for by the Advertiser has not been made -

- 8.7 The Advertiser contends that the second and third Advertisements, when read correctly and considered as a whole, do not convey a representation as to *"ineffective safety protection"* in respect of the Complainant's rideshare services. Further, that contending for

such a representation overly generalises the content of the relevant Advertisements and is inconsistent with the content of the relevant Advertisements. The Board understands the Advertiser to be contending that it does not accept that the representations contended for by the Complainant that *"the methods implemented by smartphone ridesharing services are inadequate to protect the safety of rideshare passengers"* and that *"all methods implemented by smartphone ridesharing services to protect the safety of rideshare passengers can be rendered ineffective by the driver unilaterally switching off his or her smartphone"* arise from the second and third Advertisements.

8.8 The Advertiser further contends that:

"The third (radio) advertisement contains the following relevant words:

And with no fixed vehicle tracking, your ridesharing car could become completely untraceable

The fourth (print) advertisement contains the following relevant words:

NO FIXED VEHICLE TRACKING SYSTEM.

...

*And with no fixed vehicle **tracking, switch the smartphone off and the car becomes untraceable**".*

8.9 Accordingly, the Advertiser further contends that "this part of the advertisement draws a comparison between the fixed vehicle tracking systems which licensed taxis are required to install, and mobile based applications which depend upon mobile phones being switched on".

Representation Contended for by Advertiser can be substantiated

8.10 The Advertiser goes on to point out various regulatory regimes which do not apply to the Complainant's ridesharing services, including the *Passenger Transport Act 1990 (NSW)* and *Passenger Transport Act 2014 (NSW)* (Passenger Transport Acts); the *Passenger Transport Regulations 2007 (NSW)* the Gazetted Requirements for Security Camera Systems, Vehicle Tracking Devices and Duress Alarm Systems for Taxi-Cabs, which it points out require:

- (a) Mandatory security and safety cameras;
- (b) Mandatory, tamper-proof, fixed GPS tracking devices; and
- (c) Mandatory duress alarm systems.

8.11 Finally, the Advertiser submits that *"A statement to the effect that a car could become untraceable by virtue of the smartphone ridesharing services' dependence on smartphones is uncontroversial. None of the safeguards advanced by Uber (recording trips, providing driver details, sharing trip details and providing for feedback) can logically undermine the representation because they depend upon a smartphone continuing to be on and in the car while a trip is in progress"*.

Alleged Driver Check Representation

Representation contended for by Advertiser has not been made

- 8.12 The Advertiser states that the Complainant's contentions that the third and fourth advertisements also convey representations that *"no driver checks are conducted by smartphone ridesharing services"*; and *"rideshare drivers can keep driving in all cases where they have been charged with a serious criminal offence"* ignores clear qualifications included in each relevant Advertisement. In support the Advertiser points to the following:

"The third (radio) advertisement contains the following relevant words:

While taxi drivers are subject to government enforced checks, rideshare drivers can be charged with a serious criminal offence and keep driving.

The fourth (print) advertisement contains the following relevant words:

NO GOVERNMENT ENFORCED DRIVER CHECKS ...

Drivers can be charged with a serious criminal offence and keep driving.

[Underlining added for emphasis]".

- 8.13 The inclusion of the language above, the Advertiser contends, makes it clear that any representations about driver checks are qualified by reference to *"government checks"* and the word *"can"*.

Representation Contended for by Advertiser can be substantiated

- 8.14 Understood on the above basis, the Advertiser points to various government checks, standards and licensing requirements which apply to taxi drivers (both at the time of licensing and ongoing) under the Passenger Transport Acts, which are *"government enforced driver checks"*. In contrast, at the relevant times, it states that ridesharing services operated outside such requirements. Further, background checks or policies adopted by ridesharing services, the Advertiser also contends, were voluntary and dependant on monitoring and enforcement, such that a driver could be charged with a serious criminal offence and keep driving. The Advertiser also pointed to reported failures to undertake such effective checks and referred to the Complainant's own terms of service, including acknowledgment by the user that some ridesharing operators may not be professionally licensed or permitted.

Alleged Key Representation

- 8.15 As noted above, the Complainant submitted that the Advertisements make an overarching representation that ridesharing services are not safe. The Advertiser in response contends that, for the reasons set out above, such a Key Representation has not been made and cannot be discerned from any of the Advertisements.
- 8.16 For all of the above reasons the Advertiser contends that the Complaint in its entirety should be dismissed.

COMPLAINANT'S RESPONSES

- 8.17 In further reply on the substantive issues, the Complainant submitted the following further matters:

Representation likely to damage the business or goodwill of a competitor

- 8.18 The Complainant in its Reply reiterated its submission that *"consumers could be misled into thinking that ridesharing services are not safe and therefore may stop using ridesharing services if the misleading representations are believed to be true"*. As to likely damage, the Complainant pointed to the large number of consumers likely exposed to the Advertisements; that it formed the second stage of a campaign with the message that ridesharing services are not safe; that the Advertisements were highly emotive both as to use of words (for example *huge impact on life....untraceable*) and imagery (for example image of an anxious young woman and a young person in a wheel chair); the fact that some neutral commentators have recognised the possible impact of the campaign, including referring to it as *"classic scaremongering"*; and an *"anti-uber"* campaign; that the radio advertisements are spoken in a serious and authoritative manner; that safety is a priority issue for the Complainant and the Advertisements are likely to cause consumers to lose trust in the Complainant's commitment and ability to offer this to customers; and that the damage is likely to be ongoing, the Advertiser not having committed not to continue such misrepresentations.

Alleged No Insurance Representation

- 8.19 As to the contention by the Advertiser that it has used appropriate qualifying language, this was disputed by the Complainant, who pointed to the fact that any such language was directed to the consequences of having no insurance. The representations, it says, made by the Advertiser (unqualified) were that there was no insurance coverage (or correct coverage) for all ridesharing services, which is misleading. The Complainant generally further contends that the submissions made by the Advertiser are misleading and asserts that rideshare passengers using the UberX application are insured both by statutory CTP insurance and Uber's contingent injury policy.

Alleged Ineffective Safety Protection Representations and Vehicle Tracking Representation

- 8.20 The Complainant also submits that the Advertiser's contention that the representation made is that a car could become untraceable, because smartphone ridesharing services depend on a smartphone continuing to be on and in the car while a trip is in progress (which it says is justified) is irrelevant, because this is not the representation which was made in the relevant Advertisements. Rather, the Complainant submits that the Advertiser represented (in the third Advertisement) that a ridesharing car cannot be traced because it does not have fixed vehicle tracking and that this statement is unqualified and misleading. Further, in respect of the fourth Advertisement, although reference is made to traceability dependant on a smartphone being in operation, it further represents that the safety features of smartphone ridesharing services can be rendered ineffective by the driver unilaterally switching off his or her smartphone. The Complainant contends that the representation also made is that only one smartphone (that of the driver) is in the car and can be deactivated, which is misleading and incorrect. Further, the Complainant points to the fact that requirements for taxis, that certain safety measures are required, does not guarantee that they are always functional, or unable to be circumvented.

Alleged Driver Check Representation

- 8.21 The Complainant further contends that the Advertiser has represented that ridesharing services do not conduct any checks, or at least any adequate checks, which would prevent rideshare drivers charged with a serious criminal offence from driving. This representation it contends is made and is misleading for the reasons set out in paragraph 4.3 of the Complaint. As to the Advertiser's contention that government enforced checks will always be better than voluntary checks, the Complainant also contends that this is misleading and incorrect, as there are instances where drivers have failed to meet the requirements of voluntary checks but met the government requirements.

Alleged Key Representation

- 8.22 The Complainant submits that all of the representations made by the Advertiser have a common theme, that ridesharing services are not safe. This, it says, is reinforced by use of the tag line "*Taxis put your safety first*" in each of the Advertisements and use of the word "*unsafe*". Given the Complainant's submission that each of the particular representations dealt with above are made in an unqualified manner and are false and misleading, likewise it submits that the Key Representation is equally false and misleading. The Complainant also contends that the Advertisements contain a misleading overall message (of lack of safety) which is not addressed by any qualifying language or otherwise. It is also noted that the Advertisements (at the time of the submission at least) were still available to the general public via various forms. Further, the Complainant notes that the Advertiser has not committed not to engage in further advertising campaigns including any of the alleged misleading representations in the future.

ADVERTISER'S FURTHER RESPONSES

- 8.23 The Advertiser provided a further submission in reply. The Board does not consider it necessary to outline the matters raised in further detail as the substance of these submissions was captured in earlier submissions and no new additional or materially different arguments were made in addition to those outlined above, and that the matters set out above sufficiently outline the position of the Complainant and Advertiser.

9. DETERMINATION

Introduction

- 9.1 Further to the jurisdictional issue, the Complaint requires determination in respect of four Advertisements, two radio advertisements (Annexures A and C) and two print advertisements (Annexures B and D of the Complaint), which are dealt with respectively below.
- 9.2 To the extent that the Board has determined breaches of section 1.2 of the Code, this is on the basis that the conduct identified is misleading or deceptive or likely to mislead or deceive pursuant to section 18 and (in some cases) also sections 29(1)(b) and (g) of the *Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010)*.
- 9.3 In considering and determining the matters raised by the Complainant, the Board has adopted the approach of the High Court in *ACCC v TPG Internet Pty Ltd* [2013] HCA 54 in considering the Advertisements as a whole. In particular, the High Court has noted that the dominant message test is central to the assessment of whether particular advertisements are misleading or deceptive. In that case, the High Court noted that use of any qualifying

statements needed to be clear and prominent, to be relied upon to counter an argument that a representation may be misleading or deceptive. The Board considers that this general principle applies equally to the use of any qualifying or limiting language, as the Advertiser submitted has occurred in this case.

9.4 The Board's determination has been made on the basis of the overall content and context of the Advertising, which the Board considers is also consistent with the accepted approach in *Parkdale Custom Built Furniture Pty Limited v Puxu Pty Limited* (1989) 149 CLR 191 (particularly Gibbs CJ at 199). The Complainant and Advertiser have each contended that certain emphases might apply or be given to certain words or images (either less or more) in the Advertisements. While the Board has given such submissions due consideration, overall the Board's view is that use of certain words or imagery should not be looked at in isolation, but in the context of the Advertisements in their totality, which is consistent with the above approach (see for also Shephard J in *Tobacco Institute of Australia v AFCO* (1993) ATPR 41-199 at 40, 759).

9.5 The two print advertisements are first considered below:

The Print Advertisements

The Second Advertisement (Annexure B)

9.6 In respect of the second Advertisement (print advertisement Annexure B) the Board is of the view that the totality of this print advertisement conveys an overarching message to consumers that ridesharing services are not safe and that there are ineffective safety protections in place for such services. As such, the Board considers that the Key Representation as outlined in the Complaint is made by the Advertiser in the second Advertisement, when read as a whole. Based on the material before the Board, it does not consider that this representation is one which can be substantiated by objective facts and does not consider that any language used necessarily or sufficiently qualifies this representation. As a result, the Board does consider that the representation is likely to be misleading or deceptive to consumers.

9.7 Additionally, the Board has considered the particular further representation contended for in the Complaint relevant to the second Advertisement in Annexure B. Namely, that there is no (or inadequate) insurance cover for rideshare passengers, which could result in passengers being personally liable for financial consequences in some accidents.

9.8 The Board does not agree with the Advertiser that use of the terms "*correct*", "*some*", "*could*" and "*may*" in the full context of this Advertisement (both its text and imagery), provides sufficient qualification. The submission that this Advertisement, at its highest, conveys a representation of only some risk and uncertainty as to the effectiveness of insurance arrangements for some users of ridesharing services, is also not accepted by the Board. The Board considers that the more likely overall impression to the reader of this second Advertisement is that ridesharing services do not have any, or the required or sufficient, insurance cover to adequately protect customers. If the Advertiser had intended to convey that lack of, or insufficient, insurance was merely a potential risk (and then only in certain circumstances) it could have done so. However, the Board's view is that the content of the second Advertisement, the prominence of the key words and emphasis given to some parts of this Advertisement (for example the core message versus what the Advertiser contends is qualifying language), the visual images and the impression

of this advertisement as a whole, do not convey such a limited message. Given the Board's view about the broader representations being made, and the material provided, such representations are not substantiated, even on the Advertiser's own position (contending for a more limited meaning of any representations which were made and the provision of supporting material to justify that more limited analysis).

- 9.9 The Board therefore agrees with the Complainant as to the fact that the Key Representation and additional representation set out above (and earlier in this Case Report) are made in this second Advertisement and are misleading or deceptive in breach of section 1.2 of the Code.
- 9.10 In respect of any breach of section 1.3 of the Code, the Board is also satisfied that the representations made in respect of this second Advertisement would also amount to a breach of section 1.3. In support of the contrary view, the Advertiser points to the Board's determination in *Rheem Australia Pty Ltd v Rinnai Australia Pty Ltd (2014) 14 ACB 2 at page 8* and in particular the following statement:

*"The Board is not, however, satisfied that the representations made amounts to a breach of section 1.3 of the Code (as is contended). In order to breach this section, the relevant misrepresentation must be shown to be **likely** to cause damage to the business or goodwill of a competitor. The Board considers the representations dealt with in this section **may** cause damage to the Complainant (or other competitors in the market), clearly as it was the Advertiser's apparent intention to convey to consumers that the competitor products were significantly inferior and unreliable. The Board was not, however, provided with any information or evidence on which it could determine whether this would be **likely** to cause any damage to the Complainant (or any other competitors in the market). On this basis the Board is unable to determine that any breach of section 1.3 of the Code has occurred."*

- 9.11 The Advertiser contended that the Complainant had not provided evidence to substantiate this matter and that any claim under section 1.3 of the Code should be dismissed. The Board does not agree and considers that the representations it has found were contained in the second Advertisement were likely to cause damage to the business or goodwill of a competitor. In the Board's view, the tone, content and intent of the second Advertisement, is quite different to the advertising which was being dealt with in the *Rheem Case*. As a matter of principle, the Board agrees with what is said above, extracted from that Case. However, the Board also considers that when applied to the current facts and the second Advertisement, given the content of that Advertisement as a whole and the representations which have been found to have been made in the second Advertisement, that the likelihood of damage to the business or goodwill of the Complainant is sufficiently evident to substantiate a breach of section 1.3 of the Code.

The Fourth Advertisement (Annexure D)

- 9.12 In respect of the fourth Advertisement (print advertisement Annexure D) the Board is of the view that (as with the second Advertisement, print advertisement Annexure B) the totality of this print advertisement conveys an overarching message to consumers that ridesharing services are not safe and that there are ineffective safety protections in place for such services. As such, the Board considers that the Key Representation as outlined in the Complaint is made by the Advertiser in the fourth Advertisement, when read as a

whole. As with the second Advertisement, based on the material before the Board, it does not consider that this representation is one which can be substantiated, does not consider that any language used qualifies this representation and as a result considers that the representation is likely to be misleading or deceptive to consumers.

9.13 Additionally, the Board has considered the particular further representations contended for in the Complaint relevant to the fourth Advertisement in Annexure D. Namely, that the methods implemented by smartphone ridesharing services are inadequate to protect the safety of rideshare passengers; all methods implemented by smartphone ridesharing services to protect the safety of rideshare passengers can be rendered ineffective by the driver unilaterally switching off his or her smartphone; no driver checks are conducted by smartphone ridesharing services; and rideshare drivers can keep driving in all cases where they have been charged with a serious criminal offence.

9.14 In summary, the Board has determined that the further representations contended for by the Complainant, as set out above, were also made in respect of the fourth Advertisement. As to each of those representations, the Board briefly further comments as follows:

- The Advertiser contended that the fourth Advertisement included words which indicated that the intent was to draw a comparison between fixed vehicle tracking systems (which licensed taxis are required to install) and mobile based applications (dependent on mobile phones being switched on). The Board does not agree and considers that the fourth Advertisement contains the relevant representations on this issue as contended for by the Complainant. In that regard the representations are not in the Board's view substantiated and are likely to be misleading and deceptive to consumers.
- The Advertiser also contended that the Complainant's contentions that the third Advertisement also conveyed representations that "*no driver checks are conducted by smartphone ridesharing services*"; and "*rideshare drivers can keep driving in all cases where they have been charged with a serious criminal offence*" ignored clear qualifications included in the fourth Advertisement including use of the word "*government enforced*" in respect of checks and "*can*" in respect of a driver being charged with a serious criminal offence and continuing driving. The Board does not agree with the Advertiser that the inclusion of such language makes it clear that any representations about driver checks are qualified by reference to "*government checks*" and the word "*can*". The Board considers that the fourth Advertisement contains the relevant representations on this issue as contended for by the Complainant. In that regard the representations are not in the Board's view substantiated and are likely to be misleading or deceptive to consumers.

9.15 The Board therefore also agrees with the Complainant as to the fact that the Key Representation and additional representations set out above (and earlier in this Case Report) arise from this fourth Advertisement and are misleading or deceptive in breach of section 1.2 of the Code.

- 9.16 For the reasons set out above in respect of the second Advertisement, the Board also determines that the further Advertisement also amounts to a breach of section 1.3 of the Code.

The Radio Advertisements

The Board will now review the two radio advertisements.

The First Advertisement (Annexure A)

- 9.17 The First Advertisement is a radio advertisement, the transcript of which is at Annexure A.
- 9.18 As noted above, the Complainant contends that each of the radio advertisements also makes the Key Representation.
- 9.19 The Board considers that when the First Advertisement is listened to in its entirety, including the tone and emphasis used by the speaker, it conveys an overarching message to the audience that ridesharing services are not safe and that there are ineffective safety protections in place for such services. The Board does not agree with the Advertiser that use of the terms "*correct*", "*some*" and "*could*" in the full context of the First Advertisement provides any sufficient qualification to the absolute terms "*aren't as smart as you might think*" and "*no insurance cover*" and do not sufficiently qualify the overall impression conveyed by the advertisement as a whole. In particular, the Board considers that the audience is likely to understand that the word "*could*" in the sentence "*Share a ride and you could be putting yourself at risk*" is a reference to the possibility of an accident occurring, for which there is no insurance cover, which, in the context of the advertisement as a whole, is likely to convey the impression to consumers that smartphone ridesharing services are not safe and that there are ineffective safety protections in place for such services.
- 9.20 The Board therefore considers that the Advertiser made the Key Representation in the First Advertisement. Based on the material before the Board, the Board does not consider that the Key Representation can be substantiated. It is an absolute representation that ridesharing services are unsafe and that there are ineffective safety protections in place for such services and the Advertiser accepts that this is not the case in all circumstances. The Board therefore considers that the Key Representation is likely to be misleading or deceptive to consumers.
- 9.21 As noted above, the Complainant also contends that the First Advertisement makes a further representation that there is no insurance cover for rideshare passengers, so that in the event of some accidents, the passenger could be personally liable for the financial consequences (Insurance Representation).
- 9.22 The Advertiser submits that the First Advertisement conveys a representation of only some risk and uncertainty as to the effectiveness of insurance arrangements for some users of ridesharing services, based on the use of the terms "*correct*", "*some*" and "*could*". The Advertiser submits that these words make clear to the audience that there is a risk that ridesharing services may not have insurance cover in place to adequately protect customers in certain circumstances. The Board considers it unlikely that the audience for this radio advertisement would focus on these individual words. The Board considers that the more likely overall impression conveyed to the listener is that ridesharing services do

not have any, or the required or sufficient, insurance cover to adequately protect customers. The Board considers it unlikely that the audience will pay close attention to the specific words used when listening to a short spoken radio advertisement. To the extent the audience pays attention to the word "correct" in the phrase "*without the correct insurance, there is no insurance cover*", the Board considers the words "*without the correct insurance*" to be ambiguous and insufficient to adequately qualify the absolute statement "*there is no insurance cover*". The Board's view is that the First Advertisement, when its content, tone and emphasis are considered as a whole, is likely to convey the representation complained of by the Complainant.

- 9.23 The Board therefore considers that the Advertiser made the Insurance Representation. Based on the material before it, the Board considers that the Insurance Representation is not substantiated. It is an unqualified representation that there is no insurance for rideshare passengers and the Advertiser, by submitting that it intended to raise these matters as potential risks, accepts that this is not the case in all circumstances. The Board therefore considers that the Insurance Representation is likely to be misleading or deceptive to consumers.
- 9.24 For the reasons set out above in respect of the Print Advertisements, the Board also determines that the First Advertisement also amounts to a breach of section 1.3 of the Code.

The Third Advertisement (Annexure C)

- 9.25 The Third Advertisement is a radio advertisement, the transcript of which is at Annexure C.
- 9.26 The Board considers that the Third Advertisement when listened to in its entirety, including its content and the tone used and emphasis given by the speaker, conveys an overarching message to consumers that ridesharing services are not safe and that there are ineffective safety protections in place for such services.
- 9.27 The Board therefore considers that the Advertiser made the Key Representation in the Third Advertisement. Based on the material before the Board, the Board does not consider that this representation is one which can be substantiated. It is an absolute representation that ridesharing services are unsafe and the Advertiser, by submitting that the advertisement intended to raise these matters as potential risks, accepts that this is not the case in all circumstances. The Board therefore considers that the Key Representation is likely to be misleading and deceptive to consumers.
- 9.28 The Complainant also contends that the Third Advertisement made the following specific representations:
- (a) That the methods implemented by smartphone ride sharing services are inadequate to protect the safety of rideshare passengers;
 - (b) All methods implemented by smartphone ridesharing services to protect the safety of rideshare passengers can be rendered ineffective by the driver unilaterally switching off his or her smartphone;
 - (c) No driver checks are conducted by smartphone ridesharing services;

- (d) Rideshare drivers can keep driving in all cases where they have been charged with a serious criminal offence.
- 9.29 The Board considers that each of these further representations was made in the Third Advertisement. The Advertiser contended that the Third Advertisement included words which indicated that the intent was to draw a comparison between fixed vehicle tracking systems (which licensed taxis are required to install) and mobile based applications (dependent on mobile phones being switched on). The Board does not agree. There is no reference in the Third Advertisement to mobile based applications and this submission relies on the audience noting the word "*fixed*" and inferring from this that ridesharing services use mobile tracking systems. The Board considers it unlikely that the audience for this radio advertisement would pay close attention to each word of the advertisement nor would they make such an inference from the advertisement, having regard to its content and the tone and emphasis used by the speaker.
- 9.30 The Board therefore considers that the Third Advertisement, considered in its entirety including its content and the tone and emphasis used by the speaker, conveys the overall impression that the methods implemented by smartphone ride sharing services are inadequate to protect the safety of rideshare passengers.
- 9.31 The Advertiser also contended that the Complainant's contentions concerning driver checks and rideshare drivers continuing to drive where they have been charged with a serious criminal offence ignore clear qualifications including the use of the word "*government enforced*" in respect of checks and "*can*" in respect of a driver being charged with a serious criminal offence and continuing driving. The Board does not agree. The Board considers it unlikely that the audience for this radio advertisement would pay close attention to these specific words and would be more likely to understand that ridesharing drivers are not subject to driver checks and that a driver who has been charged with a serious criminal offence may continue driving.
- 9.32 The Board therefore considers that the Third Advertisement when considered in its entirety, including its content and the tone and emphasis used by the speaker, conveys the overall impression that no effective driver checks are conducted by smartphone ridesharing services and that rideshare drivers can in all cases keep driving where they have been charged with a serious criminal offence. Based on the material before it, the Board does not consider these further representations can be substantiated. They are absolute representations and the Advertiser, by submitting that the advertisement was intended to raise these matters as potential risks, accepts that this is not the case in all circumstances. The Board therefore considers the further representations are likely to be misleading and deceptive to consumers.
- 9.33 For the reasons set out above in respect of the Print Advertisements, the Board determines that the Third Advertisement also amounts to a breach of section 1.3 of the Code.

Advertiser Statement

On 8 April 2016 the Advertiser was provided with a copy of the Claims Board's determination. In accordance with the Guidelines and on the basis of the Claims Board's determination, the Advertiser was requested to provide an Advertiser Statement indicating whether it would modify or discontinue the Advertisement.

On 15 April, the Advertiser provided the following response:

"As the advertiser has stated in submissions to the Board, the advertisements that are the subject of the complaint had ceased to be published and broadcast by 7 December 2015 (before the complaint was made) and it had previously resolved not to continue the advertisements.

In the spirit of reaching a practical resolution of the dispute, remaining links to advertisements in a press release contained in the news section of the website were removed on a without admissions basis. Steps were also taken to identify and remove any other versions of the advertising materials.

For the purposes of clauses 4.3.2 and 4.3.3 of the Advertising Claims Board's Procedural Guidelines for Participants, for the avoidance of any doubt, and without any admission that it has contravened any relevant legislation, the advertiser confirms again that the advertising has been discontinued."

Annexure A - The First Advertisement

This is a radio advertisement, accessible for a period via a link on the Advertiser's website (the link has now been removed from the Advertiser's website), the transcript of which is:

Smartphone ridesharing services aren't as smart as you might think. Know the facts. Without the correct insurance, there is no insurance cover, meaning in the event of some accidents, it could be you paying the bills. This could have a huge impact on the quality of your life. Share a ride and you could be putting yourself at risk. If you're thinking about ridesharing, think again and grab a cab. Taxis put your safety first. Authorised by the NSW Taxi Council, Sydney.

Annexure B - The Second Advertisement

This is a print advertisement previously accessible via a link on the Advertiser's website (the image of the print advertisement has now been removed from the Advertiser's website), featuring an image of a man facing away and seated in a wheelchair with the text:

Ridesharing.

Know the facts.

Know the potential costs.

WITHOUT THE CORRECT INSURANCE YOU MAY NOT BE COVERED.

Smartphone ridesharing services aren't as smart as you think. Without the correct insurance, you could be paying the bills in the event of some accidents. This could have a huge impact on the quality of your life. If you're thinking about ridesharing, think again.

Taxis put your safety first.

Annexure C - The Third Advertisement

This is a radio advertisement previously accessible via a link on the Advertiser's website (the link has now been removed from the Advertiser's website), the transcript of which is:

Smartphone ridesharing services aren't as smart as you might think. While taxi drivers are subject to government enforced checks, rideshare drivers can be charged with a serious criminal offence and keep driving. And with no fixed vehicle tracking, your ridesharing car could be completely untraceable. So who's driving you home? If you're thinking about ridesharing, think again and grab a cab. Taxis put your safety first. Authorised by the NSW Taxi Council, Sydney.

Annexure D - The Fourth Advertisement

This is a print advertisement, previously accessible via a link on the Advertiser's website (the image of the print advertisement has now been removed from the Advertiser's website), featuring an image of a young woman looking out of a car window with the text:

Ridesharing.

Know the facts.

Know the potential danger.

NO FIXED VEHICLE TRACKING SYSTEM.

NO GOVERNMENT ENFORCED DRIVER CHECKS.

Smartphone ridesharing services aren't as smart as you think. Drivers can be charged with a serious criminal offence and keep driving. And with no fixed vehicle tracking, switch the smartphone off and the car becomes untraceable. If you're thinking about ridesharing, think again.

Taxis put your safety first.