



Ad Standards Community Panel  
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Ad Standards Limited  
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## Case Report

|                                  |                                    |
|----------------------------------|------------------------------------|
| 1. Case Number :                 | 0041-22                            |
| 2. Advertiser :                  | Subway Franchisee Advertising Fund |
| 3. Product :                     | Food/Bev Venue                     |
| 4. Type of Advertisement/Media : | TV - Free to Air                   |
| 5. Date of Determination         | 23-Feb-2022                        |
| 6. DETERMINATION :               | Dismissed                          |

### ISSUES RAISED

AANA Code of Ethics\2.1 Discrimination or Vilification  
AANA Code of Ethics\2.4 Sex/sexuality/nudity  
AANA Code of Ethics\2.6 Health and Safety

### DESCRIPTION OF ADVERTISEMENT

This television advertisement features two men in a pool. One is holding a portable stereo and one is sitting on a giant inflatable subway sandwich.

### THE COMPLAINT

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

*It plainly is suggesting the other mans penis can go into the other guys mouth. The acting of the men is very suggestive. I see this ad many times throughout prime time airing and also in tv breaks for kids shows. The ad is very inappropriate*

*I found it offensive and racist. The white man reminiscent of the all the white colonialists out in the front and high off the ground riding on horses, camels, or being carried so they don't get dirty or wet, while the black man reminiscent of all the black porters and slaves carrying the white man's equipment and following on behind at ground level and on foot, getting dirty and wet. Absolutely unacceptable.*

*Why do you need someone in the pool holding music in the first place and why a black man. It's offensive.*



## THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complainant/s regarding this advertisement include the following:

*Thank you for providing Subway with the opportunity to respond to complaint reference: 0041-22 dated 14 February 2022 filed in respect of an advertisement commissioned by Subway Franchisee Advertising Fund of Australia Pty Ltd I 071 190 317 for the Subway® brand in Australia (Subway). We note we received a further complaint dated 17 February 2022 with the same reference (Further Complaint). The Further Complaint has been responded to separately and is not included in this response.*

*Subway stringently opposes any characterisation that its Floating Footlong commercial (the Advertisement) suggests discriminatory behaviours or promotes sex or nudity.*

*The Advertisement is a continuation of the Subway® SubBoat advertisements. Imagery, framing, music and actors in the Advertisement mirror those of the SubBoat advertisements. We believe this imagery is well-established with audiences following the success of the previous advertisements.*

*All parts of section 2 of the AANA Advertiser Code of Ethics has been addressed as required. Enclosed is a copy of the script and a copy of the Advertisement as aired for the Community Panel's review.*

*Compliance with AANA Code of Ethics Section 2.1 Discrimination or Vilification\Race.*

*Subway asserts the Advertisement complies with Section 2.1 of the Code of Ethics. The Advertisement does not depict, encourage or imply discrimination (i.e. depict unfair or less favourable treatment) or vilification (i.e. humiliate, intimidate, incite hatred, contempt or ridicule) towards any of the following groups: race, ethnicity, nationality, gender, age, sexual preference, or religious views, disability or political belief.*

*The Advertisement depicts two men of varying races with no implication of inequality or mistreatment. The Advertisement uses humour, however, this does not create a negative impression. The two male actors were cast as a light-hearted homage to their previous appearance in the Subway® SubBoat advertisements.*

*Furthermore, the Advertisement was reviewed by Publicis Worldwide and Subway Australia and New Zealand Communications Manager.*

*Accordingly, Subway does not believe this section applies.*

*Compliance with AANA Code of Ethics Section 2.2 Exploitive or Degrading*



*Section 2.2 of the Code of Ethics prohibits the use of sexual appeal in advertising which is exploitive of or degrading to any individual or group of people.*

*Subway asserts the Advertisement complies with Section 2.2 of the Code of Ethics. The Advertisement does not:*

- exploit (ie. take advantage of the sexual appeal of a person or group of people or depict them as objects or commodities or focus on body parts where this bears no direct relevance to the product or service being advertised); or*
- degrade (lower character of a person or group of people or depict them as a sexual object or commodity).*

*As highlighted in response to section 2.1 of the Code of Ethics above, the Advertisement uses humour, however this does not create a negative impression. The two male actors were cast as a light-hearted homage to their previous appearance in the Subway® SubBoat advertisements. At no point during the Advertisement does a person appear in a suggestive or sexualised way. This is a light-hearted scenario and Subway does not believe the male actors have been objectified for the enjoyment of others nor lowered in character or quality.*

*Accordingly, Subway does not believe this section applies.*

*Compliance with AANA Code of Ethics Section 2.3 Violence*

*The Advertisement does not feature violence or consequences of violence. The Advertisement does not feature any suggestion of malice, violence against animals or realistic depictions of the consequences of violence. Accordingly, Subway does not believe this section applies.*

*Compliance with AANA Code of Ethics Section 2.4 Sex/sexuality/nudity\S/S/N – general.*

*Subway asserts the Advertisement complies with section 2.4 of the Code of Ethics. The Advertisement does not depict sexual acts or nudity and treats sex, sexuality and nudity with sensitivity to the relevant audience.*

*The Advertisement depicts two men in an above-ground backyard pool. Both men are appropriately clothed for swimming (in a t-shirt and boardshorts and boardshorts alone, respectively). One male actor is using a floating pool toy. The manner in which the male actor is using the floating pool toy is not dissimilar to other floating pool toys currently on the market, that is, having one leg on either side of the floating pool toy to affect one's balance. The Advertisement shows the male actor in that form, floating in the pool, trying to keep his balance by using his arms and at one point raises his arms above his head. The male actor does not make any movement or action which is suggestive of any sexual activity. We respectfully deny any depiction or implication of sexual activity in the Advertisement.*



*Accordingly, Subway does not believe this section applies.*

*Compliance with AANA Code of Ethics Section 2.5 Language*

*The Advertisement does not use any verbal script at all save for the disclaimer at the end. There is no profanity or allusions to profanity. On this basis, Subway does not consider this section applies.*

*Compliance with AANA Code of Ethics Section 2.6 Health and Safety*

*Section 2.6 of the Code of Ethics provides that advertising or marketing communication shall not depict material contrary to prevailing Community Standards on health and safety. The complaint received makes reference to “someone in the pool holding music” as a potentially dangerous scenario.*

*Subway asserts the Advertisement complies with section 2.6 of the Code of Ethics as no unsafe practices are portrayed in the Advertisement. In our view, the male actor holding the equipment is akin to a person using an appropriate pool or water-based activity Bluetooth speaker or other cordless item such as a mobile phone, cordless telephone, or handheld fan. There are no visible electronic cords or wires which suggests a safety risk. Furthermore, the Advertisement was filmed under strict controls and safety standards. The music and actions in the Advertisement are exaggerated to present the scenario as comedic and unrealistic. It was not intended to depict an unsafe scenario or to depict the scene as a common everyday practice.*

*Accordingly, Subway does not believe this section applies.*

*Compliance with AANA Code of Ethics Section 2.7 Clearly Distinguishable*

*The Advertisement featured on a free to air commercial network during a commercial ad break. Subway does not consider this section applies to the Advertisement. The Advertisement uses male actors from a previous (and successful) advertisement campaign which is relatable to Subway. The Advertisement shows images of Subway Footlong® subs, Subway® cookies, Subway® choicemark logo and concludes with Subway® ‘Feels Good’ slogan. It is clear to the consumer that they are watching a Subway® commercial advertising our products and promotion.*

*Conclusion*

*Thank you again for the opportunity to provide a response to this complaint. On the basis of the above, we respectfully submit that the complaint received should be dismissed.*

*Complaint 0041-22 – Further complaint*

*Thank you for providing Subway with the opportunity to respond to complaint reference: 0041-22 dated 17 February 2022 filed in respect of an advertisement*



*commissioned by Subway Franchisee Advertising Fund of Australia Pty Ltd ACN 071 190 317 for the Subway® brand in Australia (Subway). We note we received a prior complaint dated 14 February 2022 with the same reference (Prior Complaint). The Prior Complaint has been responded to separately and is not included in this response.*

*Subway stringently opposes any characterisation that its Floating Footlong commercial (the Advertisement) suggests discriminatory or unsafe behaviours or promotes sex or nudity.*

*Each sub-section of the Code has been addressed in our response to the Prior Complaint as required (along with copies of the script and a copy of the Advertisement as aired for the Community Panel's review). This response specifically references the issues raised to date being sections 2.1, 2.4 and 2.6 of the AANA Advertiser Code of Ethics.*

*Compliance with AANA Code of Ethics Section 2.1 Discrimination or Vilification\Race. Subway asserts the Advertisement complies with Section 2.1 of the Code of Ethics. The Advertisement does not depict, encourage or imply discrimination (i.e. depict unfair or less favourable treatment) or vilification (i.e. humiliate, intimidate, incite hatred, contempt or ridicule) towards any of the following groups: race, ethnicity, nationality, gender, age, sexual preference, or religious views, disability or political belief.*

*The Advertisement depicts two men of varying races with no implication of inequality or mistreatment. The Advertisement uses humour, however, this does not create a negative impression. The two male actors were cast as a light-hearted homage to their previous appearance in the Subway® SubBoat advertisements.*

*Furthermore, the Advertisement was reviewed by Publicis Worldwide and Subway Australia and New Zealand Communications Manager.*

*Accordingly, Subway does not believe this section applies.*

*Compliance with AANA Code of Ethics Section 2.4 Sex/sexuality/nudity\S/S/N – general.*

*Subway asserts the Advertisement complies with section 2.4 of the Code of Ethics. The Advertisement does not depict sexual acts or nudity and treats sex, sexuality and nudity with sensitivity to the relevant audience.*

*The Advertisement depicts two men in an above-ground backyard pool. Both men are appropriately clothed for swimming (in a t-shirt and boardshorts and boardshorts alone, respectively).*

*We note the referenced suggestion of sexual activity. We respectfully deny any depiction or implication of sexual activity in the Advertisement. At no point in the Advertisement does a person of any gender appear in a suggestive or sexualised way.*



*Accordingly, Subway does not believe this section applies.*

*Compliance with AANA Code of Ethics\2.6 Health and Safety\Unsafe behaviour.*

*Section 2.6 of the Code of Ethics provides that advertising or marketing communication shall not depict material contrary to prevailing Community Standards on health and safety. The complaint received makes reference to “someone in the pool holding music” as a potentially dangerous scenario.*

*Subway asserts the Advertisement complies with section 2.6 of the Code of Ethics as no unsafe practices are portrayed in the Advertisement. In our view, the male actor holding the equipment is akin to a person using an appropriate pool or water-based activity Bluetooth speaker or other cordless item such as a mobile phone, cordless telephone, or handheld fan. There are no visible electronic cords or wires which suggests a safety risk. Furthermore, the Advertisement was filmed under strict controls and safety standards. The music and actions in the Advertisement are exaggerated to present the scenario as comedic and unrealistic. It was not intended to depict an unsafe scenario or to depict the scene as a common everyday practice.*

*Accordingly, Subway does not believe this section applies.*

*Conclusion*

*Thank you again for the opportunity to provide a response to this complaint. On the basis of the above, we respectfully submit that the complaint received should be dismissed.*

## **THE DETERMINATION**

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches Section 2 of the AANA Code of Ethics (the Code).

The Panel noted the complainants’ concerns that:

- the advertisement is racist
- the advertisement contains inappropriate sexual suggestion
- the advertisement contains unsafe behaviour.

The Panel viewed the advertisement and noted the advertiser’s response.

**Section 2.1: Advertising shall not portray or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual orientation, religion, disability, mental illness or political belief.**

The Panel noted the Practice Note to Section 2.1 provides the following definitions:

*“Discrimination – unfair or less favourable treatment.*



*Vilification – humiliates, intimidates, incites hatred, contempt or ridicule.”*

The Panel noted the complainant’s concern that the advertisement depicted a darker-skinned man in a subservient position to a Caucasian man.

The Panel considered that the two men in the advertisement were depicted as friends and neither was shown to be acting deferentially to the other.

The Panel considered that the darker-skinned man was not shown to receive less favourable treatment and was not humiliated or ridiculed.

### **Section 2.1 conclusion**

The Panel considered that the advertisement did not portray or depict material in a way which discriminates against or vilifies a person or section of the community on account of race and determined that the advertisement did not breach Section 2.1 of the Code.

### **Section 2.4: Advertising shall treat sex, sexuality and nudity with sensitivity to the relevant audience.**

The Panel noted the complainant’s concern that the inflatable sub was clearly suggestive of a man’s penis and that this was inappropriate to be seen by children.

#### **Does the advertisement contain sex?**

The Panel considered whether the advertisement contained sex. The Panel noted the definition of sex in the Practice Note is “sexual intercourse; person or persons engaged in sexually stimulating behaviour”.

The Panel noted that the advertisement did not feature sex.

#### **Does the advertisement contain sexuality?**

The Panel noted the definition of sexuality in the Practice Note is “the capacity to experience and express sexual desire; the recognition or emphasis of sexual matters”.

The Panel considered that the man in the advertisement was clearly sitting on an inflatable sandwich which could be obtained through a promotion. The Panel considered that there was no romantic or sexual interaction between the two men shown in the advertisement. The Panel considered that the advertisement did not contain sexuality.

#### **Does the advertisement contain nudity?**



The Panel noted that the definition of nudity in the Practice Note is “the depiction of a person without clothing or covering; partial or suggested nudity may also be considered nudity”.

The Panel noted that both men were appropriately clothed to be in a pool and that the advertisement did not contain nudity.

#### **Section 2.4 Conclusion**

The Panel determined the advertisement did not contain sex, sexuality and nudity and therefore Section 2.4 of the Code did not apply.

#### **Section 2.6: Advertising shall not depict material contrary to Prevailing Community Standards on health and safety.**

The Panel noted the complainant’s concern relating to the electrical device being held by one of the men while he was in the water.

The Panel noted that it had upheld complaints about a similar issue in case 0256-20, in which:

*“The Panel considered that the depiction of a person placing or retrieving an electrical appliance in water is a depiction of behaviour that is unsafe – regardless that the depicted music player is operating on battery power. The Panel considered that although the advertisement is unrealistic, the depiction of a person using an electrical appliance in the bathtub is the focus of the advertisement.*

*The Panel noted that the image of the man in the bathtub using the equipment is the focus of the advertisement and there is no indication or suggestion that such behaviour is potentially unsafe. Although the use of a ghetto blaster, which is not plugged in, in a bathtub may not itself be dangerous, the Panel considered that the depiction of the use of such equipment in water undermines public messages about safe use of electrical appliances around water.*

*In the Panel’s view the use of electrical equipment in and around water is unsafe and there is significant effort made in the community to educate people about such dangers. The Panel determined that the depiction of behaviour which is contrary to clear public safety messaging is contrary to prevailing community standards on safety.”*

The Panel noted that unlike case 0256-20, the current advertisement did not depict the electrical device being placed in water. The Panel noted that in the final scene the device had been seen to be placed safely to the side and not in the water. The Panel considered that the setting of the outdoor pool and the depiction of a battery powered device that was clearly not connected to power, was not a depiction which would encourage unsafe use of electrical equipment around water.





### **Section 2.6 conclusion**

The Panel considered that the advertisement did not contain material contrary to Prevailing Community Standards on health and safety and determined that it did not breach Section 2.6 of the Code.

### **Conclusion**

Finding that the advertisement did not breach the Code on other grounds, the Panel dismissed the complaints.