



Ad Standards Community Panel
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Ad Standards Limited
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Case Report

1. Case Number :	0076-21
2. Advertiser :	Sportsbet
3. Product :	Gambling
4. Type of Advertisement/Media :	TV - Pay
5. Date of Determination	14-Apr-2021
6. DETERMINATION :	Upheld - Modified or Discontinued
7. IR Recommendation:	Panel to Reconsider
8. Date of reviewed determination:	9-Jun-2021
9. Determination on review:	Dismissed

ISSUES RAISED

AANA Wagering Code\2.1 Directed to Minors

DESCRIPTION OF ADVERTISEMENT

This Pay TV advertisement features an animated football player who is being tackled. He smiles and winks at the camera as he places the ball down to score a try. He then celebrates. The voice-over states, "Want a flying start to this football season? Well if your team scores a try in the first five minutes, you win. We'll pay you out straight away. Footy's back with Sportsbet".

THE COMPLAINT

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

The ad was animated, and it was clearly imitating the style of the video game Fortnite. I am a teacher, and I know about half of my students play that video game and many of them also watch football. It seems to me there is a deliberate attempt by Sportsbet to associate the two and target a younger audience, many of whom would be under the age of 18.

THE ADVERTISER'S RESPONSE



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

We refer to your letter dated 31 March 2021 and the Complaints mentioned above regarding the Advertisements, digital files of which are enclosed.

The Complaints

Ad Standards has identified the following section of the AANA Wagering Advertising & Marketing Communication Code (Code) which is addressed in the Complaints:

2.1 Advertising or Marketing Communication for a Wagering Product or Service must not, having regard to the theme, visuals and language used, be directed primarily to Minors.

Sportsbet rejects that the Advertisements breach section 2.1 or any other section of the Code. However, in the interests of protecting the welfare of minors and continuing to meet our obligations as a responsible wagering operator, Sportsbet has decided to remove the Advertisements from all channels and mediums through which they are currently communicated. This work has already begun and will be finalised over the course of the next week as alternative advertising is arranged.

Conclusion

We trust that the action taken by Sportsbet in this instance brings an end to the matters raised in the Complaints. However, please do not hesitate to contact me if you have any further queries.

THE ORIGINAL DETERMINATION 14-April-2021

The Ad Standards Community Panel (Panel) considered whether this advertisement breaches the AANA Wagering Advertising and Marketing Communication Code (Wagering Code).

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

The Panel noted that the advertiser is a company licensed in a State or Territory of Australia to provide wagering products or services to customers in Australia and that the product advertised is a wagering product or service and therefore the provisions of the Wagering Code apply.

As per the AANA Wagering Advertising and Marketing Communication Code Practice Note:



“The Code applies to advertising and marketing communication for wagering products and services provided by licensed operators in Australia.

2.1 Advertising or Marketing Communication for a Wagering Product or Service must not, having regard to the theme, visuals and language used, be directed primarily to Minors

The Panel noted that the Practice Note for the Wagering Code states:

“Whether an advertisement or marketing communication is “directed primarily to minors” is an objective test based on a range of factors. It is a combination of visual techniques and age of characters and actors which will mean the marketing communication is directed primarily to minors. The use of any one factor or technique in the absence of others may not necessarily render the marketing communication “directed primarily to minors”...An advertisement or marketing communication featuring cartoons or licensed characters, such as super heroes and celebrities, that particularly appeal to minors may breach the Code. Licensed operators should take great care when using cartoon-like images. They may be acceptable if they are adult in nature but licensed operators run the risk of breaching the Code if the cartoon images are appealing to minors.”

The Community Panel noted that minors were defined in the Wagering Code as those under 18.

NRL version

The Panel noted the complainants’ concerns that the advertisement features animation similar in style to the game Fortnite and this is a game with primary appeal to those under 18 years old.

The Panel noted the advertiser response that they have removed the advertising from television.

The Panel considered that the brightly coloured animation would be attractive to younger children. The Panel considered that this style of animation is also common in many video games, such as Fortnite, and would also be attractive to teenage audiences. The Panel considered the language used was simplistic and would be easily understood by children. The Panel noted that in general children would not be attracted to wagering promotions, however in this case the simple and immediate nature of the promotion would be easily understood by children and would be attractive to them.

The Panel considered that the overall advertisement was not adult in nature, and that there was no evidence that the advertiser had taken care not to be attractive to children in their use of cartoon imagery.



Overall, the Panel considered that the advertisement would have strong appeal to those under 18 and that the advertisement was directed primarily to minors.

Section 2.1 conclusion

Finding that the advertisement was directed primarily to Minors, the Panel determined the advertisement breached Section 2.1 of the Wagering Code.

Conclusion

Finding that the advertisement breached Section 2.1 of the Wagering Code, the Panel upheld the complaint.

THE ADVERTISER'S RESPONSE TO ORIGINAL DETERMINATION

Thank you for your letter dated 27 April 2021 regarding the Advertisement, and for the opportunity to provide an Advertiser's Statement in response to the Community Panel's determination.

As set out in our letter dated 9 April 2021, Sportsbet strenuously denies that the Advertisement contravenes any section of the AANA Wagering Advertising & Marketing Communication Code (Code). Nevertheless, as foreshadowed in our letter dated 9 April 2021, Sportsbet has already (without any admission) discontinued the Advertisement on all channels and mediums under our control.

We look forward to receiving further correspondence from your office providing Sportsbet with the option to request an independent review of the Community Panel's determination. Sportsbet takes its obligations under the Code very seriously, and is deeply concerned by the Community Panel's determination. Accordingly, Sportsbet intends to request that an independent review of the Community Panel's determination be conducted.

REQUEST FOR INDEPENDENT REVIEW

We refer to our previous correspondence regarding the Advertisement. As set out in our letter dated 29 April 2021, Sportsbet takes its obligations under the AANA Wagering Advertising & Marketing Communication Code (**Code**) very seriously. Notwithstanding our commitment to compliance with the Code, Sportsbet is deeply concerned by the Panel's determination dated 14 April 2021 regarding the Advertisement (**Determination**).

Sportsbet respectfully requests that the Independent Reviewer conduct a review of the Determination and to this end considers:



- there is an overwhelming (and most certainly a prima facie) case for review, such that Sportsbet's request should be **accepted** by the Independent Reviewer; and
- after conducting appropriate investigations, that the Independent Reviewer should recommend that the Panel **review** the Determination and **dismiss** the original complaint regarding the Advertisement.

The Advertisement is not directed to minors at all, let alone "primarily"

In its first response to the complaint about the Advertisement, Sportsbet strenuously denied that the Advertisement contravened any section of the Code. Sportsbet did not provide more substantive comments at that time because it did not consider it was necessary to do so given, in Sportsbet's respectful submission, the Advertisement was:

- on its face, not directed to minors **at all**; and
- certainly not directed **primarily** to minors, as prohibited by section 2.1 of the Code.
- Accordingly, Sportsbet expected that the Panel would find that the Advertisement did not breach section 2.1 of the Code having regard also to the AANA's Practice Note in respect of the Code (**Practice Note**) which provides that:
 - section 2.1 **does not apply** to advertising which is **directed primarily to adults**; nor does it apply to advertising that may be seen by minors, but is **not directed primarily to them**;
 - whether an advertisement is "directed primarily to minors" is an **objective test** (and is not to be determined based on the subjective views of one complainant); and
 - although care should be taken when using cartoon-like images, the use of any one factor or technique in the absence of others may not necessarily render the marketing communication "directed primarily to minors".

Further, as noted by the Panel in Case Number 0176-20 (**BlueBet case**), it is a well-established principle that "*animation per se does not mean that an advertisement will be considered to be directed primarily to children*". If such an advertisement is directed primarily to adults, it does not breach section 2.1 of the Code. That is so even if the advertisement may be seen by minors, but is not directed primarily to them.

In Sportsbet's respectful submission, on the face of the Advertisement and based on the principles described above, the Panel should not have concluded that the Advertisement breached section 2.1 of the Code. Accordingly, Sportsbet submits that there was a substantial flaw in the Determination, which was clearly made in error.

Further to the reasoning outlined above, Sportsbet would like to take this opportunity to provide some greater context to the Advertisement to assist the Independent Reviewer. That information is set out below and is structured by reference to the language of section 2.1 of the Code, which requires that advertisements not be



directed primarily to minors having regard to the **theme, visuals and language** used in the advertisement.

Theme of the Advertisement

As to the theme of the Advertisement, the Determination states the Panel's view that *"the overall advertisement was not adult in nature, and that there was no evidence that the advertiser had taken care not to be attractive to children in their use of cartoon imagery"*. The Determination goes on to conclude that *"Overall, the Panel considered that the advertisement would have strong appeal to those under 18 and that the advertisement was directed primarily to minors"*.

Sportsbet submits that these conclusions are clearly wrong, such that it is appropriate for the Independent Reviewer to conduct an independent review.

The central theme of the Advertisement is the promotion of a specific, short term retail betting offer on professional sport. As a result, the Advertisement is set on a professional sporting pitch involving professional sportsmen. That is an entirely adult environment, and (as explained further below) the characters depicted are of a *particularly* adult appearance. Minors are not represented in the Advertisement at all, nor does the Advertisement depict any environment normally associated with minors.

While some minors undoubtedly have an interest in professional sport, the Practice Note provides that section 2.1 of the Code does not apply to advertising that may be seen by minors **unless it is directed primarily to them**. That rule is particularly relevant in the context of this Advertisement, which is clearly not directed to minors - primarily or otherwise. Otherwise, it could be argued that any advertising which promotes betting on professional sport contravenes section 2.1 of the Code.

As the Advertisement made very clear, the Advertisement was promoting a specific, short term retail betting offer that was only available for approximately four weeks via Sportsbet's online betting platform. Further, these offers, and the ability to wager with Sportsbet, are exclusively for customers over the age of 18 years. Before using Sportsbet's betting platform, customers must go through a process of registration, which requires strict customer identification verification as part of Sportsbet's compliance obligations under applicable laws (namely the *Anti Money Laundering and Counter Terrorism Financing Act 2006* (Cth)) and under the conditions of its licence to conduct sports bookmaking business granted pursuant to the *Racing and Betting Act 1983* (NT). This includes ensuring that the age of customers is at least 18 years. Consistent with those arrangements, the Advertisement features a prominent "18+" warning message.

The Advertisement was therefore directed exclusively towards adult consumers who were legally permitted to take up the relevant offers and who are the only consumers who can lawfully engage with Sportsbet's betting platform. To this end, guidance can be drawn from two previous Panel determinations.



- *first*, from Case Number 0085/19 (***the Neds case***) which concerned an advertisement featuring imitation player cards with a number of NRL "legends" on them. However, in dismissing the complaint, the Panel noted: "*As a gambling operator, Neds is only able to have customers who are 18 years of age or older. The Ad is not targeting children... [but] is directed at people who can legally use the product*". With respect, the Panel should have reached the same conclusion here; and
- *secondly*, from Case Number 0357/19 (***the McDonald's case***) which concerned a complaint under the Code of Advertising and Marketing Communications to Children. The advertisement in question related to prizes which could be won by ordering McDonald's through Uber Eats. The Panel dismissed that complaint because (among other things) UberEats requires a credit card and was age gated so that users must be at least 18 years of age in order to register an account. That is directly analogous to the present circumstances, given that Sportsbet's platforms are age gated and cannot be used by persons under 18 years of age.

Sportsbet has certainly not, as suggested by the complainant, deliberately attempted to associate the game "Fortnite" with football and target a younger audience. Sportsbet accepts that some members of the community hold strong views about sports betting, and choose to express those views in an emotive and inflammatory fashion. However, Sportsbet does not agree with the suggestion made by the complainant. Put simply, the complainant's allegation is **false** and runs contrary to Sportsbet's core values as a responsible online sports betting company.

Visuals used in the Advertisement

As to the visuals used in the Advertisement, the Determination states the Panel's view "*that the brightly coloured animation would be attractive to younger children. The Panel considered that this style of animation is also common in many video games, such as Fortnite, and would also be attractive to teenage*

audiences". With respect to the Panel, Sportsbet submits that these conclusions were clearly reached in error, such that there was a substantial flaw in the Determination.

As noted above, while care should be taken when using cartoon-like images in such advertising, the Practice Note makes clear that the use of any one factor or technique in the absence of others does not necessarily render the advertisement "directed primarily to minors". In addition, it is a well-established principle that "*animation per se does not mean that an advertisement will be considered to be directed primarily to children*".⁴

Animations are an important advertising tool for Sportsbet to use in order to advertise its service to adults. That is because of four key reasons:



- Sportsbet does not have rights to use real match vision of all sporting codes in its advertising. Even for those codes where a partnership does exist, the rights to real match vision are strictly limited. Animated advertisements allow Sportsbet to achieve marketing continuity across its channels and align with its overarching marketing strategy, which focusses on humour and circular narrative (being the fundamental differentiators quintessential to our brand and those which drive consumer choice to successfully separate us from competitors);
- Sportsbet requires its retail offer advertising to be nimble, flexible and quick to market to readily accommodate change if an offer is not meeting performance expectations or to respond to the launch of competing advertising and products or regulatory updates. Animated advertisements are suited to meet those requirements;
- Sportsbet's annual advertising spend is significant so it is imperative that it achieves an acceptable return on investment. Animated advertisements are affordable and impactful (ie, engaging and easily comprehended by our adult target audience). Accordingly, animated advertisements provide a good alternative to film advertisements and diversify Sportsbet's overall marketing portfolio; and
- Sportsbet's ad tracking research indicates that 2D advertisements have a higher 'wear-out' rate with consumers than film advertisements. Sportsbet's view is that 3D advertisements are more akin to film advertisements and therefore are less susceptible to wear-out and more engaging for Sportsbet's adult target audience.

Quite deliberately, Sportsbet instructed the third party animator who created the animations used in the Advertisement to create characters which most accurately resemble the players who participate in the NRL, including in terms of size, masculinity, grittiness and sharpness. Sportsbet went to great lengths in the development process to ensure that the characters **did not** resemble any kind of superhero or other fictional character, given Sportsbet's target market consists exclusively of adults and not minors.

Sportsbet did not, at any time, instruct or intend for the Advertisement to bear any resemblance to the Fortnite video game or any other game – whether popular with children or otherwise.

By way of analogy, the *BlueBet case* concerned an animated advertisement which included a reference to the word "Bluey". The complainant was concerned that minors would draw a connection between that reference and the "Bluey" children's cartoon character. The Panel dismissed the complaint. In doing so, it noted that although the advertisement was in animated form, it featured only adult characters and there was nothing in the advertisement which could be seen to be appealing to minors of any age. With respect, the Panel should have reached the same conclusion



here, or at least concluded that the Advertisement was not **primarily** directed to minors, which is the conduct prohibited by the Code.

As to the colours used in the Advertisement, bright colours are used in almost all modern advertising (film or animation) to drive customer engagement. Sportsbet, like any other business, should be entitled to use that technique to deliver effective marketing. The colours used in the Advertisement were also necessarily selected so that the Advertisement accurately resembled the NRL, including bright team/club colours and the fact that the NRL is played on green grass, under blue sky and in luminous venues. Bright blue and yellow are also Sportsbet's house brand colours, and are used by Sportsbet to differentiate its advertising from Sportsbet's competitors.

To this end, in Case Number 0008/17 (the ***Tatts Lotteries case***), the advertisement portrayed animated lottery ball characters going about their daily lives (exercising, brushing their teeth and making a cake) until an alert is given to load a truck with cash for delivery to a Division 1 winner. The Panel dismissed the complaint on the basis that (among other things) the advertiser had endeavoured to produce a television commercial that was engaging for adult viewers through bright, entertaining and professional animation. To ensure that the animation appealed to adults, the lottery ball characters were intentionally designed to appear in a realistic, life-like environment and use language targeted at eligible customers over 18 years of age. That reasoning is **directly applicable** in the present case and, with respect, the Panel should have reached the same conclusion for the Advertisement.

Language used in the Advertisement

As to the language used in the Advertisement, the Determination states the Panel's view that "*the language used was simplistic and would be easily understood by children. The Panel noted that in general children would not be attracted to wagering promotions, however in this case the simple and immediate nature of the promotion would be easily understood by children and would be attractive to them*".

Almost all wagering promotions (and indeed commercial advertisements) are simplistic. That is because consumers "turn off" from advertising at the first sign of complexity. The simple language used in the Advertisement is consistent with that approach and consistent with other advertisements published by Sportsbet and indeed the broader industry. Complicated messaging is not effective and so is avoided by Sportsbet (and the sports betting industry generally). The objective of the language used in the Advertisement was to drive marketing continuity and appeal to Sportsbet's adult target audience, who are far more likely to respond to clear and unambiguous messaging.

Sportsbet is particularly troubled by the Panel's suggestion that "*the simple and immediate nature of the promotion would be easily understood by children and would be attractive to them*". In light of the simple and immediate nature of the promotion,



the Advertisement would have been **particularly unattractive** to children. As noted above, the Advertisement made very clear that it was promoting a specific, short term retail betting offer that was only available for approximately four weeks via Sportsbet's online betting platform (which can only be accessed by **adults**).

In addition, the manner in which the language is delivered in the Advertisement must be recognised. That language is spoken by a man with a voice which is extremely masculine and adult in tone. In the *BlueBet case*, in dismissing the complaint, the Panel observed that the voiceover was quite masculine and the music was obviously not childlike or child-friendly. Similarly, the music used in the Advertisement is (quite deliberately) crafted in a 1980s style, which is very different from the music which an advertiser would select to target minors. In addition to the masculine voiceover and visual features of the Advertisement, this merely reinforces the obvious conclusion that the Advertisement was not directed to minors – and **certainly not primarily**.

Other matters

Finally, Sportsbet's commercial broadcast advertising is already subject to strict blackout rules under the Commercial Television Industry Code of Practice which are designed to protect the interests of minors. The Advertisement was compliant with that code.

INDEPENDENT REVIEWER

Please note that this Independent Review covers cases 0077-21 and 0076-21 and incorporates complaints and advertisements from both cases.

Request for review: Case Numbers 0077-21 and 0076-21.

I have been asked to review related cases. They concern two television advertisements on free-to-air and Pay TV by Sportsbet. Determinations on 14 April 2021 by the Community Panel upheld the complaints about the advertisements as in breach of the *AANA Wagering Advertising Code*. On being notified of the outcome, Sportsbet discontinued the advertisements.

Background

The two advertisements feature animated images. The advertisements are for a specific, short term promotion by Sportsbet for betting on NRL and AFL games.

The NRL version features an animated football player who is being tackled. He smiles and winks at the camera as he places the ball down to score a try. He then celebrates. The voice-over states, 'Want a flying start to this football season? Well if your team scores a try in the first five minutes, you win. We'll pay you out straight away. Footy's back with Sportsbet'.



The AFL version features an animated football player holding a football, attempting to get past another player. He passes the ball behind him and brings it back out wrapped up like a lolly. He gets around the other player and kicks the ball, then celebrates. The voice-over states, 'Kick off this season with something delicious, because for AFL this week if your team scores a goal in the first two minutes, you win. We'll pay you out straight away. Footy's back with Sportsbet'.

COMPLAINTS

The complaints are that the advertisements breach section 2.1 of the *Wagering Advertising Code*, because they are 'directed primarily to minors'.

A sample of the complaints follows:

- *The reason I am objecting to this advertisement is the animation style used is blatantly copying the animated characters from the popular children's game Fortnite, and they are trying to subliminally target children with this type of advertisement, using similar looking characters from a popular children's video game. ...*
- *[T]he advertisement is predatory in nature due to this similarity. The main demographic of users who play the popular game 'Fortnite' is those aged under 18 years old.*
- *The advertisement features animated footballers and the football turns into a football sized 'candy'. There are other simplistic features to the ad that make it seem very geared towards children. Even if not trying to get kids to bet NOW, it seems to be making betting appear attractive to kids.*
- *SportsBet uses animation in their advertising that is way too kid friendly. The commercial features animation of footballers of a very high quality that looks more like something from a kid's TV show. Gambling companies should not be able to use animation for this very reason as it has a huge appeal to kids watching. Even aesthetically it draws in kids to pay attention to the message.*
- *The ad [the NRL version] was animated, and it was clearly imitating the style of the video game Fortnite. I am a teacher, and I know about half of my students play that video game and many of them also watch football. It seems to me there is a deliberate attempt by Sportsbet to associate the two and target a younger audience, many of whom would be under the age of 18.*

PANEL'S FINDINGS

The panel relied on the Practice Note to the *Wagering Advertising Code* making its findings.

In doing so, the Panel also referred to the AANA *Wagering Advertising and Marketing Communication Code: Practice Note*:

The Code applies to advertising and marketing communication for wagering products and services provided by licensed operators in Australia.



The Panel noted that the advertiser is a company licensed in a State or Territory of Australia to provide wagering products or services to customers in Australia and that the product advertised is a wagering product or service and therefore the provisions of the Wagering Code apply.

The Panel also observed that minors were defined in the *Wagering Advertising Code* as those under 18.

The Panel noted, in upholding the complaint, that *'Licensed operators should take great care when using cartoon-like images. They may be acceptable if they are adult in nature but licensed operators run the risk of breaching the Code if the cartoon images are appealing to minors'*.

The Panel's findings were as follows:

NRL version (Case number: 0076-21 and 0077-21)

The advertisement:

- *Features cartoon-like animation which would be appealing to children.*
- *Features animation similar in style to the game Fortnite and this is a game with primary appeal to those under 18 years old.*
- *The language used was simplistic and would be easily understood by children ... and would be attractive to them.*
- *The brightly coloured animation would be attractive to younger children.*
- *Overall [the] advertisement was not adult in nature, and ... there was no evidence that the advertiser had taken care not to be attractive to children in their use of cartoon imagery.*
- *Would have strong appeal to those under 18 and ... was directed primarily to minors.*

AFL version (Case number 0077-21)

The Panel said of this version:

- *The simplistic style and the use of the candy would be attractive to children.*
- *The overall visuals, language and theme of the advertisement would be highly attractive to those under 18.*

THE ADVERTISER'S RESPONSE

The advertiser rejected the findings, saying of the advertisements:

- They are 'not directed to minors at all, let alone 'primarily'.
- Use of 'animation per se does not mean that an advertisement will be considered to be directed primarily to children': *Case Number 0176-20 – BlueBet.*



- The environment was entirely adult, namely set on a professional sporting pitch involving professional sportsmen of a particularly adult appearance and was not directed primarily to children.
- The promotional offers are exclusively for customers over the age of 18 years who must be registered using Sportsbet's betting platform which requires strict customer identification verification.
- Feature prominent '18+' warning messages.
- Have 'not sought to "subliminally target children" by copying the style of animation used in the Fortnite video game'.
- That as the target market was adults not minors, Sportsbet went to great lengths to create characters who accurately resemble the players in terms of size, masculinity, grittiness and sharpness' rather than characters who 'resemble any kind of superhero or other fictional character'.
- Use of bright colours is common in advertisements and represents the sporting codes they depict.
- 'Bright blue and yellow are Sportsbet's house brand colours', used to 'differentiate its advertising from Sportsbet's competitors'.
- Used language targeted at eligible customers over 18 years of age, which though simplistic is used in 'almost all wagering promotions and commercial advertisements'.
- The candy image 'depicts the very well-known football maneuver known as "selling the candy"' and was not directed primarily to minors.
- The language is delivered by a man with an extremely masculine and adult tone of voice.
- The music was deliberately in 1980s style and was not music which would be used to target minors.
- Sportsbet's commercial broadcast advertising is subject to strict blackout rules.

CONSIDERATION

The following discussion does not distinguish between the AFL and the NRL advertisement since the arguments are, in effect, common to both.

Wagering Advertising Code

2.1 Advertising or Marketing Communication for a Wagering Product or Service must not, having regard to the theme, visuals and language used, be directed primarily to Minors.

Wagering Advertising Code: Practice Note

Whether an advertisement or marketing communication is 'directed primarily to minors' is an objective test based on a range of factors. It is a combination of visual techniques and age of characters and actors which will mean the marketing communication is directed primarily to minors. The use of any one factor or



technique in the absence of others may not necessarily render the marketing communication ‘directed primarily to minors’.

The application of the term ‘directed primarily to minors’ recognizes that particular types of advertising and marketing communication engage and resonate with minors in such a way as to bring about a response or action. This provision does not apply to advertising ... which is directed primarily to adults; nor does it apply to advertising ...that may be seen by minors, but is not directed primarily to them.

Code of Advertising and Marketing Communications to Children: Practice Note

The *Wagering Advertising Code: Practice Note* directs readers to additional information available in the *Code of Advertising and Marketing Communications to Children: Practice Note*. The direction points out that the *Code of Advertising and Marketing Communications to Children: Practice Note* specifically applies to children aged 14 and under but says of the factors listed:

... however, the same concepts are used in determining whether material is directed primarily to minors’.

Accordingly, the relevant concepts or factors in the *Practice Note* to the *Code of Advertising and Marketing Communications to Children* also ‘provide guidance to the Community Panel in considering whether marketing communications are “directed primarily to minors”’ in the *Wagering Advertising Code* and its *Practice Note*. The relevant factors are as follows:

Primarily

Marketing communication which is aimed in the first instance at children is subject to the Code. Marketing communication which is directed to parents, adults or grocery buyers is not subject to the restrictions in this Code. ...

Theme of the marketing communication

Marketing communications are directed primarily to children if they use children’s themes and characters.

...

Visuals

... Animation is an example of a visual technique that may appeal to children ...

However, animation as a visual technique is often used in marketing communication targeting an adult audience and is not necessarily indicative of a marketing communication directed primarily to children. The animated characters used and how they are used, along with the other themes, visuals and music are relevant factors.

Language

Marketing communication which uses language which is appropriate and able to be comprehended by children 14 years old and younger is likely to be directed



primarily to children.

Marketing communication which uses language which is adult like, using adult concepts and vernacular is unlikely to capture a child's attention or engage a child.

Age of actors and characters

Marketing communication which uses actors or characters 14 years old or younger may be directed primarily to children, particularly if they are using a product or service which is targeted toward and of principle (sic) appeal to children. ...

Call to action

Marketing communication which speaks to children and directs a call to action to children using language and visual techniques which are understood are most likely directed primarily to children.

If there is a clear call to action to adults, the advertisement or marketing communication may not be directed primarily to children.

The *Macquarie Concise Dictionary* (5th edn, 2009) defines the words in the expression 'directed' and 'primarily' as follows:

'directed': '5. To point or aim towards a place or an object; cause to move, act, or work towards a certain object or end' (at p 348)

'primarily': '1. In the first place; chiefly; principally' at (p 996)

APPLICATION OF RELEVANT PROVISIONS

The explanations in the *Practice Notes* indicate that if an advertisement is of a type to encourage or cause those under 18 to take some action, such as bet on football codes, the advertisement falls within the prohibition in s 2.1. The ordinary English dictionary meaning of the words in the expression are in line with their meaning in the *Wagering Advertising Code: Practice Note*. Those explanations are in line with the dictionary meaning of 'directed' which indicates the need to take steps toward or cause achievement of a certain object or end.

The meanings are also aligned with factors **Primarily** and **Call to action** in the *Code of Advertising and Marketing Communications to Children: Practice Note*.

'Primarily directed'

Applying these meanings of the words in the expression '*directed primarily to minors*', in my opinion the advertisements are not chiefly or principally aimed at '*minors*'. The advertisements are primarily to encourage betting on football. That is the object or call to action of the short-term promotion of betting by Sportsbet in the two advertisements.



There are legal and practical barriers to minors responding to this call. As the advertiser pointed out, the advertisements are age-gated and contain a reference to the fact that only those 18 or over are eligible to bet. The '18+' logo on the advertisement indicates the age limit. Assuming the process of registration is effective, no child or young person would be able to take advantage of the promotion.

Equally, as a practical consideration, many minors do not have the necessary credit cards to facilitate the online betting transaction. So, it would be fanciful to suggest that Sportsbet, knowing this, has sanctioned advertisements chiefly to attract minors to bet.

No time limit to taking action is indicated in the meaning of 'primarily directed to minors' in s 2.1. That led one complainant to state:

... the issue I had with the advertisement is the subliminal appeal to children. ... The issue was that children are more likely to remember the advertisement and have gambling be more appealing to them ... which would make them more predisposed to eventually use the product at a later point in their lives.

The thrust of this complaint is echoed in the complaints of others.

That long-term outcome – sensitizing children to betting when they are able as adults to take part, may be a possible outcome of the exposure. This issue raises the question of whether the explanations in the relevant *Practice Notes*, assisted by the dictionary meaning of 'directed', are intended to be applied at the time an advertisement is shown or for an indefinite period in the future.

For example, in the case of the advertisements under consideration is the explanation of an advertisement of a type that '*engages and resonates with minors in such a way as to bring about a response or action*', to be assessed now, or in the future when the minors are adults.

The only aids to the interpretation issue are grammatical and practical. Grammatically, 'engages' and 'resonates' are expressed in the present tense suggesting it is the period in which the advertisement is shown which is relevant. Equally factor (9) in the *Code of Advertising and Marketing Communications to Children: Practice Note* refers to a communication that '*directs a call to action*', a test also expressed in the present tense.

The *Macquarie Dictionary* definition of '*directed*' refers to '*a certain object or end*'. Certainty of achievement is harder to predict in the future.

At a practical level, although behavioural research and probability theory can assist, it is challenging to envisage what evidence could be provided by a complainant that the bringing about, in the future, of a 'response or action', is due to the viewing of an advertisement during a person's minority. It is also hard to



envisage what evidence could be provided of achievement of an object or end in the uncertainty of the future.

In my opinion, these responses indicate that the tests for ‘directed primarily to minors’ refer to action at the time of the advertisement, not when the child has become an adult.

When the advertisement, as in this case, is time-limited, the issue is clearer. To take advantage of the promotion, the steps to achieve the payout on offer to those who bet on the NRL\AFL games must be taken within a limited time-frame. In those circumstances unless minors are, from a practical and legal view, able to take advantage of the promotion within that period, it is unlikely that the advertisements were ‘primarily’ intended to apply to them.

This suggests that the argument of the complainants about the potential for an effect on children in the futures, ignores the grammatical and practical issues involved in the ‘call to action’ element of ‘directed’.

An additional point in support of this reading of the relevant provisions is the explanatory note in Factor (9) in the *Code of Advertising and Marketing Communications to Children: Practice Note* that: *If there is a clear call to action to adults, the advertisement or marketing communication may not be directed primarily to children.*

If only adults legally can take advantage of the promotion, the call to action relates principally or chiefly only to adults. See also the earlier point about the practical impediment of access to credit cards. Access to online betting with Sportsbet is age gated, meaning that only adults may bet. In addition, Sportsbet stated that their ‘commercial broadcast advertising is ... subject to strict blackout rules’ with which the company complied.

These practical and legal barriers mean that the time-limited effect of these advertisements should be taken into account in deciding whether an advertisement is ‘*directed primarily to minors*’. Despite their potential for subliminal appeal to minors, in my opinion, the chief or principal effect of the advertisements in this instance is a call to action to adults, not minors.

That argument is not sufficient to conclude the matter. There are other factors to be considered – ‘the theme, visuals and language’ – before an objective conclusion may be reached.

Theme

The theme of the advertisements is that betting can lead to instant rewards. The issue is whether the advertisements are chiefly aimed at encouraging minors to take action to seek those rewards.



The *Code of Advertising and Marketing Communications to Children: Practice Note* states at (3) that if the advertisements ‘use children’s themes and characters’ they may be ‘*directed primarily*’ to children. The depictions of football in the advertisements are not overtly directed at children. Football may be engaged in by any members of the community. It is not an age limited activity. Nor are the characters – clearly adult males – recognizable and specifically children’s characters.

For this reason, in my opinion, the Panel’s conclusion that the theme would have strong appeal to those under 18, does not necessarily mean that the advertisements were ‘*directed primarily*’ to minors.

Visuals

The principal focus of the complaints and the findings of the Panel relate to this factor. As the Panel commented, the arguments are that the use of cartoon-like animation, akin to those used in the game Fortnite, and the brightly coloured animation would be attractive to children.

The adult figures used in the animation are not recognizable characters like superheroes or other well-known figures in cartoons primarily directed to children. Equally, just because animation is used in an advertisement does not mean that ‘an advertisement will be directed *primarily* to children’: *BlueBet* case, Case Number 0176-20. Other tests must also be considered before an objective response is possible.

Fortnite is well known as a source of online games and its games are played by adults as well as children, albeit children may be the predominant audience. Just because it a game, does not mean the audience is *primarily* children. More is needed. No evidence was provided as to what proportion of users are children as compared with adults.

In any event, the animated figures are demonstrably adult football players, not characters of the age of children: *Code of Advertising and Marketing Communications to Children: Practice Note* factor (8). Sportsbet’s evidence is that it took care to ensure that ‘the characters depicted are of a *particularly* adult appearance – as shown by their ‘size, masculinity, grittiness and sharpness’.

Using adult figures in brightly coloured cartoons is also ubiquitous. The use of bright colour is not sufficient by itself. The figures in the Sportsbet ads are clearly adults, playing a game of football; they are not involved in the fast-moving actions commonly used in Fortnite’s games. In my opinion, there is a similarity, but it is not marked.

The transformation of the ball into a lolly - the so-called ‘very well-known manoeuvre known as selling the candy’ – may be particularly attractive to children. Nonetheless, if the manoeuvre is ‘well-known’ it is known by both adult



fans as well as minors. Although sweets are widely seen as rewards by children, sweet treats are also attractive to many adults. The depiction on its own is insufficient to make the advertisement one *primarily* aimed at minors.

These considerations also affect the finding of the Panel that Sportsbet did not take sufficient care that the advertisements not to be attractive to children in their use of cartoon imagery.

In my opinion, although the visuals may be attractive to children, these aspects of the images do not strongly suggest that the advertisements were *primarily* focused on minors.

Language

The language used in the advertisements is simple and would be well understood by children. Such language is universal in advertising, particularly in short clips like the two advertisements. The simplistic language does not mean that it is '*primarily directed*' to children.

Conclusion

On balance and adopting an objective view, there are certainly factors, such as some elements of the visual images used, which could make the advertisements attractive to children. That alone is insufficient. When considered alongside other factors such as the language, evidence of some care in choice of visual images, and the impracticality of children being able to respond to the theme, in my opinion the advertisements, although attractive to children, are not *primarily* directed to them.

More significant is the fact that the Panel has given insufficient consideration to the fact that the advertisements were couched so as to produce a response or action during the limited time the promotion was activated. That was legally prohibited and practically difficult for minors.

In general, the present effects of the advertisements on the behaviours of minors in the future is generally too problematic from an interpretive and practical viewpoint for this to suggest an advertisement is of a type to resonate and engage action on the part of minors. There maybe a rare case where there is sufficient evidence of a causal link between childhood experience and future behaviour to fall within the prohibition in s 2.1 but such a case would be rare.

That is particularly the case when the call to action is short-term and there are legal and practical barriers to minors taking action to achieve the steps required within that timeframe. Accordingly, in my opinion, in these circumstances, the types of advertisements involved in this case could not 'engage and resonate with minors' in such a way as to bring about a response or action within that limited time frame. Hence they would not be 'primarily directed to minors'.



That omission was a substantial flaw in the Panel’s consideration. Accordingly, I recommend that the Panel reconsider their findings taking into account in light of the comments in this review.

THE DETERMINATION ON REVIEW

The Ad Standards Community Panel (Panel) noted the request for review of its decision and the findings of the Independent Reviewer.

The Panel noted that the Independent Reviewer considered that there were substantial flaws in Panel’s determination. Specifically the Independent Reviewer noted that the Panel had given insufficient consideration to the fact that the advertisements were couched so as to produce a response or action during the limited time the promotion was activated. That was legally prohibited and practically difficult for minors.

The Panel noted that the independent review covered two cases, 0076-21 and 0077-21. This decision relates to case 0076-21, the NRL advertisement.

The Panel noted that it needed to reconsider the case under Section 2.1 of the the AANA Wagering Advertising and Marketing Communication Code (Wagering Code) taking into account the Independent Reviewer’s recommendations and comments, and the further information provided by the advertiser.

2.1 Advertising or Marketing Communication for a Wagering Product or Service must not, having regard to the theme, visuals and language used, be directed primarily to Minors

The Panel noted that the Practice Note for the Wagering Code states:

“Whether an advertisement or marketing communication is “directed primarily to minors” is an objective test based on a range of factors. It is a combination of visual techniques and age of characters and actors which will mean the marketing communication is directed primarily to minors. The use of any one factor or technique in the absence of others may not necessarily render the marketing communication “directed primarily to minors”...An advertisement or marketing communication featuring cartoons or licensed characters, such as super heroes and celebrities, that particularly appeal to minors may breach the Code. Licensed operators should take great care when using cartoon-like images. They may be acceptable if they are adult in nature but licensed operators run the risk of breaching the Code if the cartoon images are appealing to minors.”

The Community Panel noted that minors were defined in the Wagering Code as those under 18.



The Panel noted the Independent Reviewer's recommendation that the Panel take into account the following factors when making its determination on whether the advertisement was directed primarily to Minors:

- Theme – use of children's themes and characters
- Visuals – Animation may appeal to children however is not necessarily indicative of a marketing communication directed primarily to children
- Language – use of language which is appropriate and able to be comprehended by children
- Age of actors and characters – use of child actors or characters
- Call to action – speaks to children and directs a call to action to children.

Theme

The Panel noted the Independent Reviewer's recommendation that the theme of the advertisement is that betting can lead to instant rewards and that while this may have strong appeal to those under 18, this does not mean that the advertisement is directed primarily to Minors.

The Panel considered that the nature of instant rewards is something that does hold particular appeal to children. A minority of the Panel considered that the theme of the advertisement would resonate the strongest with teenage boys given the style of animation was akin to video games such as Fortnite, and that this theme was directed primarily to Minors.

The majority of the Panel considered that the theme of winning money quickly while supporting your team is a theme which would have broad appeal to both teenagers and adults, and was not a theme which was directed primarily to Minors.

Visuals

The Panel noted the Independent Reviewer's comment that the use of cartoon-like images does not in itself mean the advertisement is directed primarily to Minors.

The Panel noted that many children and teenagers have a strong interest in watching football and supporting their teams. The Panel considered that the use of animation and bright colours in combination with football imagery would attract the attention of Minors.

A minority of the Panel considered that the visuals in the advertisement would engage and resonate with Minors, particularly teenage boys, more so than it would with adults.



The majority of the Panel considered that both Minors and adults have an interest in football and supporting their teams, and the visuals in the advertisement would equally resonate with young adult males.

Language

The Panel noted the Independent Reviewer's comments that the simplistic language used in the advertisement does not mean that it is primarily directed at children.

The Panel considered that the language used is simplistic and designed to create excitement and generate immediate action. The Panel considered that the language in the advertisement would have broad appeal and was not directed primarily to Minors.

Call to Action

The Panel noted the Independent Reviewer's comments that the purpose of the advertisement was to produce a response or action during the limited time the promotion was active, and that this would be legally impossible and practically difficult for Minors because the process of registration for the advertised product was age-gated (18+) and many Minors do not have the financial means to facilitate online betting transactions.

The Panel acknowledged that the intent of the advertiser was likely to elicit immediate action in adults to take part in the betting promotion. However, the Panel noted that the intent of the advertiser does not always reflect how the advertisement is received by the audience. The Panel considered that the purpose of this section of the Wagering Code is to prevent wagering advertisers from creating advertisements which would be more appealing to Minors than to adults, and the fact that Minors cannot access wagering products does not preclude this section from being applicable.

A minority of the Panel considered that the themes, visuals and language used combined to create an advertisement which would attract the attention of Minors, and resonate and engage with them more so than adults.

The majority of the Panel considered that overall the advertisement would have broad appeal to both Minors and adults. The Panel acknowledged that there is a strong concern in the community relating to the visibility and attractiveness of gambling ads to children. The Panel considered that this advertisement may be attractive to children and teenagers given the style of animation, however the advertisement was not directed primarily to Minors.



2.1 Conclusion

On review, considering the factors of them, visuals and language, the Panel determined that the advertisement was not directed primarily to Monors and therefore did not breach Section 2.1 of the Wagering Code.

Conclusion

Finding that the advertisement did not breach any other Section of the Wagering Code, the Panel dismissed the complaint.