



Case Report

1	Case Number	0095/13
2	Advertiser	Spudbar
3	Product	
4	Type of Advertisement / media	Poster
5	Date of Determination	10/04/2013
6	DETERMINATION	Dismissed
7	Date of reviewed determination	22/05/2013
8	Determination on review	Dismissed

ISSUES RAISED

- 2.5 - Language Inappropriate language
- 2.5 - Language Strong or obscene language

DESCRIPTION OF THE ADVERTISEMENT

Poster advertising Spudbar featuring the text 'Why F@ck with a Good Thing'.

THE COMPLAINT

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

I cannot state in strong enough terms how unnecessary, vulgar and offensive it is to have a food service provider attempt to sell its product by emphasising the word 'Fuck.' This appears as the largest word in the poster advertisements, and the fact that the 'u' is replaced does nothing whatsoever to hide the crudity. I was both personally offended by the advertisement, and disturbed that such a term should be used so gratuitously. As the father of a young primary school child, I do not wish to be asked: 'What does that word mean?'

The swear word in question serves no purpose but to provoke.

THE ADVERTISER'S RESPONSE

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

No response received from the Advertiser.

THE DETERMINATION

The Advertising Standards Board (“Board”) considered whether this advertisement breaches Section 2 of the Advertiser Code of Ethics (the “Code”).

The Board noted the complainants' concerns that the advertisement used language that is offensive and unacceptable for advertising in a public place.

The Board viewed the advertisement and noted the advertiser had not provided a response.

The Board considered whether the advertisement was in breach of Section 2.5 of the Code. Section 2.5 of the Code states: “Advertising or Marketing Communications shall only use language which is appropriate in the circumstances (including appropriate for the relevant audience) and strong or obscene language shall be avoided.”

The Board noted that this advertisement is promoting a food outlet that sells potato products.

The Board noted that the poster features the word “F#ck” and considered that the F word is a word that is considered strong if not obscene by some members of the broader community. The Board noted that in this instance however the F word is not used in full and it is used in the context of a question (“why f*ck with a good thing”). The Board considered that there are no sexual or violent connotations associated with the use of the F word in this advertisement.

The Board considered that advertisers should be encouraged to not use language which could offend the community. In this instance, it was the Board’s view, based on the information provided by the complainant in respect of the placement of the poster on the window of the advertiser’s premises, combined with its relatively small size, that the advertisement amounted to an overall depiction which would be unlikely to attract significant attention from members of the community, unless they were entering the advertiser’s premises.

The Board noted that the content of the advertisement is not directed at children and is not designed to be attractive to children. The Board noted that there is community concern surrounding the use of strong or obscene language however the Board considered that in this instance, the advertisement makes reference to a swear word, without using the word itself, in a manner which is not likely to be considered offensive by most members of the community.

Based on the above the Board determined that the advertisement did not breach Section 2.5 of the Code.

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

THE INDEPENDENT REVIEWER'S RECOMMENDATION

INDEPENDENT REVIEWER'S RECOMMENDATION

This is an application for review of the decision of the Advertising Standards Board (the Board) relating to an advertisement by Spudbar: Case Report 0095/13. The advertisement was a poster advertising Spudbar featuring the text "Why F@ck with a Good Thing". The poster was used to promote a food outlet that sells potato products. The copy of the advertisement given to the Board indicated that the poster was displayed on the window of a Spudbar shop. The word "F@ck" is the predominant feature of the poster.

The Board considered whether the poster constituted a breach of Section 2.5 of the AANA Code of Ethics which states: "Advertising or Marketing Communications shall only use language which is appropriate in the circumstances (including appropriate for the relevant audience) and strong or obscene language shall be avoided."

The Board's conclusion was that:

....based on the information provided by the complainant in respect of the placement of the poster on the window of the advertiser's premises, combined with its relatively small size, that the advertisement amounted to an overall depiction which would be unlikely to attract significant attention from members of the community, unless they were entering the advertiser's premises.

The grounds on which a decision of the Board may be reviewed are:

- (1) Where new or additional relevant evidence which could have a significant bearing on the determination becomes available. An explanation of why this information was not submitted previously must be provided.
- (2) Where there was a substantial flaw in the Board's determination (determination clearly in error having regard to the provisions of the Code, or clearly made against the weight of evidence).
- (3) Where there was a substantial flaw in the process by which the determination was made.

The appellant's appeal was based on ground (3) above. It was asserted that:

Given that the Board's decision was heavily based on the size and placement of the advertisement it is my contention that the Board failed to consider evidence that would have substantially impacted on its decision. Because of this the process by which the decision was

made was flawed.

The Board's decision seems to be based on the assumption that the poster appeared in the window of one shop. However, the appellant indicates that the advertisements were "posted on busy roads near the central business district [of Melbourne]... and beside roads in South Melbourne". I note that there are 10 Spudbar locations in the Melbourne CBD.

It would thus appear that the use of the advertisements was more widespread than the information presented to the Board and on which it based its decision. While, depending on the circumstances, the use of a thinly disguised version of the word "Fuck" in the window of one shop window might be thought not to breach the Code, (see, however, my remarks below), widespread distribution of the advertisement, including perhaps its reproduction on other than Spudbar shops, might lead to a different conclusion.

I recommend that this case be reconsidered by the Board as there was a substantial flaw in the process by which the determination was made. The Board appears to have been misled in its consideration of the complaint by the fact that it was not made aware of the extent of the use of the poster nor its placement. The appellant and the advertiser should be requested to provide evidence of these matters to the Board. If no further information is forthcoming, the Board should reach its decision on the evidence presented by the complainants, noting that the advertiser has not attempted to explain or refute the facts as presented by them.

I also suggest to the Board that, on its reconsideration, it should consider the previous Board decisions in cases 0407/11 and 0318/11 where complaints about the use of variations of the word "Fuck" were held to breach Section 2.5 of the Code. While there are differences between the facts of those cases and the present case, there is sufficient similarity to warrant further consideration of the conclusion reached in this case. I think it important for the Board to act consistently in regard to complaints that come before it so that advertisers will be aware of the matter that can or cannot be used in advertisements.

THE DETERMINATION ON REVIEW

The Board noted the recommendation of the Independent Reviewer that it reconsider its decision on the basis that there was a substantial flaw in the process by which the decision was made.

The grounds on which a decision of the Board may be reviewed are:

- (1) Where new or additional relevant evidence which could have a significant bearing on the determination becomes available. An explanation of why this information was not submitted previously must be provided.
- (2) Where there was a substantial flaw in the Board's determination (determination clearly in error having regard to the provisions of the Code, or clearly made against the weight of

evidence).

(3) Where there was a substantial flaw in the process by which the determination was made.

The appellant's appeal was based on ground (3) above. It was asserted that:

Given that the Board's decision was heavily based on the size and placement of the advertisement it is my contention that the Board failed to consider evidence that would have substantially impacted on its decision. Because of this the process by which the decision was made was flawed.

The Independent Reviewer considered that the Board should reconsider the complaint after having received further information about the extent of use of the poster and its placement. The Independent Reviewer also suggested that the Board ensure that it considered its decisions in cases 0407/11 and 0318/11 which concerned the use of iterations of the F word and in which the Board determined that the wording breached section 2.5 of the Code.

The Board noted that following the Independent Reviewers recommendation, the advertiser provided further information and detail as to the placement of the poster at various locations around the Melbourne CBD. The Board considered the information about the more extensive locations. The Board noted that the nature of placing posters on road side poles and walls and buildings is a common method of advertising among small businesses and that such posters are available for viewing by a broad audience.

The Board noted that under section 2.5 of the Code it must consider Advertising or marketing communications shall only use language which is appropriate in the circumstances (including appropriate for the relevant audience and medium). Strong or obscene language shall be avoided.

The minority of the Board considered that the use of 'Why F@ck with a good thing' was a strong suggestion of strong language and that use of strong language or a clear suggestion of strong language was not appropriate in this advertisement which is able to be seen by a broad audience in a number of locations.

The majority of the Board however considered that the reference was not strong or obscene as it merely suggested and did not use the word 'fuck', and that the context of the use of the word was consistent with common language and was not used in a strong or aggressive manner. In the majority of the Board's view, even if the poster is displayed in a variety of road side and store window locations, it is not inappropriate to use this phrase in the context of a reference to a product and in a manner which would be unlikely to be read by young children as a strong word. The majority of the Board considered that the advertisement did not breach section 2.5 on this basis.

The Board also noted the suggestion that it should reconsider the previous Board decisions in cases 0407/11 and 0318/11 where complaints about the use of variations of the word "Fuck" were held to breach Section 2.5 of the Code.

The Board considered these previous matter and agreed that the differences between the facts of those cases and the present case, are sufficiently different.

The Board noted that in the previously considered case of the Grosvenor Hotel (ref: 0407/11), although the entire word “Fuck” was not used, the overall context of the F*#k in conjunction with “F*#k Me” and the sexual image meant that the use of the word was not appropriate in the circumstances. The Board considered that the overall impact was one of a sexual nature and in conjunction with the suggested obscenity was sufficient to breach section 2.5 of the Code.

The Board noted however that in the use of the text F@ck in the poster for the Spudbar there was no sexual or aggressive intent in the use of the modified word.

In the case of 0318/11 – Dangerfield Pty Ltd the Board noted that the word “Fuck?” was not used in its entirety and had a letter replaced with an image. In this instance the Board noted that the letter that is replaced, is done so with the use of the image of an extended middle finger which is used to replace the “u.” The Board considered that the use of this gesture is understood by the broad community to be offensive and in the Board’s view in replacing the actual text of the word with an obscene gesture amounts to strong or obscene language.

The Board noted that the advertisement for the Spudbar in significant contrast to the two above mentioned advertisements did not include additional factors that accentuated the offensive nature of the modified word. The Board noted that the replacement of letters within language to lessen their impact is a common occurrence within the community and noted the use of such a concept in the widely advertised clothing brand FCUK. In the context of this advertisement the Board agreed that as the actual word was not used in its entirety, it did not amount to language that could be considered strong or obscene and was appropriate for the relevant audience.

The Board also considered the results of ASB’s 2012 research which suggests that the community are becoming increasingly more aware of and concerned about the use of inappropriate, strong and/or obscene language in advertising that is available to children. The Board noted the issues raised in the original complaint and in the appeal and agreed that there is a genuine community concern about the use of such language. However the Board considered that as the modified word was not used in an aggressive manner, did not depict the word ‘fuck’, and did not use the word in conjunction with offensive imagery, it did not amount to inappropriate use of language or to language this would be considered strong or obscene.

The majority of the Board determined that the advertisement did not breach section 2.5 of the Code and affirmed their original decision to dismiss the complaint.