



Ad Standards Community Panel
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AdStandards.com.au

Ad Standards Limited
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Case Report

1. Case Number :	0115-20
2. Advertiser :	Kayo Sports
3. Product :	Sport and Leisure
4. Type of Advertisement/Media :	Internet - Social - Facebook
5. Date of Determination	8-Apr-2020
6. DETERMINATION :	Upheld - Modified or Discontinued
7. IR Recommendation:	Reconfirm the Original Decision

ISSUES RAISED

AANA Code of Ethics\2.6 Health and Safety

DESCRIPTION OF ADVERTISEMENT

This Facebook advertisement features a commuter seated at a bus stop watching NRL on her phone. Commentary of the game, “Keary runs the ball down”, is heard as two NRL players, Alex Glenn and Luke Keary, appear in front of the bus stop. Keary attempts to side-step Glenn before he’s tackled through the bus stop glass. At the moment of impact, further commentary, “huge hit by Alex Glenn”, is heard from the phone. A super comes up saying “Nowhere is safe from footy”.

THE COMPLAINT

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

Unsafe, dangerous.

THE ADVERTISER’S RESPONSE

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

Dear Sir/Madam,

Case reference number 0115-20 (the Complaints)



We refer to the Complaints made against Kayo Sports (Kayo) which were received from Ad Standards on 11 March 2020 and 13 March 2020. Foxtel Management Pty Limited (Foxtel) provides this response on behalf of Kayo.

Description of the Advertisements

From the information provided by Ad Standards, we understand that the Complaints relate to two 15 second advertisements from Kayo's current "Nowhere is safe from footy" campaign (the Advertisements).

The concept underpinning the campaign is that no matter where you are or what you are doing, nowhere is safe from footy and with Kayo you can watch every game of the 2020 NRL Telstra Premiership Season and the 2020 Toyota AFL Premiership Season, anywhere, anytime. To convey this message, the campaign comprises several advertisements with footy appearing at the most unexpected times in everyday situations.

The Advertisements are scheduled for broadcast on free-to-air, connected TV, YouTube, Facebook and Instagram between 1 March 2020 and 14 April 2020.

The Complaints

The Complaints include the allegations that the Advertisements depict "violence" and "dangerous and inappropriate social behaviour".

Applicable provisions of the AANA Code of Ethics

Section 2.3

Ad Standards has raised Section 2.3 of the Australian Association of National Advertisers Code of Ethics (the Code) as an applicable provision in the context of the Complaint. Section 2.3 requires that:

"Advertising or Marketing Communications shall not present or portray violence unless it is justifiable in the context of the product or service advertised."

The Advertisements depict common sporting manoeuvres; a tackle and a mark. The actions of the players are not menacing, threatening or aggressive and at no point are the players involved shown to be injured. The scenes do not relate to or involve any confrontation; and there is no threat to any other person. Referring to the AANA's Practice Note on the Code, Foxtel does not consider that the content of the Advertisements fall within the stated guidelines as to the definition of "violence". The guidelines refer to a range of other depictions, including "sexual violence", "violence against animals" and "strong suggestion of menace", and it is Foxtel's view that the actions of the players within the Advertisements do not constitute violence.

We believe that most reasonable viewers would recognise that the actions depicted in the Advertisements are consistent with a tackle and mark that would occur in a typical



NRL or AFL match but are performed in an exaggerated and unrealistic setting. The Advertisements are humorous and light-hearted and intended to be taken by viewers in the same manner in which they were created, namely a celebration of the availability of footy on Kayo, anywhere, anytime.

If Ad Standards determined that the Advertisements depicted “violence”, Foxtel’s view is that the scenes are justifiable in the context of the product being advertised, namely the availability of NRL and AFL, both contact sports, on Kayo.

Foxtel notes Ad Standards has previously dismissed similar complaints. For example, Ad Standards did not consider the depiction of an elderly man being tackled during a family picnic in the context of an Austar advertisement to portray violence (case number 0082/12). Ad Standards considered that most members of the community would not consider the advertisement to be a real life situation and considered that the fanciful and exaggerated context of the advertisement minimised any suggestion of actual violence and did not condone attacks on other people.

For the above reasons, we submit that there is no depiction of violence as understood by most members of the community in the Advertisements and, accordingly, no breach of Section 2.3.

Section 2.6

Ad Standards has also raised Section 2.6 of the Code as an applicable provision in the context of the Complaints. Section 2.6 requires that:

“Advertising or Marketing Communications shall not depict material contrary to Prevailing Community Standards on health and safety.”

The actions depicted in the Advertisements are consistent with a common tackle and mark that would occur in a typical NRL and AFL match, respectively, and would not be regarded as dangerous by the games’ own rules. While we acknowledge that these actions take place in unusual scenarios, we consider that most members of the community would recognise the stylistic nature of the Advertisements and leave the viewer in no doubt about the Advertisements’ imaginary nature. Given the exaggerated nature of these stunts and the overall tone of the Advertisements, we do not consider it to be realistic in any way and do not consider viewers would try to replicate the content. Further, we note that the Advertisements were filmed under strict controls, with the use of stunt doubles.

In the context of the Advertisements, Foxtel does not consider that the content depicted any material contrary to prevailing community standards on health and safety and therefore do not breach Section 2.6 of the Code. Further, we submit that the Advertisements do not breach any other provisions of the Code.

Foxtel takes the Complaints very seriously and regrets any offence caused to the complainants, their family or anyone else.



THE DETERMINATION

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

The Panel noted the complainant's concerns that the advertisement depicts unsafe and dangerous behaviour.

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

The Panel considered whether the advertisement was in breach of Section 2.3 of the Code. Section 2.3 states: "Advertising or Marketing Communications shall not present or portray violence unless it is justifiable in the context of the product or service advertised".

The Panel considered that the depiction of a tackle by by well known football players in playing kit would be considered by most members of the community to be a depiction of violence. The Panel considered however that the actions depictions are an inherent part of the particular games.

The Panel considered that the tackles are sporting actions and are being used in the context of a streaming service that is focused on sporting activities including football games and therefore is directly relevant to the product being advertised.

The Panel noted that football is a sport popular with all ages and that the depiction of a tackle is not inappropriate for children to view.

The Panel considered that the tackle was one which is common in football, and that of itself the tackle used in conjunction with a promotion for football was justifiable in the context of the product being advertised and did not breach Section 2.3 of the Code.

The Panel then considered the depiction of the NRL players going through a glass panel in a bus shelter.

The Panel considered that the advertisement depicts violence through the images of the men falling into glass, and there is significant damage to property.

The Panel noted that the advertisement is clearly unrealistic and fanciful in that the woman in the advertisement does not react to the tackle and property damage that occurs in front of her and that there is a clear depiction of the players walking away uninjured after their falls. The Panel noted that the intention of the advertisement is to highlight that football can be watched anywhere and viewers can immerse themselves in the game regardless of where they are.

However the Panel considered that the content of the advertisement contained violence in regard to the scene where the football players crash through the glass



panel of the bus stop. The Panel considered that even though there were not adverse consequences to the players, this particular scene where property is damaged was a depiction of violence that is not relevant to the product promoted.

The Panel considered that the depiction of violent behaviour in the context of this advertisement was not relevant to the product promoted and was a breach of Section 2.3 of the Code.

The Panel considered whether the advertisement complied with Section 2.6 of the Code. Section 2.6 of the Code states: “Advertising or Marketing Communications shall not depict material contrary to Prevailing Community Standards on health and safety”.

The Panel noted that the fantasy of the advertisement has the players depicted in a public place – a bus stop. The Panel accepted that the intention of the advertisement is to depict the immersive experience of the woman at the bus stop in the product and the quality of the streaming service.

However the Panel considered that the behaviour was depicted in a realistic every day settings – a public road– where such behaviour would be unacceptable and unsafe.

The minority of the Panel considered that the advertisement was an exaggerated and unrealistic scenario that is clearly a visual representation of the up close and real experience that users of the streaming service can enjoy. The minority considered that the advertisement was not depicting behaviours that would be seen to be unsafe due to the lack of realism and the clear link to the streaming service.

The majority of the Panel considered that regardless of the link to the streaming service and the unrealistic lack of consequence/injury to the players and the fact that the woman pays no attention to what is happening beside her, the overall depiction is realistic every day scenarios of sitting at a bus stop. The majority of the Panel noted that the football players are shown to get up and keep playing after crashing through the bus shelter.

The Panel considered that the advertisement would be attractive to younger people as there are well known sporting players in the advertisement. The Panel considered that the depiction of this behaviour in realistic settings would be easily imitated.

The Panel considered that this is of concern as it suggests that such behaviour will result in no harm to a person, and the Panel considered that such a message is not appropriate for younger viewers.

The Panel noted that Facebook requires users to be over 13 and that this would limit the number of young children viewing the advertisement, however considered that the advertisement in any case depicts material that is contrary to prevailing community standards on safety.



Overall the Panel considered that while the fantastical element is clear, the unsafe behaviour depicted shows no consequences and is easily imitated. The Panel considered that this depiction is contrary to prevailing community standards on safety and did breach Section 2.6 of the Code.

Finding that the advertisement breached Sections 2.3 and 2.6 of the Code, the Panel upheld the complaint.

THE ADVERTISER'S RESPONSE TO DETERMINATION

Foxtel confirms that Kayo's "Nowhere is safe from footy" campaign has finished, with the advertisement removed from Facebook on 22 March 2020.

INDEPENDENT REVIEWER'S RECOMMENDATION

Background

The complaints related to a version of a television advertisement by Kayo Sports depicted as arising in a public space; one relating to a depiction of an NRL 'tackle' leading to property damage.

Bus stop advertisement. A commuter is seated at a bus stop watching NRL on her phone. Commentary 'Keary runs the ball down' is heard as two well-known NRL players, Alex Glenn and Luke Keary appear in front of the bus stop. Keary attempts to side-step Glenn before he's tackled through the bus stop glass. At the moment of impact, further commentary 'huge hit by Alex Glenn' is heard from the phone. A super comes up saying 'Nowhere is safe from footy'.

Complaint

The complaint was that the advertisement depicted unsafe and dangerous behaviour.

Panel findings

Section 2.3. The Panel considered that the depiction of a tackle by well-known football players in playing kit would be considered by most members of the community to be a depiction of violence. The Panel considered, however, that the actions depicted are an inherent part of the particular games.

The Panel considered that the tackles are sporting actions and are being used in the context of a streaming service that is focused on sporting activities including football games and therefore is directly relevant to the product being advertised.

The Panel considered that the advertisement depicts violence through the images of the men falling into glass, and there is significant damage to property. Even though there were no adverse consequences to the players, the particular scene where property is damaged was a depiction of violence that is not relevant to the product promoted.



Consequently, the Panel considered that the depiction of violent behaviour in the context of this advertisement was not relevant to the product promoted and was a breach of section 2.3 of the Code.

Section 2.6. Overall, while the fantastical element is clear, the unsafe behaviour depicted shows no consequences and is easily imitated, particularly by younger viewers. The Panel considered that this depiction is contrary to prevailing community standards on safety and did breach section 2.6 of the Code.

Advertiser's response to Panel findings for purposes of review

The advertisements ceased broadcasting on 25 March 2020.

The advertiser's response was that overall the actions did not involve violence contrary to section 2.3 since they were not 'menacing, threatening or aggressive and at no point are the players shown to be injured'. The advertiser's view was that reasonable viewers would accept that the actions were consistent with moves that occur in typical NRL or AFL matches, and their performance, although in public, rather than on the field, in the context of the exaggerated and unrealistic setting, notably the phone users' absence of reaction to what would be noisy and disruptive actions in their close proximity, presented these actions in a humorous and light-hearted manner. This setting highlighted the theme underpinning the advertisement, namely that through Kayo you can enjoy football anywhere, anytime.

The advertisers also maintained that for these reasons, and seen in the context portrayed, notably that the actors were shown walking away, unhurt, after the depictions, the content did not breach prevailing community standards of health and safety and hence did not breach section 2.6 of the Code.

Code Principles

Section 2.3 of the Code of Ethics states:

Advertising or Marketing communications shall not present or portray violence unless it is justifiable in the context of the product or service advertised.

Section 2.6 of the Code of Ethics states:

Advertising or marketing Communications shall not depict material contrary to Prevailing Community Standards on health and safety.

Role of reviewer

The Independent Reviewer first considers whether the application for review sets out a prima facie case for review and decides whether to accept or not accept the request. That decision depends on whether the complaint meets any of the required but limited grounds for review. The relevant ground relied on was:



- Where there was a substantial flaw in the Community Panel's determination (determination clearly in error having regard to the provisions of the Codes or Initiatives, or clearly made against the weight of evidence).

If the Independent Reviewer accepts the application for review, their role is to review the Panel's reasons to identify whether there are substantial flaws in the Panel's reasoning or clearly made against the weight of evidence, including errors in interpreting the relevant sections of the Codes or inconsistencies with previous decisions. If an error or inconsistency is identified, the Independent Reviewer remits the decision(s) to the Panel for reconsideration.

Reviewer's reasons

Section 2.3. This section requires the Panel to make two findings: the first is whether there is a depiction of violence in an advertisement; the second is to decide, if there is violence, whether it is justifiable in the context of the circumstances shown in the advertisement. The Panel failed to undertake this process, at least in relation to the second, AFL mark advertisement. The two actions, the tackle and the mark, should have been dealt with separately and were not. This was confusing and resulted in an ultimate finding of breach of section 2.3 in the case of both advertisements which in the opinion of the reviewer was not justified and involved a substantial flaw in the Panel's reasoning.

'Tackle'. The Panel's reasoning appears in paras 4-8 on p 4. The Panel concluded that the tackle involves violence, but in the context of promotion for football was 'directly relevant to the product being advertised'. In the next paragraph, the Panel states 'the tackle used in conjunction with a promotion for football was justifiable [of itself] in the context of the product being advertised and did not breach Section 2.3 of the Code'.

However, having said on p 4 of its reasons that the behaviour was not in breach of section 2.3, the Panel ultimately concluded (p 5, para 2) that the 'violent behaviour in the context of the advertisement was not relevant to the product promoted and *was* a breach' of section 2.3 (emphasis added). This is confusing and a flaw in the reasoning. The apparent reason for the contradiction is the image of the men, as a result of the tackle, falling into and breaking the glass of the bus stop window was not considered in the finding on p 4, but this is not clear in the reasoning.

In the reviewer's opinion, the 'significant damage to property' may be a reason for concluding that, despite the need for the advertisement to depict some form of commotion, the damage to public property was not a justifiable way to present a noisy event in the advertisement. That is not spelled out. The confusing reasoning and this aspect of the Panel's decision in relation to the tackle are flaws in its reasoning, but are not 'substantial flaws' leading to an inappropriate outcome. That conclusion is based on the reviewer's acceptance of the finding that the 'tackle' is 'of itself' violent behaviour.



Section 2.6. The reviewer accepts the Panel's findings that the 'tackle' could be considered of itself to be violent behaviour and in the context of an advertisement involving damage to public property, and broken glass which could involve harm to the health and safety of the public was a breach of section 2.6.

The reviewer supports the findings of the Panel in relation to these complaints.

Previous decisions

The advertiser has argued that previous decisions were insufficiently relied on by the Panel. It should be noted that, in the opinion of the reviewer, in none of the cases cited are the facts sufficiently close for the parallels to be compelling. Each case must always be considered on its own facts, guidance only being provided by other, earlier cases.

ALDI Australia, Case Number 0239/17

The advertisement featured a woman dancing alone at night with a trolley in an almost empty ALDI car park, performing acrobatic-like stunts before returning and recovering her \$2 coin.

Although the Board acknowledged the safety concerns for children about children copying the woman's actions when riding on trolleys, 'the majority of the Board ... considered that the exaggerated nature of the advertisement' and 'the overall look and tone was clearly one of fantasy, and was not considered to be realistic in any way'. As a consequence, the ALDI depiction was not 'contrary to Prevailing Community Standards on health and safety'.

The element of fantasy in the Kayo Sports advertisement of the 'tackle' is less than the ALDI case, given its setting in day-time, at a bus stop, and the use of well-known sporting figures. In addition, the potential for harm to adults and children from the broken glass following the tackle is a depiction which could be considered to be contrary to prevailing community standards on health and safety and more likely to be emulated by children in an outdoor setting. The outcome in the ALDI case can be distinguished on the facts from the Kayo Sports 'tackle' advertisement.

Mars Confectionary, Case Number 0150/10

The advertisement depicts young men playing football, but their contact tackles are not considered to be violent because they are undertaken on the sporting field. However, the depiction of the tackles being performed on an older man or woman would, if real, harm them, but the transformation of one of them, following consumption of a Snickers bar, to again being young is so startling and unreal that it negates the violence of a tackle against older persons, was clearly exaggerated and humorous and did not breach section 2.2 of the Code.

In the opinion of the reviewer this conclusion can be distinguished in relation to the tackle given the damage to public property and the more realistic potential for injury and harm, thus being contrary to prevailing standards of health and safety.



Smith's Snackfood Co Ltd, Case Number 0045/16

An old lady is miffed at being denied a Smith's Chip from a supply being consumed by someone repairing the premises' lift. Annoyed at his selfishness, while the lift is being tested to check that it is working, the old lady sneaks up behind the person, presses the button to start the lift, causing the repairman to fly up the stairs before smashing through the upstairs window.

The Board found that the old lady's action was not an act of aggression. It is clearly a fantastical situation, so there was no depiction of violence contrary to section 2.3 of the Code. Nor, given the humour of the advertisement and its fantastical nature, was there a suggestion that the person was actually harmed, thus the depiction being contrary to prevailing standards of health and safety.

When compared with the Kayo Sports advertisement, there is more potential for the tackle to be considered violent, and this was not ameliorated by the context being in a public place, not on a sporting field.

Conclusion

The reviewer has not found substantial flaws or inadequate weight given to the overall circumstances in the findings by the Panel or the majority of the Panel in relation to the advertisement depicting the tackle.