



Ad Standards Community Panel
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Case Report

1. Case Number :	0115-21
2. Advertiser :	Sportsbet
3. Product :	Gambling
4. Type of Advertisement/Media :	TV - Pay
5. Date of Determination	12-May-2021
6. DETERMINATION :	Upheld - Modified or Discontinued
7. IR Recommendation:	Panel to Reconsider
8. Date of reviewed determination:	14-Jul-2021
9. Determination on review:	Upheld – Modified or Discontinued

ISSUES RAISED

AANA Code of Ethics\2.1 Discrimination or Vilification

DESCRIPTION OF ADVERTISEMENT

This TV On Demand advertisement features several people competing in a race in which they walk 10km over grass which is full of bindis. The advertisement includes a voiceover which at one point, when a Kenyan athlete appears on screen and stumbles, states "and when Kenya's 'oh no I copped a bad one' fell at the pointy end, not even officials could steal victory from the Aussie".

THE COMPLAINT

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

There was a racist remark. It referred to a person of African descent as "Oh No I Copped A Bad One". I found this racist and offensive.

THE ADVERTISER'S ORIGINAL RESPONSE

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

The Complaint alleges that the Advertisement may breach section 2.1 of the AANA Advertising Code of Ethics, which relevantly states that:



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

The Community Panel's views on discrimination and vilification are well recognized and extremely serious, as set out below:

Discrimination: Acts with inequity, bigotry or intolerance or gives unfair, unfavourable or less favourable treatment to one person or a group because of their race, ethnicity, nationality, sex, age, sexual preference, religion, disability and/or political belief.

Vilification: Humiliates, intimidates, and incites hatred towards, contempt for, or ridicule of one person or a group of people because of their race, ethnicity, nationality, sex, age, sexual preference, religion, disability and/or political belief.

Sportsbet takes a zero-tolerance approach to discrimination and/or vilification of any kind including, relevantly, on account of race, ethnicity or nationality.

Sportsbet submits that the Advertisement does not discriminate or vilify against any individual or group of people. The Advertisement is a light-hearted, comedic take on an Olympic walking event where competitors must walk across a lawn covered in prickly bindi. The Australian athlete, "Prickly Pam Patterson" wins Gold after her Kenyan competitor succumbs to a bindi injury in the home straight, with the commentator proclaiming "and when Kenya's Ohno Ikopta-Badwon fell at the pointy end, not even the officials could steal victory from the Aussie."

The athlete's name is descriptive of what has happened to her in the race, copping a bad bindi which forces her out of the event. Nothing in the Advertisement discriminates or vilifies on the basis of race, ethnicity or nationality, and none of the required elements of inequity, bigotry, intolerance, contempt or inciting hatred (among others) are present.

Action taken by Sportsbet

Whilst Sportsbet is satisfied the Advertisement does not breach the Code, to avoid any risk of the Advertisement being misinterpreted, we have decided to replace the Advertisement and use an alternative voice over which does not reference the Kenyan athlete's name.

We trust this resolves the Complaint and satisfies the ASB. However, should the ASB wish for Sportsbet to submit further submissions as to the Advertisement's compliance with the Code please let us know.

THE ORIGINAL DETERMINATION



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

The Panel noted the complainant's concerns that the advertisement is mocking a Kenyan name which is racist and offensive.

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

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

The Panel noted the AANA Practice Note which provides guidance on the meaning of:

- Discrimination - unfair or less favourable treatment
- Vilification - humiliates, intimidates, incites hatred, contempt or ridicule
- Nationality – people belonging to a particular nation either by birth, origin or naturalisation.

Does the advertisement portray material in a way which discriminates against or vilifies a person on account of nationality?

The Panel noted that it had considered this advertisement on Free TV in case 0090-21, in which:

“The majority of the Panel however considered that the phrasing of the sentence made it clear that the voiceover was stating the athlete's name. The majority noted the advertiser's response that the reference to “Ohno Ikopta-Badwon” is descriptive of what happened to the runner, and considered that the advertiser acknowledged that the comment was intended to refer to her name.

The majority of the Panel considered that while the Australian athlete has a name, Prickly Pam Patterson, the Kenyan athlete's name is made as a joke.

The majority of the Panel considered that the advertisement is mocking the pronunciation of some Kenyan names, and that this was vilifying of the woman by humiliating and inciting ridicule of her, and all Kenyans, based on their names.”

Section 2.1 conclusion

Finding that the advertisement did portray material in a way which discriminates against or vilifies a person or section of the community on account of nationality, consistent with its determination in case 0090-21 the Panel determined that the advertisement did breach Section 2.1 of the Code.

Conclusion



Finding that the advertisement did breach Section 2.1 of the Code the Panel upheld the complaint.

THE ADVERTISER'S RESPONSE TO THE ORIGINAL DETERMINATION

Thank you for your letter dated 24 May 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 21 April 2021, Sportsbet strenuously denies that the Advertisement contravenes any section of the AANA Code of Ethics (Code). Nevertheless, as Sportsbet foreshadowed in that letter, Sportsbet has already (without any admission) modified the Advertisement by using an alternative voice over which does not reference the Kenyan athlete's name.

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 letters dated 18 and 24 May 2021, Sportsbet takes its obligations under the AANA Code of Ethics (Code) very seriously. Notwithstanding our commitment to compliance with the Code, Sportsbet is deeply concerned by the Panel's determinations dated 28 April and 12 May 2021 regarding the Advertisement (Determinations).

Sportsbet respectfully requests that the Independent Reviewer conduct a review of the Determinations 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 Determinations and dismiss the original complaints regarding the Advertisement.*

The relevant prohibition and the Determinations



Section 2.1 of the Code prohibits the discrimination or vilification of any individual or group of people on the basis of certain defined attributes, one of which is nationality.

The AANA's Practice Note in respect of the Code (Practice Note) relevantly provides that:

- *"nationality" means "people belonging to a particular nation either by birth, origin or naturalisation";*
- *"discrimination" means "unfair or less favourable treatment"; and*
- *"vilification" means something which "humiliates, intimidates, incites hatred, contempt or ridicule".*

In the Determinations, the Panel concluded that the Advertisement breached the Code because it "is mocking the pronunciation of some Kenyan names, and that this was vilifying of the woman by humiliating and inciting ridicule of her, and all Kenyans, based on their names". With respect, Sportsbet submits that this conclusion was plainly wrong.

The Advertisement is an irreverent exercise in absurdist humour

The Advertisement portrays an obviously fictional athletics event, being a walking race on grass track covered with prickles (colloquially known in Australia as "bindis") in which the competitors compete barefoot. The event is described as the "10KM BAREFOOT BINDI WALK". Participants of various nationalities compete in the event and each is shown to be struggling with that exercise. The irreverent, "tongue in cheek" nature of the Advertisement is made clear at the outset when the fictional Australian athlete is introduced as "Prickly Pam Paterson", being a humorous reference to the bindis on the grass track.

For an advertisement to be successful and attention grabbing, it must be attractive to viewers. In achieving this purpose, Sportsbet adopted a competitive climax in which the fictional Australian athlete was racing to the finish line against another worthy opponent. Amongst the other athletes that were participating in the race, the Kenyan athlete was depicted as the Australian athlete's main competitor because Kenyans are well-known for their prowess in professional athletics, including long-distance walking events. Accordingly, Sportsbet featured a fictional Kenyan athlete in the Advertisement's climax on the basis of a positive stereotype commonly associated with Kenyans.

As regards the name given to the fictional Kenyan athlete, this is a play on words. It is conveyed to the viewer of the Advertisement at the time that she succumbs to a particularly bad bindi. When spoken in a heavy Australian



accent, that name is pronounced "oh no I copped a bad one". This comedic technique is not uncommon. By way of example, it is used regularly by Shaun Micallef in his MAD AS HELL program on the ABC. The program broadcast on 26 May 2021, for instance, depicted a fictional character named "Vaguary Bellchamber" (screenshot below) who spoke in vague terms about the Labor party's political strategies.

The Advertisement does not vilify the Kenyan athlete or Kenyans generally

The Advertisement's use of the "Ohno Ikopta Badwon" name for the fictional Kenyan athlete is obviously for comedic purposes. However, and contrary to the Determinations, the Advertisement does not do so in a way which vilifies the fictional Kenyan athlete, much less "all Kenyans". The comedy lies in the sound of the name when pronounced in a heavy Australian accent – not in the name itself – and the meaning which it connotes: namely, the fact that the athlete has just stepped on a particularly painful bindi in a race on grass track covered with bindis in which the competitors compete barefoot.

To the extent that the Advertisement is "mocking" anything, it is mocking the capacity of heavy Australian accents to mispronounce names of other nationalities. That certainly does not humiliate or incite ridicule of the fictional Kenyan athlete in the Advertisement, much less "all Kenyans". At most, it mocks those who speak with heavy Australian accents.

In this regard, the Practice Note makes clear that advertisements can humorously or satirically suggest stereotypical aspects of a group of people in society provided the overall impression of the advertisement does not convey a negative impression of people of that group on the basis of their nationality. The impression that the Advertisement creates of the fictional Kenyan athlete is not negative at all, and the Advertisement certainly does not convey a negative impression of "Kenyans generally". The depiction of the fictional Kenyan athlete (and Kenyans generally) is certainly no more negative than the depiction of Australians by reference to "Prickly Pam Paterson" given "prickly" is a term colloquially used to describe someone with disagreeable tendencies.

For these reasons, Sportsbet respectfully submits that there was a substantial flaw in the Determinations, which were clearly made in error.

Relevant determinations concerning previous Sportsbet advertisements

Further support for the submissions set out above can be drawn from the following relevant determinations of the Panel regarding previous Sportsbet advertisements. Sportsbet submits that the Determinations are inconsistent with those previous determinations, and that the reasoning applied in those previous determinations should have been applied here.



Bet Live case

Case Number 0112/16 concerned a Sportsbet advertisement featuring a voice-over artist comically attempting to pronounce real athletes' names that are particularly long and difficult to pronounce. The Panel dismissed the complaint. In doing so, the Panel observed (rightly) that:

- although "some people may have struggled to pronounce the names of international sports men and women [that] is not a negative depiction of other nationalities but rather an acknowledgement that some people may struggle to pronounce names not common in their home country";*
- "the advertisement does not make any comment about the names or origins of the players, or about countries other than Australia, and considered that overall the advertisement does not present other nationalities in a negative light and does not depict, encourage or condone intolerance towards people from other countries"; and*
- "identifying that some names are hard to pronounce is not a promotion of intolerance but rather an acknowledgement of a fact".*

With respect, the Panel should have applied similar reasoning to dismiss the complaints relating to this Advertisement.

Chinese swimmer case

Case Number 0314/17 concerned a Sportsbet advertisement featuring a competitive Chinese swimmer called Mee Chee Ting (pronounced "me cheating") speaking Mandarin whilst a male voiceover with an Australian accent translates. The complainants were concerned (among other things) that by using a fake name, the advertisement was "not mocking a particular individual, but making a generic mockery of any female swimmer who is Chinese".

However, in dismissing the complaint, the Panel noted that "imitating an accent is not of itself discriminatory". The Panel also considered (rightly) the overall irreverent tone of the advertisement. In that regard, the Advertisement is obviously an exercise in absurdist humour and cannot be divorced from its context. Even so, this is not a case (such as Case Number 0546/16 which referred to a man speaking with an Asian accent as "Mr Ping Pong") where the relevant name is an offensive name that can be used to refer to people of the relevant nationality or ethnicity. In that case, the Panel noted that "Ping Pong" is not an Asian name and is a disrespectful term that can be used to refer to a person of Asian descent. The Panel relied upon the Racial Slur Database to find that this fake name was inappropriate, because table tennis is well known to be the favourite sport of Chinese people. The present case is completely



different. The fictional Kenyan athlete's name in the Advertisement is not (nor could it be) used to refer to Kenyan people in general. That name contains no racial overtones. It is not a double entendre, with a secondary/underlying meaning containing a negative reference to the fictional Kenyan athlete or Kenyans generally. The name used in the Advertisement is quite obviously a direct, humorous reference to the cause of the fictional Kenyan athlete's fall and is certainly not used in any derogatory sense.

Soap-dodger case

In Case Number 0189/20, a complaint was made against a Sportsbet advertisement featuring a commentator calling a fictional platform diver a "soap-dodger" as he jumps off a diving platform into a pool. The Panel found that whilst the term "soap-dodger" is a negative stereotypical representation of British people, the advertisement was intended to be light-hearted and humorous and drew upon the sentimental and friendly sporting rivalry between Australia and England. Accordingly, the complaint was dismissed because the Panel noted that "advertisements regularly draw upon cultural norms and sentiment to promote a product and service and that in this instance, the advertisement was not likely to be offensive to most members of the Australian community".

That conclusion was reached despite the Panel's conclusion that "soap-dodger" can be a negative stereotypical representation of British people. Concluding that the Advertisement breached Section 2.1 of the Code is even less appropriate in the present case because the Panel has not concluded (nor could it have) that "Ohno Ikopta Badwon" carries any negative connotation of the fictional Kenyan athlete or Kenyans generally.

Towel flick case

In Case Number 0188/20, the Sportsbet advertisement in question featured a fictional Chinese athlete named "CH Ting" competition in a towel flick competition. The complaint was that this text-only reference to the athlete's name was racially vilifying to Chinese people. The Panel dismissed the complaint made under section 2.1 of the Code. While the Chinese athlete's name could be read as "cheating", the Panel observed that there was no reference in the advertisement to the athlete acting unfairly or in a way which was unsporting. Further, the Panel considered that the preference shown to the Australian competitor by the voice over was indicative of the preference generally shown to Australian competitors by Australian commentators in television/radio coverage of sporting events and "was not an indication that the man was being treated unfairly because of his race".



In this regard, it appears that the Determinations may have been influenced by the Australian commentator's preference for the fictional Australian athlete to win the race, even if that is at the expense of the fictional Kenyan athlete stepping on a particularly painful bindi. However, to conclude (as the Panel has) that the Advertisement involves vilification of the fictional Kenyan character or Kenyans generally is plainly wrong.

That is because:

- *the Advertisement is clearly an exercise in absurdist humour; and*
- *the Advertisement contains no negative reference to or of the fictional Kenyan athlete or Kenyans generally, whether in relation to the fictional Kenyan athlete's name or otherwise.*

INDEPENDENT REVIEWER'S RECOMMENDATION

Independent Review Decision

I recommend that the Community Panel review its determinations in both matters.

Complaints

This review relates to two matching complaints about the same television advertisement that appeared on free-to-air TV (Case 0090-21) and pay TV (Case 0115-21). Both Panels upheld the complaint, though by a majority Panel decision in the first case (on 28 April 2012). The second Panel decision on 12 May 2021 endorsed the reasoning of the majority in the earlier Panel ruling. (For convenience the following discussion refers principally to the first Panel decision.)

The advertisement that was complained about was a Sportsbet television advertisement that was described as follows in the Case Report:

This ... advertisement features several people competing in a race in which they walk 10km over grass that contains bindis. The advertisement contains a voiceover which at one point when a Kenyan athlete appears on screen states "and when Kenya's 'oh no I copped a bad one' fell at the pointy end, not even officials could steal victory from the Aussie".

The 'Aussie' athlete featured in the advertisement who won the gold medal was named 'Prickly Pam Paterson'. A paraphrase of the Kenyan athlete's name used in correspondence in this case is 'Ohno Ikopta-Badwon'.



The complaints were treated as an alleged breach of Section 2.1 of the AANA Code of Ethics:

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

The following complaints were made about the advertisement:

'... we should be beyond making fun of names from other nationalities'

'I found the ad offensive ... because of the mocking name given to a Kenyan runner. This mocks the culture and language and is done for comedic effect. I feel this is inappropriate ...'

'There was a racist remark [that] I found ... racist and offensive'

Sportsbet advised in its initial response to the complaint that, while of the view that no Code breach had occurred, Sportsbet had altered the advertisement to use an alternative voice-over that did not reference the Kenyan athlete's name. A ruling on the complaint was nevertheless made by the two Community Panels, and Sportsbet has sought independent review of those rulings.

Community Panel decision

The first Panel considered whether the advertisement discriminated against or vilified a person on account of nationality. The Panel noted the definition of those three terms in the AANA Practice Note:

Discrimination – unfair or less favourable treatment

Vilification – humiliates, intimidates, incites hatred, contempt or ridicule

Nationality – people belonging to a particular nation either by birth, origin or naturalisation

The majority of the Panel concluded as follows:

[T]he advertisement is mocking the pronunciation of some Kenyan names, and ... this was vilifying of the woman by humiliating and inciting ridicule of her, and all Kenyans, based on their names.

The minority of the Panel considered that the advertisement made a humorous reference to the Kenyan runner stumbling, and that most viewers would not



think that was her name or that it was an offensive reference based on her nationality.

The advertiser's response

Sportsbet addressed the complaint allegations briefly in an initial response to the complaint, and more extensively in the request for independent review. Sportsbet sought review of the Panel decisions on the basis of a substantial flaw in the Panel determination. Sportsbet made the following points:

- Sportsbet takes a zero-tolerance approach to discrimination and/or vilification of any kind, including on account of race, ethnicity or nationality.*
- The advertisement features a fictitious Olympic sporting event, described as the '10km barefoot bindi walk'. Participants of various nationalities are struggling in the event. To be attention grabbing, the advertisement features a competitive climax in which two athletes are featured. One is the Australian, Prickly Pam Paterson, and the other is the Kenyan athlete. A Kenyan athlete was pictured because of their well-known prowess in professional athletic events. This was a positive stereotype commonly associated with Kenyans.*
- The advertisement was a light-hearted, comedic, 'tongue-in-cheek' portrayal of the event. It was an irreverent exercise in absurdist humour. The fictional Kenyan athlete's name was a play on words and did not convey any secondary or derogatory meaning. The chosen name was linked to the nature of the event.*
- Nothing in the advertisement discriminated or vilified on the basis of race, ethnicity or nationality, and there was no element of inequity, bigotry, intolerance, contempt or inciting hatred. The advertisement did not vilify either the athlete or all Kenyans. Nor did it humiliate or incite ridicule of the fictional Kenyan athlete. The depiction of the Kenyan athlete was no more negative than the depiction of an Australian athlete as 'Prickly' Pam. At most, the advertisement mocked the mispronunciation and heavy accent of the Australian commentator.*
- The comedic technique used in the advertisement is not uncommon. An example given by Sportsbet was a Shaun Micallef 'Mad as Hell' segment in May 2021 that featured a 'Labor Apparatchik' named 'Vaguary Bellchamber'.*



- *The advertisement was consistent with guidance in the AANA Practice Note: ‘Advertisements can humorously or satirically suggest stereotypical aspects of a group of people in society provided the overall impression of the advertisement does not convey a negative impression of people of that group on the basis of [their nationality].’*
- *The Panel determination is inconsistent with previous Panel determinations (that are discussed below).*

The complainant’s response

One of the complainants responded to the invitation to comment on Sportsbet’s application for independent review. The following points were made:

- *The Kenyan walker was the only athlete in the advertisement identified by race, ethnicity or nationality. This was done to incite ridicule. The other named character, Prickly Pam Paterson, uses a name (Pam Paterson) that is not uncommon or unusual in Australia; and ‘Prickly’ is a fairly neutral description that is relevant to the subject matter of bindis.*
- *The example given by Sportsbet – Vaguary Bellchambers – does not rely on race, ethnicity or nationality for humour.*
- *The revised version of the advertisement that does not name the Kenyan walker achieves the advertiser’s stated aim of being attention grabbing. The advertisement is not diminished by removing the Kenyan walker’s name.*
- *The advertisement cannot be characterised as mocking the Australian commentator’s accent, as a fictitious Kenyan name was created for this purpose. On this point, the case is distinguishable from Case 0112/16.*

Relevant Panel determination

Sportsbet submitted that the Panel determination is inconsistent with four earlier determinations in which Sportsbet was the advertiser. The allegations of racial vilification were dismissed in all cases. A fifth case regarding a different advertiser is also noted below (Case 0546/16).

- **Case 0112/16:** *A radio advertisement comically featured an announcer mispronouncing long and difficult names that, by implication, were names of international sports men and women. The advertisement advised that a*



new Sportsbet product enabled a person to place a bet without having to speak to an operator.

In dismissing the complaint, the Advertising Standards Board observed that struggling to pronounce a name is not of itself racist; the focus of the advertisement was the announcer's pronunciation difficulties; it is not a negative description of another nationality to observe that names can be difficult to pronounce; and to do so does not encourage or condone intolerance.

- **Case 0314/17:** *An internet advertisement featured an athletic Chinese female swimmer named as 'Mee Chi Ting' (to be understood as Me Cheating). The advertisement implied that the swimmer had taken performance enhancing drugs and that her spoken words (translated by a dismissive commentator) could not be accepted.*

A majority of the Board, in dismissing the complaint, observed that the advertisement had an overall irreverent tone; it was intended to be understood as a reference to an historical event in which some Chinese swimmers had tested positive for banned steroid use; the advertisement was not suggesting that all Chinese swimmers take illegal substances; nor was it a negative stereotypical description of female Chinese swimmers.

- **Case 0189-20:** *A TV advertisement featured a man in swimming attire that portrayed him as British, being described by the commentator as a 'soap dodger' as the man dived into a pool.*

The Ad Standards Panel accepted that the term 'soap dodger' is a negative stereotypical representation of people of British origin. However, the Panel dismissed the complaint on the following basis: the advertisement was intended to be light-hearted and humorous and drew upon sentimental and friendly rivalry and banter between Australia and Britain; the term was not used in a way that was meant to be hostile or vilifying or would be regarded as offensive by most people; and advertisements regularly draw upon cultural norms and sentiment to promote a product.

- **Case 0118-20:** *A TV advertisement featured an Olympic-style towel-flicking (or fencing) match between an Australian competitor (named V Rees) and a Chinese competitor (named C H Ting). The Australian won the event.*

The Panel accepted that the Chinese man's name could be read as 'cheating'. However, the Panel dismissed the complaint on the following basis: most viewers would not read the man's name as 'cheating' in the overall context of the advertisement; there was no suggestion the Chinese man was acting unfairly or was being racially vilified; the commentator's



preference for the Australian competitor was not unusual or racial in preference; and the Panel's decision was in line with the earlier majority Panel determination in the Mee Chi Ting case. (The complaint was upheld on another ground of being discriminatory on the ground of gender by reason of a different aspect of the advertisement.)

- **Case 0546/16:** A TV radio advertisement relayed a telephone conversation between a man with an Asian accent named Mr Ping Pong and a concreting firm (the advertiser).

A majority of the Board determined that the advertisement breached Section 2.1 of the Code by inciting ridicule of Asian people, mocking their command of English grammar, and making fun of differences between Western and Asian culture in a way that was humiliating for people of Asian descent. This ruling was based on several features of the advertisement, including the use of a fictitious and offensive name (Ping Pong), the background behaviour of the caller's mother, and comments by the concreter.

Analysis of the application for review

The issue to be addressed in this matter is whether there was a substantial flaw in the finding of the Community Panels that the advertisement breached Section 2.1 of the AANA Code by vilifying people of Kenyan nationality,

It has not been suggested by the advertiser that there is new and relevant evidence that was not considered by the Community Panels.

The scope of this review can also be narrowed by noting that the Panel decision, though it referred to the embargo against discrimination in Section 2.1, was not based on that element of the Code. Nor was there any reference in the Case Reports to the related terms of race and ethnicity.

The element of national identification (or nationality) is also not in dispute. The advertisement refers to the athlete as being Kenyan. The advertiser accepts that the name given to the athlete, though fictitious, could be construed as a generic Kenyan name.

The key issues, accordingly, are:

- *whether the advertisement could reasonably be construed as vilifying the Kenyan runner and Kenyans generally, and if not*
- *whether there was a substantial flaw in the Panel's determination that the advertisement was racially vilifying.*



Vilification

The Panel decision notes the definition of ‘vilification’ in the Practice Note – ‘humiliates, intimidates, incites hatred, contempt or ridicule’.

The action that is classified by the Panel as ‘vilification’ is ‘mocking the pronunciation of some Kenyan names’. The Panel comments that this ‘was vilifying of the woman by humiliating and inciting ridicule of her, and all Kenyans, based on their names’.

That is a strong and, perhaps, surprising inference. The term vilification ordinarily refers to actions more injurious than mocking a person’s name, particularly in the context of a parody sketch.

Dictionary definitions of vilifying commonly use terms such as ‘abusively disparaging’ or ‘slandorous and abusive criticism’. The AANA Practice Note aligns with that common usage by referring to actions that humiliate, intimidate, or incite hatred, contempt or ridicule.

Those detrimental qualities are not immediately apparent in the advertisement. The only words or images in the advertisement that are referable to Kenyans is the runner’s fictitious and unusual name. This reference is clearly intended to be humorous by describing the difficulty the runner is facing. There is no other element of the advertisement that could reasonably be construed as inciting hatred, contempt or ridicule of the runner or Kenyans generally. As Sportsbet submitted, the fictional Kenyan athlete’s name was a play on words and did not convey any secondary or derogatory meaning.

Humour that springs from nationality stereotypes will inevitably evoke a mixed response. All humour of that kind is likely to be unwelcome and displeasing to some people. On the other hand, it is accepted by many others. The AANA Code of Ethics takes the middle path by advising that the humour must not rise to the point of vilifying people on the basis of nationality, race or ethnicity.

This is spelt out in the AANA Practice Note which contains a section headed ‘Humour’. It advises that an advertisement ‘can humorously or satirically suggest stereotypical aspects of a group of people provided the overall impression of the advertisement does not convey a negative impression of people of that group’.

On one view, that is all the advertisement did – it satirically implied that Kenyan names can be different and open to parody in the way they are pronounced. That does not necessarily equate to ridiculing or creating a negative impression of all Kenyans.

The majority of the Panel have taken the different view that the advertisement, in mocking the pronunciation of Kenyan names, is ridiculing and vilifying all



Kenyans. That view, without further explanation, does not align easily with the guidance in the Practice Note that stereotypical satire is acceptable if it falls short of implying an overall negative impression of a group of people.

The previous Board and Panel decisions referred to above appear to take a more robust and accepting stance in the use of humour and satire in referring to people of other nationalities in advertisements. For example, those decisions accepted that advertisements could include difficulty in name pronunciation, the use of fictitious names that are referable to other nationalities, common stereotyping, and support for Australian victory in international sporting events. An important thread in the earlier determinations was that this was done in a way that was designed to be humorous, even though it was possible that the humour would not appeal to all viewers.

Substantial flaw

Humour has a different appeal from one person to the next. It is not necessarily a substantial flaw in reasoning for one group of people to reject the use of humour that others accept.

For present purposes, the issue to be resolved is whether the determinations of the Community Panels should be reconsidered as a result of a clear shortcoming or flaw in the reasoning used to support their determinations. In my view, two shortcomings in the Community Panel determinations are:

- *The Panels applied the concept of vilification in a way that was not spelt out, and that was seemingly at odds with commonly accepted understanding of vilification as defined in the AANA Code of Ethics, and*
- *The Panel determinations are apparently inconsistent with earlier Board and Panel determinations, and this inconsistency is not acknowledged or explained.*

Recommendation

I recommend that the Community Panel review its determinations in both cases that the advertisement was in breach of Section 2.1 of the AANA Code of Ethics.

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 definition of vilification and that the differences between this case and precedent cases were not acknowledged.

The Panel noted that it needed to reconsider the case under Section 2.1 of the the AANA Code of Ethics (the Code) taking into account the Independent Reviewer's recommendations and comments.

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

The Panel noted the AANA Practice Note which provides guidance on the meaning of:

- Discrimination - unfair or less favourable treatment
- Vilification - humiliates, intimidates, incites hatred, contempt or ridicule
- Nationality – people belonging to a particular nation either by birth, origin or naturalisation.

Does the advertisement vilify a person or section of the community on account of nationality?

The Panel noted the Independent Reviewer's comments that the definition of vilification usually refers to actions more injurious than mocking a person's name and the Panel's reasoning for finding the advertisement to be vilifying were not spelt out.

A minority of the Panel considered that the advertisement was light-hearted and humorous and did not give an overall impression of negativity in relation to the Kenyan runner or Kenyan people in general. The minority of the Panel considered that this advertisement builds on the positive stereotype of Kenyans being good athletes. The minority of the Panel considered that the Australian competitor was also called by a funny name, and that this is part of the overall satirical nature of the advertisement and was not singling out the Kenyan or mocking Kenyans in general. Accordingly a minority of the Panel considered that the matter did not rise to the level of vilification.

The Panel noted that the main Australian character was referred to as 'Prickly Pam Patterson' and that prickly is not a positive trait. However, the majority of the Panel considered that the term 'prickly' was used as a nick-name and was not portrayed as her real name, unlike the Kenyan competitor who was depicted as being named "Oh-no-i-copped-a-bad-one".

The Panel acknowledged the importance of humour in matters such as this however noted that the 'joke' is that African, and in particular Kenyan, names sound funny in comparison to common European names. The Panel considered that people with non-European-sounding surnames in Australia do often face ridicule and mocking in the community due to this perceived difference. The Panel considered that the mocking



of someone's name because they are from a minority community and the name sounds different is a form of racism and exclusion. The Panel noted that the definition of vilification in the Code includes ridicule.

The Panel considered that actions such as not making an effort to pronounce someone's name correctly, or laughing at the way someone's name sounds, are forms of casual racism which are prevalent in Australia and which do real harm.

The Panel acknowledged that the advertiser's intent was not to cause offense or harm to Kenyan people, or to suggest that Kenyan's names should be mocked. However, the Panel considered that although offense may not be intended, by using humour which is based on ridiculing someone for a cultural difference the advertiser is perpetuating a form of racism.

The Panel considered that the advertisement could easily be modified to remove the name of the Kenyan runner and that this would not affect the overall humour of the satirical Olympic situation. The Panel considered that as this element was not needed to tell the story of the advertisement, the inclusion added to the mocking effect.

Overall, the Panel considered that the advertisement was mocking of Kenyan people and African people more broadly by suggesting that Kenyan names are difficult to pronounce and funny-sounding and therefore a suitable butt of a joke. As such, the Panel considered that the advertisement was vilifying of Kenyan people as the humour in the advertisement incites ridicule of Kenyans.

How does this determination differ from previous determinations of the Panel?

The Panel noted the advertiser's concerns and the Independent Reviewer's comments that the Panel's determination on this matter differed from previous determinations of the Panel.

The Panel acknowledged that, while it is not formally bound by precedent, consistency in decision making is desirable in order to demonstrate clearly to advertisers what is and is not appropriate in advertising according to community standards.

However, the Panel noted that community standards are not static and can change rapidly based on local and world events and changing sentiments in the community.

The Panel noted that there has been a large amount of media attention on issues of racism and discrimination, both around the world and in Australia, in recent years. These include the black lives matter movement, a continued and rising awareness of the issue of Indigenous deaths in custody in Australia, and the very recent media attention around the racist abuse of Euro Cup players.

The Panel noted that the increased media attention is contributing to, and reflective of, a growing community concern about the treatment and portrayal of people of



colour. The Panel considered that this increase in community concern has led to a change in prevailing community standards since previous determinations were made by the Panel.

The Panel considered that its role is to make determinations based on prevailing community standards at the time an advertisement is considered, and in this instance the prevailing community standard is that the humour in this advertisement is reflective of casual racism that is not appropriate in advertising.

2.1 Conclusion

On review, the Panel determined that the advertisements did vilify a section of the community on account of nationality and did breach Section 2.1 of the Code.

Conclusion

Finding that the advertisement did breach Section 2.1 of the Code, the Panel upheld the complaints.