



## Case Report

1	Case Number	0175/16
2	Advertiser	Ultra Tune Australia
3	Product	Automotive
4	Type of Advertisement / media	TV - Free to air
5	Date of Determination	11/05/2016
6	DETERMINATION	Upheld - Modified or Discontinued
7	IR Recommendation	Reconfirm original decision

### ISSUES RAISED

- 2.1 - Discrimination or Vilification Gender
- 2.2 - Objectification Exploitative and degrading - women
- 2.3 - Violence Causes alarm and distress
- 2.4 - Sex/sexuality/nudity S/S/N - general
- 2.6 - Health and Safety Within prevailing Community Standards

### DESCRIPTION OF THE ADVERTISEMENT

This modified advertisement shows two women driving a convertible car and listening to music. The car comes to a stop and we see that they are on a railway crossing. The warning lights for the crossing flash and the barrier comes down trapping the women and their car in the path of an oncoming train which we can hear and see approaching them. The women scream and the screen goes dark and we hear the sound of a crash. A male voiceover then says, "Avoid unexpected situations. Get your car serviced at Ultra Tune". We then see the two women walking away from their car which is now engulfed in flames.

### THE COMPLAINT

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

*They use two women who are portrayed as "glamorous helpless airheads" exploiting their sexuality. There is absolutely no need to use this senseless tactic to promote the servicing of your car. This is akin to the age old girly calendars which have now been condemned as sexist and not permitted in workplaces. Why is this ad permitted to be displayed in households during family viewing times. This is a double standard. Disgusting!*

*One of my workmates (an engine driver with NSW railways), was severely affected with flashbacks of serious rail/car on track incidences and became cold and clammy and shaking when he saw the ad.*

*As a Locomotive Engine Person (Train Driver) I found this ad extremely emotional and very distressing. What this ad depicted is one of every Engine Person's worst nightmares i.e. being in control of an engine hurtling along at high speed, seeing a vehicle across the tracks at a level crossing, knowing that it is impossible to stop in time to avoid a collision, praying that the vehicle gets out of the way in time, knowing there is no way you can prevent the engine from colliding with the vehicle. This ad was completely insensitive to an Engine Person's mental state and the potential situation they could be faced with. It also caused flash backs of previous incidents and I'm still shaken from the commercial an hour later. I found this ad to be shocking with regard to its content and very distressing and it should be withdrawn from the TV immediately.*

## **THE ADVERTISER'S RESPONSE**

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

*Advertisements Complaint References 0175/16 & 0176/16*

*We refer to your email letters attaching complaints concerning Ultra Tune's advertisements broadcasted on pay TV and Channel 9.*

*The advertisements in questions are 30 & 15 second advertisements with two female actors in a motor vehicle that breaks down at a railway crossing. The 30- second advertisement can be viewed at the following link:*

*[https://www.dropbox.com/sh/yb1ui07vhutngx2/AACQMXhfK2yxKwFOobSCTID\\_a?lst](https://www.dropbox.com/sh/yb1ui07vhutngx2/AACQMXhfK2yxKwFOobSCTID_a?lst)*

*The relevant CAD reference numbers are P2VHIROA and P2VHJROA respectively and we note that they have a PG rating.*

*We note the issues raised by the complainants (2.1, 2.2, 2.3, 2.4 & 2.5 of the Code) and respond as follows:*

*1. We refer to the previous decisions of the ASB complaint reference number 0020/16 and 0021/16 ("the Previous Decisions") and advise that, notwithstanding that the ASB Decision upheld the complaints, the board did dismiss all complaints regarding:*

*(a) the appearance of the actresses; and*

*(b) the allegation that any alleged violence depicted in the advertisements is capable of causing alarm and/or distress.*

*2. We refer to the following extracts from the Previous Decisions:*

*(a) "In the Board's view, while the women are wearing revealing clothes, the emphasis in the*

*advertisement is on their position on a train track and not on particular aspects of their bodies. The Board considered that the women's physical appearance may be considered as sexy to some viewers or exaggerated to others but that this is not of itself vilifying or discriminatory."*

*(b) "The Board considered that, consistent with a previous determination in case 0093/12, whilst it is not necessary for the women to be wearing low cut clothing their clothing is not unusual for women to wear on a night out and the women's physical features are not the focus of the advertisement."*

*(c) "The Board determined that the advertisement did not breach*

*Section 2.2 of the Code."*

*(d) "The Board considered that the advertisement did not present or portray violence and determined that the advertisement did not breach Section 2.3 of the Code."*

*(e) "The Board noted that the women's actions are similar to the walking style of catwalk models and considered that their actions are confident, they are filmed from a distance which minimises the focus on particular parts of their bodies, and are not strongly sexualised."*

*(f) "The Board considered that the advertisement did not encourage or condone members of the community to copy the women's actions with regards to the safe crossing of rail tracks. The Board considered that the advertisement did not depict material contrary to Prevailing Community Standards on safety around level crossings. The Board determined that the advertisement did not breach Section 2.6 of the Code"*

*3. The Previous Decisions upheld the complaint from the previous advertisement regarding vilification (per section 2.1 of the Code). We have applied for, and are in the process of, having the Previous Decisions Independently Reviewed.*

*4. However, the abovementioned advertisements (i.e. contained in the hyperlink) are amended versions of the previous advertisements, which were the subject of complaints regarding vilification under Section 2.1 of the Code. These amendments were made in order to address the ASB's concerns.*

*5. New footage and amended have been inserted from the 9 second mark to the 20 second mark of the advertisements. The amendments portray the driver of the vehicle and occupants as:*

*(a) aware of the vehicle breakdown;*

*(b) attentive to situation they find themselves in; and*

*(c) reacting to the lights / bells and general emergency (although their reaction is ultimately too late to save the vehicle).*

*6. For completeness, we partially repeat our original response (contained in our letter of 8 February 2016):*

*(a) The advertisement was designed in an exaggerated 'slap-stick' action movie-style and is not intended to be a realistic portrayal of real events.*

*(b) Concerns about safety & violence -*

*(i) We sympathise and extend our condolences to the complainants who have suffered or been affected by any railway related tragedy. Our advertisements are not intended to cause distress and we regret any distress they may have caused to members of the public.*

*(ii) The characters portrayed in the advertisements do not intentionally stop at the railway crossing. There is no suggestion of a suicide or an attempted suicide.*

*At approximately 4 seconds into the advertisement, a loud bang can be heard and the driver is seen to attend to the controls of the vehicle at first instance (as any reasonable driver would). In the next scene, the vehicle's brakes are being applied in a controlled manner (brake lights are illuminated), as any driver would be expected to do.*

*(iii) It is clear that the vehicle has broken down. At approximately 6 seconds, the vehicle stops abruptly and the red crossing signal lights are not flashing.*

*(iv) The driver immediately tries to re-start the vehicle (in order to move the vehicle off the rail line).*

*(v) There is no depiction of the collision between the motor vehicle and any "train" (no train is actually depicted in the advertisements).*

*(vi) The characters are shown as having survived the inferred collision in an exaggerated and unrealistic movie style (mentioned above) at the conclusion of the advertisement.*

*(vii) The advertisement was filmed in a controlled environment. At no time were any actors or production crew every at any risk of harm.*

*(c) We refute the suggestion that the advertisements in any way objectify or degrade women. Rather, the advertisements portray an entirely different picture – confidence and strength.*

*(d) The actors are fully clothed in evening street clothing that is common in today's society.*

*(i) The scenes take place at dusk and night time, when it is common for women to be in such attire.*

*(ii) The advertisements do not portray nor suggest sex or any sexual act and the actors are not being portrayed as objects of lust.*

*(iii) The advertisements do not include any graphic nudity and there is no uncovered flesh.*

*(iv) Finally, we refer to the Board's previous comments that the actors "are not strongly sexualised".*

*(e) We refute that the advertisements suggest or encourages harassment, rape or any other violence against women.*

*(i) Ultra Tune strongly objects to any violence against all people including women.*

*(ii) The clothing that the actors are wearing are in no way an excuse or reason for harassment, rape or violence against them.*

*(iii) Indeed, one of the actors is a current ambassador of White Ribbon Australia (Australia's campaign to prevent men's violence against women).*

*(f) Furthermore, we refute that the actors are portrayed as being unintelligent or stupid.*

*(i) At no time are the actors shown as anything other than as normal people driving with loud music in their vehicle or otherwise.*

*(ii) The characters deal with the vehicle break down without assistance and are not "helpless".*

*(iii) The actors also escape the implied collision by themselves. The decision to abandon and escape the vehicle is the safest decision.*

*(iv) The final scene was designed to emphasise female empowerment and shows the actors confidently walking away from the vehicle without suffering any harm.*

*(g) The advertisements has been given a PG rating classification.*

*For the reasons above, we do not believe the advertisement breaches AANA Advertisers Code of Ethics in any way.*

## **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 depicts women in a sexist and derogatory manner, and is insensitive to, and at odds with, community concerns about rail crossing safety.

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

The Board considered whether the advertisement complied with Section 2.1 of the Code which requires that 'advertisements shall not portray or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual preference, religion, disability, mental illness or political belief.'

The Board noted that there are two versions of this advertisement – one is 15 seconds and one is 30 seconds - both featuring two women whose car breaks down on a rail crossing and is subsequently hit by an oncoming train. The Board noted that the original versions of these advertisements were previously considered by the Board in case 0020/16 and were upheld.

The Board noted the advertiser's response that the current advertisement has been modified and the footage has been inserted from the 9 second to the 20 second mark of the 30 second version of the advertisement. The Board noted the advertiser's response that this amendment portrays the women as aware of their vehicle breaking down, attentive to the situation they find themselves in, and reacting to the lights/bells and general emergency.

The Board noted that the advertiser had requested an Independent Review of the Board's determination in case 0020/16. The Board noted its consideration of its determination in that review where:

"The Board noted that there are two versions of this advertisement both featuring two women whose car breaks down on a rail crossing and is subsequently hit by an oncoming train. The Board noted the original complaints that the women are depicted as unintelligent sex objects and that this is discriminatory to women.

The Board noted the Practice Note relevant to this matter and in relation to Section 2.1 which describes types of behaviour and restricts depictions of those types of behaviour against people within certain groups. The types of behaviour are:

- Discrimination – unfair or less favourable treatment
- Vilification – humiliates, intimidates, incites hatred, contempt or ridicule.

The Board noted the Macquarie Dictionary definition of incite:

- "to urge on; stimulate or prompt to action".

The Board considered whether the depiction of the women was discriminatory or vilifying of women. The Board noted its earlier discussion around Section 2.1 of the Code of Ethics where:

"The Board noted that the intent of the advertisement is to depict two women unexpectedly breaking down – with the advertiser suggesting that regular services from Ultratune will prevent such an 'unexpected situation.' The Board accepted that the intent of the advertisement is to show an unrealistic situation. However the Board considered that the women are depicted as unintelligent in the way in which they sit passively, with blank faces, in the car on the train tracks and also in the way they appear to not notice the oncoming train. This behaviour, in the Board's view, makes the women appear unintelligent and presents them in a stereotypical helpless female situation. In the Board's view, the depiction of the women's reaction to their situation is a negative depiction of women and does amount to vilification of women."

The Board noted the reviewer's comments relating to the need for the Board to reconsider the decision ensuring it properly considers the definition of 'vilification'. The Board noted that the definition to be applied is as set out in the Code of Ethics and associated Practice Note. The Board therefore considered whether the advertisement breached Section 2.1 of the Code and specifically considered the elements outlined in the Practice Note.

- Discrimination – unfair or less favourable treatment

- Vilification – humiliates, intimidates, incites hatred, contempt or ridicule of women.

The Board noted the Macquarie Dictionary definition of ridicule:

- “1. Words or actions intended to excite contemptuous laughter at a person or thing;  
2. To deride”.

The Board considered that the advertisement ridicules people of a certain group, namely women, in the way in which the women are depicted. Specifically, the Board considered that the overall suggestion in the advertisement is that these women can't think: their car slowly comes to a stop and their reaction is to look as though they have not fully registered what has happened and take too long to realise where they have broken down and the consequence of that.

In the Board's view the advertisement depicts women in a manner which suggests they do not get their car serviced, are unintelligent and unable to recognise a dangerous situation and the Board considered that the advertisement presents women as ridiculous. The Board considered that the stereotypical depiction of women being unable to look after their car perpetuates the depiction of women being ridiculous in relation to cars and that this incites ridicule towards their behaviour and women in general. The Board considered that this ridicule is directed at the women in a manner which does meet the grounds for vilification as defined in the AANA Practice Note for Section 2.1.

The Board noted the advertiser's request for review which stated that the women do not look blank but rather they look uncertain and that had male actors been depicted no such findings of vilification would have been made. The Board noted that it can only look at the advertisement as presented, not suppose how it might be interpreted had the actors been men.

The Board noted the Independent Reviewer's recommendation that the Board address the use of humour in the advertisement and whether this ameliorates the presentation of the women as helpless females.

The Board noted the advertiser's submission that the advertisement employs humour. The Board noted that different people will find different things humorous. In the Board's view however the attempted humour in the advertisement does not work and the overall impression taken from the advertisement is not of a funny situation but rather of a potentially dangerous situation which has come about due to the lack of intelligence employed by the main characters. In the Board's view any potential humour is directed at the women and their behaviour, adding to the overall impression that the women are being ridiculed. With regards to the situation– being stuck on a train track – this is a situation that is a significant community concern in Australia, and the depiction of this situation works against an overall impression of humour in the advertisement.

By contrast the Board considered case 0001/15. In this previous case the Board considered that the advertisement presented exaggerated and unrealistic situations that provided an overall impression of humour, as well as situations which would not be able to be replicated by the broad community, which meant that the humour was more successful. In the Board's view the humour in the current advertisement is not sufficiently obvious to mitigate against the overall impression of ridiculing women that the advertisement conveys.

The Board noted the Independent Reviewer's recommendation that the Board address the final scene where the women walk away unscathed from the train supposedly hitting their car. The Board noted the advertiser's response that the advertisement depicts the women in a strong and capable light having rescued themselves.

The Board noted that the advertisement shows a vehicle breaking down on a train track and considered that although the women are shown to walk away there is no indication whatsoever that the women have orchestrated their escape. The Board noted that the advertisement shows the women screaming when they realise at the last minute that a train is about to hit their car and considered that we do not see how the women escape or the moment of impact. The Board noted the advertiser's response that the advertisement employs editing and dramatization to heighten the situation depicted in the advertisement. The Board acknowledged that the women are shown to confidently walk away from the accident but considered that their actions throughout the rest of the advertisement are presented as ridiculous and there is no indication in the advertisement that the women themselves have contributed to their escape but rather that their escape is a result of luck. The Board considered that this final scene does not detract from the overall impression the advertisement gives which is that the women are being presented in a manner which incites ridicule on account of their gender.

Overall the Board considered that the advertisement presents women as ridiculous suggesting that they don't look after their cars, react passively to breaking down, and are unaware of their surroundings. The Board considered that the advertisement does encourage ridicule of women and therefore does portray or depict material in a manner which is vilifying of a person or section of the community on account of gender."

The Board viewed the modified advertisement and considered that whilst some very minor changes have been made – notably at the 10 second mark where in the original version the two women look at one another but in the modified version they don't – the Board was of the view that these changes do not alter the overall impression given by the advertisement that the women appear unintelligent and until the last minute are completely unaware of their surroundings or the danger they are in.

The Board considered that the modifications made by the advertiser in response to the Board's original upheld determination in case 0020/16 are not sufficient. The Board noted that these modifications were applied to both the 15 second version and the 30 second version and in the Board's view the overall impression is that the women in both versions of the advertisement are presented in a manner which incites ridicule on account of their gender.

Consistent with its original determination in case 0020/16 and its reconsideration of the original advertisement as part of an Independent Review, the Board considered that the modified 15 second and 30 second advertisements did portray or depict material in a way which discriminates against or vilifies a person or section of the community on account of gender.

The Board determined that the advertisement did breach Section 2.1 of the Code.

The Board considered whether the advertisement was in breach of Section 2.2 of the Code. Section 2.2 of the Code states: "Advertising or marketing communications should not employ



sexual appeal in a manner which is exploitative and degrading of any individual or group of people.”

The Board acknowledged that some members of the community would find the use of female models to promote an automotive service to be exploitative. The Board noted that the two women are wearing ‘going out’ clothing which is often revealing but considered that in this instance although the women’s breasts are enhanced by the style of clothing they are wearing, their breasts are not the focus of the advertisement. The Board considered that, consistent with a previous determination in case 0093/12, while it is not necessary for the women to be wearing low-cut clothing, it is not an unusual style of clothing for women to wear on a night out and the women’s physical features are not the focus of the advertisement.

The Board noted that the women walk away from the aftermath of the implied accident between the car and the train and considered that in these scenes there has been no modification from the original version. The Board considered that the manner in which they walk is reminiscent of the television series ‘Charlies Angels’ and that while the women are portrayed as sexy, they are also portrayed as confident, and in the Board’s view the overall manner in which the women are depicted in the advertisement does not use their sexual appeal in a manner that is degrading.

The Board considered that the advertisement did not employ sexual appeal in a manner which is exploitative and degrading to any individual or group of people.

The Board determined that the advertisement did not breach Section 2.2 of the Code.

The Board 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 Board noted the complainants’ concerns that the depiction of a car being hit by a train could be distressing to those who have lost a loved one in a similar manner or been involved in a similar accident. The Board noted that this image had not been modified from the original version. The Board acknowledged that this scene could cause concern to some members of the community based on their personal experience but considered that the moment of impact is not actually shown and in the Board’s view the depiction of the women walking away from the aftermath lends an unrealistic air to this scenario. The Board considered that the advertisement depicts a suggestion of imminent danger which proves to be a lucky escape and is not a depiction of violence.

The Board considered that the advertisement did not present or portray violence and determined that the advertisement did not breach Section 2.3 of the Code.

The Board then considered whether the advertisement was in breach of Section 2.4 of the Code. Section 2.4 of the Code states: “Advertising or Marketing Communications shall treat sex, sexuality and nudity with sensitivity to the relevant audience”.

The Board noted it had previously dismissed complaints about an advertisement for the same advertiser in case 0201/14 where:

“The Board noted the complainants’ concerns that the women use seductive moves around

the tyres.

The Board noted that the advertisement is for tyres and tyre fitting and that the idea is to draw the attention of the viewer to the tyres. The Board noted that it is unlikely that anyone would behave in the same manner around tyres but that the actions of the women are exaggerated and unrealistic in a humorous way and are only mildly sexually suggestive.”

In the current advertisement the Board noted that the women are wearing clothing consistent with going out for an evening and considered that while the women’s cleavages are substantial the level of exposure is not excessive or inappropriate for evening wear.

The Board noted that the camera focuses on the women’s reactions when they break down on the rail crossing and considered that the focus is on their faces and not their bodies. The Board noted that when the women walk away from the aftermath of the train hitting their car they are shown to strut towards the camera. The Board noted that the women’s actions are similar to the walking style of catwalk models and considered that their actions are confident, they are filmed from a distance which minimises the focus on particular parts of their bodies, and are not strongly sexualised.

The Board noted that the advertisement had been rated ‘PG’ by CAD and considered that overall the advertisement depicted two women wearing revealing clothing but did so in a manner that minimised the sexual impact of the advertisement and in the Board’s view did treat the issue of sex, sexuality and nudity with sensitivity to the relevant broad audience which would include children viewing the television with parental guidance.

The Board determined that the advertisement did not breach Section 2.4 of the Code.

The Board considered 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 Board noted the complainants’ concerns that the advertisement is insensitive to community concerns about rail crossing safety.

The Board noted that rail crossing safety is a genuine community concern and considered that depictions of this that are intended to be humorous should be treated with care. The Board considered that in this instance the advertisement clearly depicts the women’s actions as negative. The Board noted that the voice over enforces the negative connotation by describing the situation as an unexpected scenario which could have been avoided. The Board noted that the women survive the implied accident between the train and the car and considered that their survival is not misleading or presenting an unsafe message because the scenario of the women being able to walk away from such an accident is clearly an unrealistic outcome.

The Board considered that the advertisement did not encourage or condone members of the community to copy the women’s actions with regards to the safe crossing of rail tracks.

The Board considered that the advertisement did not depict material contrary to Prevailing Community Standards on safety around level crossings.

The Board determined that the advertisement did not breach Section 2.6 of the Code.

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

## **THE ADVERTISER'S RESPONSE TO DETERMINATION**

We advise that we act on behalf of Ultra Tune Australia.

We refer to your letter to our clients dated 23 May 2016 and the draft case report detailing the Board's decision enclosed therein.

We are instructed that our client will discontinue the amended advertisement "unexpected situations" ("the Advertisement"), which is currently the subject of the abovementioned case under protest, noting that it intends to seek an independent review of the Board's decision once finalised.

Therefore kindly consider this letter as formal notice of our client's discontinuance of the Advertisement and our request that the Board publish and circulate its final decision.

We advise for the record that our client views the Board's decision that the Advertisement "did breach Section 2.1 of the Code" as without foundation and intends to vigorously dispute those findings.

Accordingly, we look forward to your confirmation of receipt of this letter and subsequently, to the Board's final decision.

## **INDEPENDENT REVIEWER'S RECOMMENDATION**

### **Review Application**

The grounds for seeking a review of the decision of the Board are as follows:

1. 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)
2. 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.
3. Where there was a substantial flaw in the process by which the determination was made.

The appellant has requested a review of the determination of the Board although it does not specifically cite any of the three above grounds. It appears, however, upon examination of the review application, that it is ground one that is largely being relied upon.

The appellant states that it seeks a "review of the Board's findings that the advertisement portrays or depicts the actors in a way that discriminates or vilifies women". It goes on to

cite, in support of this contention, certain passages from the determination of the Board as follows:

a) The Board noted that the intent of the advertisement is to depict two women unexpectedly breaking down – with the advertiser suggesting that regular services from Ultratune will prevent such an ‘unexpected situation.’ The Board accepted that the intent of the advertisement is to show an unrealistic situation. However, the Board considered that the women are depicted as unintelligent in the way in which they sit passively, with blank faces, in the car on the train tracks and also in the way they appear to not notice the oncoming train. This behaviour, in the Board’s view, makes the women appear unintelligent and presents them in a stereotypical helpless female situation. In the Board’s view, the depiction of the women’s reaction to their situation is a negative depiction of women and does amount to vilification of women.

b) The Board considered that the advertisement ridicules people of a certain group, namely women, in the way in which the women are depicted. Specifically, the Board considered that the overall suggestion in the advertisement is that these women can’t think: their car slowly comes to a stop and their reaction is to look as though they have not fully registered what has happened and take too long to realise where they have broken down and the consequence of that. In the Board’s view the advertisement depicts women in a manner which suggests they do not get their car serviced, are unintelligent and unable to recognise a dangerous situation and the Board considered that the advertisement presents women as ridiculous. The Board considered that the stereotypical depiction of women being unable to look after their car perpetuates the depiction of women being ridiculous in relation to cars and that this incites ridicule towards their behaviour and women in general. The Board considered that this ridicule is directed at the women in a manner which does meet the grounds for vilification as defined in the AANA Practice Note for Section 2.1.

c) The Board considered that the advertisement does encourage ridicule of women and therefore does portray or depict material in a manner which is vilifying of a person or section of the community on account of gender.

The appellant notes that they understand the Board in its decision referred to the section of the advertisements commencing from approximately 9 seconds and ending at 20 seconds of the 30 second version of the advertisement. Though the appellant first speaks of plural advertisements, it goes on to refer only to the 30 second advertisement.

The appellant submits in respect of Section 2.1 of the Code as follows:

#### A. SECTION 2.1 OF THE CODE

1. The Board erred in its findings that the advertisement had contravention [sic] Section 2.1 of the Code, which sets out that:

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

2. The Code does not provide any definition of what “vilification” is, or what conduct could constitute “vilification”.

3. However, the AANA Practice Note to the Code (“the Practice Note”) sets out that vilification is constituted by conduct which “humiliates, intimidates, incites hatred, contempt or ridicule”.

4. The Practice Note explains that “Images of men or women in traditional roles are not prohibited provided the major focus of the advertisement is on the product, not the role portrayed. However, care should be taken if depictions suggest that such activities are “women’s work” or “work of little value”.

4.1. We submit that the Practice Note specifically contemplates that which would not be acceptable, by outlining that advertising material suggesting depictions of “women’s work” or “work of little value” should be made cautiously.

4.2. However, there is no suggestion by the Board in its decision that the advertisement involves either women’s work or work of little value, rather the Board has relied on subjective definitions of its own invention of what constitutes portrayals of women as “ridiculous”. We therefore submit that the Board erred in its finding by not interpreting the Practice Note correctly.

5. The Board set out that it considers the advertisement to portray women as “unintelligent”, “ridiculous” and “helpless”, citing these considerations as the basis for a finding that the advertisement “discriminates against or vilifies” women.

5.1. We refer to the statement in the Practice Note that “Advertisements can suggest stereotypical aspects of an ethnic group or gender with humour provided the overall impression of the advertisements is not a negative impression of people of that ethnicity or gender.”

5.1.1. We submit that, even if the advertisement had created a portrayal of “stereotypically helpless women” (which is denied), it is clear the tone of the advertisement is one of drama mixed with humour. The Board has accepted this and stated:

“The Board accepted that the intent of the advertisement is to show an unrealistic situation.”

5.1.2. It is readily apparent that the situation portrayed in the advertisement is hyper realistic, if at all. The advertisement does not create a negative impression of women and we query how the Board could make such a finding in light of the scene depicted at the conclusion of the advertisement (i.e. that the actors safely exit the situation of their own volition).

6. The Board found that, by virtue of having depicted a scenario in which the actors reacted in a specific way to the implied impending collision of a train with the stranded vehicle, that this was a depiction that “makes the women appear unintelligent and presents them in a stereotypical helpless female situation.”

6.1. We submit that this interpretation is entirely subjective and contrary to the purpose that Section 2.1 of the Code was intended to protect. The Board noted that “The different people will find different things humorous”, yet ironically makes the finding that “the attempted humour in the advertisement does not work” – we submit that the Board improperly relied on this finding in its decision.

6.1.1. The advertisement in no way suggests or implies that women are “stereotypically helpless”. The Board itself commented that, at the culmination of the advertisement, “while the women are portrayed as sexy, they are also portrayed as confident, and in the Board’s view the overall manner in which the women are depicted in the advertisement does not use their sexual appeal in a manner that is degrading” – this finding is fundamentally incongruous with a finding that the actors are portrayed as “ridiculous”.

6.2. Furthermore, by virtue of the actors escaping from the implied collision in the advertisement, the Board’s finding flies in the face of the logical conclusion, that the actors used their own initiative to save themselves from the obviously over dramatized situation.

6.3. The Board found that the “advertisement depicts a suggestion of imminent danger which proves to be a lucky escape”. We submit that no part of the advertisement implies or otherwise suggests the manner of escape from the vehicles and that the Board improperly subjectively implied a manner of escape into the advertisement, which is used to bolster the findings.

6.3.1. Put simply, the actors could not be depicted as helpless in circumstances where they are, in fact, shown as empowered and confident by virtue of having acted in a precisely opposite manner in rescuing themselves. We refer to the submissions in paragraph 6.1.1 above.

6.4. There is no scope to make a finding that any vilification took place “on account of... gender” on the basis that there is no suggestion that the women are helpless from the outset. Furthermore, we submit that had male actors been used in place of female actors, ironically, no such finding would have been made by the Board.

6.5. The Board has noted that “vilification” will be found where an advertisement “humiliates, intimidates, incites hatred, contempt or ridicule”. The Board went on to define “incite” as either “Words or actions intended to excite contemptuous laughter at a person or thing”, or “To deride”. We note that the Board’s only finding in respect of “vilification” was in respect of inciting “ridicule towards...women in general”.

6.5.1. We submit that the Board made no comments as to how the advertisement had either derided or intended to excite contemptuous laughter at women, other than to comment that: a) The advertisement suggests women do not get their cars serviced; b) Women are unintelligent; and c) Women are unable to recognise dangerous situations. (collectively, “the suggestions”)

6.5.2. We submit that the Suggestions are not based on any finding of fact, nor are they made in reference to specific elements of the advertisement, rather they are value judgments made with no reference to the Practice Note (i.e. they do not suggest that the advertisements makes suggestions of women’s work or work of little value) and the Board’s findings in respect of the Suggestions are not within the ambit of the Code or the Practice Note – those findings are therefore inappropriate and not capable of being made by the Board.

## REVIEWER’S COMMENTS

Point 4 of appellant’s submission:

It appears that the appellant has misunderstood one of the provisions of the AANA Practice Note under Portrayal of people (Section 2.1). The Practice Note gives various examples at the end of that section but those examples are deliberately varied and are not intended to be applied to all advertisements being considered under Section 2.1, only to relevant types of advertisements. There are no images of either men or women in traditional roles in the advertisement about which the Board made its determination and hence no associated suggestion that such activities are ‘women’s work’ or ‘work of little value’. As this explanatory example does not apply to this advertisement, there is no question of the Board having erred in its decision by not interpreting the Practice Note properly. Thus there is no substantial flaw in the determination of the Board based on point four of the appellant’s submissions in the Review Application.

Point 5 of appellant’s submission:

In point 5, the appellant appears to be contending that because the Board “accepted that the intent of the advertisement is to show an unrealistic situation” it is not entitled to make its finding that the women in the advertisement were portrayed as ‘unintelligent’, ‘ridiculous’ and ‘helpless’ and that the advertisement ‘discriminates against or vilifies women’.

The appellant cites the Practice Note referring to advertisements being able to suggest stereotypical aspects of gender with humour provided (reviewer’s emphasis) the overall impression of the advertisements is not a negative impression of people of that gender.

The appellant also seems to be suggesting that because the Board accepted that the intent of the advertisement was to show an unrealistic situation, that the Board had also accepted that the tone of the advertisement was one of drama mixed with humour. Firstly, the Board specifically refers to the ‘intent’ of the advertisement and not necessarily to the execution. Many advertisements may be intended to have a particular received effect but the execution of the advertisement may not successfully deliver that effect. Secondly, the fact that the Board accepted that the intent of the advertisement was to show an unrealistic situation is irrelevant to whether the Board did or did not accept that as the appellant contends ‘the tone of the advertisement is one of drama mixed with humour’. Lack of realism and drama mixed with humour are entirely different possible elements of any advertisement and are not necessarily linked together. The Board does not link them in its determination. Later in its determination, the Board considers the use of humour and, inter alia, comments that, in its view, the ‘attempted humour’ in the advertisement ‘does not work’.

Moreover, it is significant that the wording of the section of the Practice Note cited by the appellant has a proviso (emphasised above). It is clear that the Practice Note indicates that stereotypical aspects of gender can be suggested with humour PROVIDED the overall impression of the advertisement is not a negative impression of people of that gender. Thus, when making determinations relevant to this section, the Board would always be entitled to find that despite the use of humour, stereotypical aspects of gender or an ethnic group might still be found in breach of the Code if the overall impression is a negative impression of people of that ethnicity or gender. In this case, the Board, having considered all aspects of the advertisement, including the use of humour and unrealistic elements, was entitled to decide that such a negative impression was created. It is important to note that every aspect of the advertisement does not have to create the negative impression as long as the ‘overall impression’ created by the advertisement does.

There is no substantial flaw in the Board's determination based on point five of the appellant's submission.

Point 6 of appellant's submission:

It is unclear what the appellant means about the "purpose" of Section 2.1, when it states that the Board's interpretation of the reaction of the women to the impending collision, that it was a depiction that 'makes the women appear unintelligent and presents them in a stereotypical helpless female situation', is "contrary to the purpose that Section 2.1 of the Code was intended to protect". The appellant also criticises the interpretation as 'entirely subjective'. The Board's general observation that different people will find different things humorous is a truism which is obvious to all and in no way precludes the Board from making a finding that 'the attempted humour in the advertisement does not work'. On the issue of subjectivity, in making its determinations on all complaints, the Board members necessarily bring their individual judgements to the task, in the context of their views of community attitudes. It is for this reason that the members of the Board are chosen from a wide variety of sectors and backgrounds, in order to maximise their ability to represent the community. The Board did not improperly rely on the finding that 'the attempted humour in the advertisement does not work'.

The appellant further denies that the advertisement suggests or implies that the women are stereotypically helpless. It contends that the Board's comments on the culmination of the advertisement that 'while the women are portrayed as sexy, they are also portrayed as confident, and in the Board's view the overall manner in which the women are depicted in the advertisement does not use their sexual appeal in a manner that is degrading' are fundamentally incongruous with a finding that the actors are portrayed as 'ridiculous'. The appellant has failed to note that these comments by the Board are made in relation to the Board's consideration of the advertisement under Section 2.2 and not under Section 2.1. It is the finding under Section 2.1 which gives rise to this Review. The Board's finding that the depiction 'makes the women appear unintelligent and presents them in a stereotypical helpless female situation' was made during its consideration of Section 2.1. The two sections contain different criteria for breach and different aspects are properly considered by the Board. The Board did not find any breach of Section 2.2 and its comments in relation to this Section are unrelated to its findings in relation to Section 2.1 and are not incongruous with those findings. In addition, in its consideration of Section 2.1, the Board has made clear that the final scene of the advertisement does "not detract from the overall impression the advertisement gives which is that women are being presented in a manner which incites ridicule on account of their gender".

In Points 6.2 and 6.3, the appellant contends that the findings of the Board quoted above that the reaction of the women to the impending collision makes the women 'appear unintelligent and presents them in a stereotypical helpless female situation', "flies in the face of the logical conclusion, that the actors used their own initiative to save themselves from the obviously over dramatized situation". The Board had stated that the advertisement depicts 'a suggestion of imminent danger which proves to be a lucky escape'. There is no indication at all in the advertisement as to how the women manage to escape the closely impending collision. The appellant itself concedes this in the following point 6.3 where it states

"We submit that no part of the advertisement implies or otherwise suggests the manner of escape from the vehicles [sic] and that the Board improperly subjectively implied a manner of



escape into the advertisement which is used to bolster the findings”.

Again, the appellant fails to note that the comments by the Board quoted above that the advertisement depicts a ‘suggestion of imminent danger which proves to be a lucky escape’ are made in the context of the Board’s consideration of the advertisement under Section 2.3 and not under Section 2.1. Different criteria apply to these sections in order to find a breach of the Code and none was found in relation to Section 2.3. However, the more significant point is that the appellant itself confirms that nothing in the advertisement suggest the manner of escape from the vehicles and that is the salient point in terms of Section 2.1. The Board, by referring to the escape as ‘lucky’ in view of the imminent nature of the collision, clearly depicted with the lights of the train bearing down on the women in the car and reflecting on their faces at very close proximity, does not describe the manner in which the women escape, only that however they escaped, it was lucky that they did so.

The appellant appears to be attempting to have it both ways in contending, firstly, that ‘no part of the advertisement implies or otherwise suggests the manner of escape from the vehicles’ and yet also suggesting that the women ‘used their own initiative to save themselves’ and that this is the ‘logical conclusion’.

It is clear that if we do not know the manner of escape from the car, then we do not know how the escape occurred and whether it was achieved alone or with assistance or by some miracle.

The Board states in its consideration of Section 2.1:

“...there is no indication whatsoever that the women have orchestrated their escape.”

Clearly, the Board is doing the very opposite of subjectively implying a manner of escape from the car. The fact that the women appear confident as they leave the crash scene does not offer definitive evidence of how they escaped the imminent crash and does not negate the findings of the Board in relation to how the women are portrayed in other parts of the advertisement.

At point 6.4, the appellant contends that the Board could not have made the finding that vilification took place on account of gender ‘on the basis that there is no suggestion that the women are helpless from the outset’. The appellant continues: “Furthermore we submit that had male actors been used in place of female actors, no such finding would have been made by the Board”. It is unclear exactly what the appellant is intending to say in the first sentence. It could be referring to the outset of the advertisement and saying the women are not shown as helpless from the very beginning of the advertisement or it could be suggesting that the women are not shown as helpless generally in the advertisement. Apart from this bald contention, no further evidence is adduced under 6.4 to support the claim that the Board had no scope to find that vilification took place. The Board was entitled to find that the behaviour of the women presented them in a ‘stereotypical helpless female situation’. The assertion that the Board would not have made its findings if male actors had been used in the advertisement is hypothetical and completely speculative. The Board can only consider an advertisement as it is, not a different hypothetical advertisement. There is no substantial flaw in the determination of the Board disclosed in point 6.4.

At point 6.5 the appellant recites parts of the Board’s comments (quoting the Practice Note)

relating to circumstances where vilification will be found and refers to the definition of 'incite', which the appellant incorrectly claims is noted by the Board in its determination as 'words or actions intended to excite contemptuous laughter at a person or thing' or 'To deride'. The appellant states that 'the Board's only finding in respect of vilification was in respect of inciting "ridicule towards...women in general"'.

The appellant submits that the Board has not commented as to 'how the advertisement had either derided or intended to excite contemptuous laughter at women, other than to comment that:

- a. The advertisement suggests women do not get their cars serviced
- b. Woman [sic] are unintelligent; and
- c. Women are unable to recognise dangerous situations. (collectively 'the suggestions')

The appellant continues:

"We submit that the Suggestions are not based on any finding of fact, nor are they made in reference to specific elements of the advertisement, rather they are value judgments made with no reference to the Practice Note (i.e. they do not suggest that the advertisements makes suggestions of women's work or work of little value) and the Board's findings in respect of the Suggestions are not within the ambit of the Code or the Practice Note – those findings are therefore inappropriate and not capable of being made by the Board. "

Regarding these comments by the appellant it is clear that it has mistakenly transposed the word 'incite' for the word 'ridicule' in the above quotes from the Board's determination. The definition above for 'incite' is actually the definition of 'ridicule' quoted in the determination. It is assumed the appellant actually meant to say 'ridicule' instead of 'incite' in its submission.

It is misleading to state that the Board's only finding in respect of vilification in Section 2.1 is in respect of inciting 'ridicule towards...women in general'. The Board's comments were much more encompassing than this simple phrase. Inter alia, the Board stated:

"The Board considered that the advertisement ridicules people of a certain group, namely women, in the way in which the women are depicted. Specifically, the Board considered that the overall suggestion in the advertisement is that these women can't think: their car slowly comes to a stop and their reaction is to look as though they have not fully registered what has happened and take too long to realise where they have broken down and the consequence of that."

'In the Board's view the advertisement depicts women in a manner which suggests they do not get their car serviced, are unintelligent and unable to recognise a dangerous situation and the Board considered that the advertisement presents women as ridiculous. The Board considered that the stereotypical depiction of women being unable to look after their car perpetuates the depiction of women being ridiculous in relation to cars and that this incites ridicule towards their behaviour and women in general. The Board considered that this ridicule is directed at the women in a manner which does meet the grounds for vilification as defined in the AANA Practice. Note for Section 2.1.'

A little later in its decision the Board comments:

‘In the Board’s view any potential humour is directed at the women (emphasis added) and their behaviour, adding to the overall impression that the women are being ridiculed.’

Still later in its decision the Board states:

‘Overall the Board considered that the advertisement presents women as ridiculous suggesting that they don’t look after their cars, react passively to breaking down, and are unaware of their surroundings. The Board considered that the advertisement does encourage ridicule of women and therefore does portray or depict material in a manner which is vilifying of a person or a section of the community on account of gender.’

Further, the Board, when specifically considering the modifications made to the advertisements, comments:

‘The Board was of the view that these changes do not alter the overall impression given by the advertisement that the women appear unintelligent and until the last minute are completely unaware of their surroundings or the danger they are in ... in the Board’s view the overall impression is that the women in both versions of the advertisement are presented in a manner which incites ridicule on account of their gender.’

Contrary to the contention of the appellant, the Board has indicated in its determination, as noted above, the specific elements of the advertisement which it regards as indicating the inciting of ridicule towards women, thus satisfying the criteria for a finding of vilification. There is no preconceived number of examples which the Board is required to provide in support of its findings nor is it required to express its findings in terms of dictionary definitions, rather than in terms of the wording of the Code and Practice Note. It may have been preferable for the Board to avoid using the word “ridiculous” and to rather use the term ‘subject to ridicule’ but this is a stylistic suggestion and is not a matter which goes to the validity of the determination of the Board.

The Board was entitled to make its findings based on the elements of the advertisement which it has nominated as encouraging the ridicule of women, thus satisfying the criteria for vilification on account of gender. The findings are not ‘value judgements’ made with no reference to the Practice Note as contended by the appellant. As noted earlier in this review, the appellant has misunderstood the Practice Note in respect of ‘women’s work’ or ‘work of little value’. Accordingly, the appellant’s contentions under point 6.5 disclose no substantial flaw in the Board’s determination.

No evidence of a substantial flaw in the determination of the Board is adduced by Section A of the appellant’s submission.

The appellant continues its submissions as follows:

## B. THE BOARD’S INTERPRETATION

We refer to the following comment contained in the Board’s findings with respect to our purported breach of Section 2.1 of the Code:

1. a) "...the advertisement depicts women in a manner which suggests they do not get their car serviced are unintelligent and unable to recognise a dangerous situation..."

b) "...the women appear unintelligent and until the last minute are completely unaware of their surroundings or the danger they are in. ..."

1.1. The Board have not particularised any specific point in the advertisement which actually implies this idea, nor that such an implication is directed at the female gender (as opposed to the notion that 'people' who do not get their cars serviced – i.e. the advertisement is not specific to any gender).

1.2. However, we presume that the Board is referring to the driver's 'look' to the passenger at approximately 11 to 12 second into the advertisement ("the Look").

1.3. We submit that the Board has incorrectly found that the advertisement portrays the female actors as unintelligent.

1.4. We believe that this interpretation is refuted by the following aspects of the advertisement:

1.4.1. The driver is seen and heard to attempt to restart the vehicle, in an attempt to escape from the impending collision;

1.4.2. This amended advertisement contains more specific body language to connote that the actors are, in fact, aware of the danger of the situation and are responding to the emergency;

1.4.3. Ultimately, the actors did escape the implied collision and, by virtue of there being no suggestion of external assistance, the viewer must conclude that the actors escaped using their own initiative; and

1.4.4. We submit that any suggestion that the female actors are portrayed as unintelligent must be refuted by the fact that they escaped' - the implication that this was "a result of luck" is pure speculation on the part of the Board. ?

1.5. We note that any perception of the actors as "ridiculous" is a subjective interpretation of the advertisement that is only established if one views the advertisement with the most narrowed attitude that is agenda-driven. We note that:

1.5.1. The purpose of the advertisement is to demonstrate that a person should not have to escape an 'unexpected situation' in a similar manner to that of the actor;

1.5.2. The final scene of the advertisement shows empowered women walking away from a difficult situation;

1.5.3. How the actors purportedly react during the situation must be compared with how the situation actually eventuated;

1.5.4. The entire advertisement must be viewed with the understanding that it is an over dramatization that is geared toward drawing the viewer in and selling a product/service using well established techniques to create drama.

1.5.5. We submit that the advertisement does not seek to make any commentary regarding gender issues, or community values and the Board had acted outside of the scope of the Code and the Practice Note in making such findings.

1.6. The actors' apparent ignorance of the oncoming train was an edited and exaggerated dramatization of the situation ("the Technique"). This was geared toward drawing the viewer in and maintaining the viewer's attention.

1.6.1. The Techniques is often used in cinema and other visual art forms. Our use of the Technique cannot, in and of itself, constitute vilification of the female actors, by virtue of being a commonly used technique. Furthermore, it is not farfetched or unreasonable to assume that an advertiser would use over dramatization in the creation of advertisements.

1.6.2. If male actors had been used in place of females in the advertisement, we submit that the Board would not have found that the actors had been discriminated against or vilified.

1.6.3. We submit that the Board, in making its decision, has failed to place adequate weight on the advertiser's purposeful use of the Technique.

2. "...the Board was of the view that these changes do not alter the overall impression given by the advertisement that the women appear unintelligent and until the last minute are completely unaware of their surroundings or the danger they are in."

2.1. The actors do not sit passively, nor are they unresponsive or unaware of the issue created in this 'unexpected situation' (i.e. the theme of the ad series).

2.2. The women cannot, therefore, be said to be portrayed in an unintelligent or stereotypically helpless depiction. ?

2.3. Furthermore, the fact that the car breaks down cannot form a depiction of women as unintelligent or unable to recognise a dangerous situation. There is no suggestion of any nexus between the car breaking down and the fact that the actors are women.

2.4. We submit that any finding that relates these matters is purely subjective and such a finding is not able to be made on any objective viewing of the advertisement.

3. Finally, we reiterate that the Board found that "the manner in which they walk is reminiscent of Charlies Angels and that whilst the women are portrayed as sexy they are also portrayed as confident...". We submit that a finding that the advertisement discriminates or vilifies women based on, what the Board classifies as a "ridiculous" look cannot be reconciled with its finding that the actors are portrayed as "confident" at the end of the advertisement and the Board's prior statement that "advertisers are free to use whomever they wish in their advertisements and considered that the use of two women in a car for an automotive product or service is not of itself discriminatory".

#### REVIEWER'S COMMENTS.

In relation to point 1 of Section B above, the Board does, in referring to its earlier discussion of the advertisement, refer to specific scenes in the advertisement which went to forming the

basis of its original findings about the depiction of the women, and then goes on to consider what impact, if any, the amendments to the advertisements have on those findings. The Board decided that the amendments “do not alter the overall impression given by the advertisement that the women appear unintelligent and until the last minute are completely unaware of their surroundings or the danger they are in”. The Board is entitled to consider the ‘overall impression’ of the advertisement in cumulative terms rather than specific incidents in finding that the advertisement breaches Section 2.1. On the issue of ‘people’ as opposed to ‘women’ getting their cars serviced, this advertisement only contains women and thus the Board can only consider the advertisement as it is, not as it might have been if another gender had been included.

The appellant contends that the Board incorrectly found that the advertisement portrays the female ‘actors’ as unintelligent for a number of reasons. Firstly, it is important to point out that the Board made no findings which related to the actors themselves, rather the findings were related to the women they played in the advertisement. The actors are clearly only playing a part and no sensible comment could be made about their state of intelligence. The appellant seems to be confusing the female actors with the roles they play in the advertisement insofar as it uses the terminology ‘female actors’ in its submissions.

The points the appellant makes under 1.4 do not refute the quoted findings of the Board and regarding 1.4.2, the Board specifically refers to the ‘very minor’ changes made to the amended advertisement. As noted above, the Board’s view of the advertisement, having considered these amendments, is that the women ‘until the last minute are completely unaware of their surroundings and the danger they are in’. The Board is entitled to its interpretation of the effect or lack of effect of the amendment on the advertisement.

Regarding point 1.4.1, the videos of the advertisement indicate that the attempt to restart the car occurs before the women become aware of the train, so it is not an attempt to escape from the impending collision as the appellant asserts, but rather an attempt to restart the car from its stationary position. This does not refute the findings made by the Board and based on the overall impression created by the advertisement.

In 1.4.3 and 1.4.4 the appellant contends that because the actors (women) do escape the implied collision, and as there is no suggestion of external assistance, ‘the viewer must conclude that the actors escaped using their own initiative; and

We submit that any suggestion that the female actors are portrayed as unintelligent must be refuted by the fact that they escaped.’ The appellant further contends that the Board’s comment that the indication in the advertisement is that their escape is a result of luck is pure speculation on the part of the Board.

This point raised in 1.4.3 has been addressed above in this review. The appellant itself states that “no part of the advertisement implies or otherwise suggests the manner of escape from the vehicles [sic] “. The amended advertisements do not suggest how the women escape the implied collision. It is not apparent whether they had assistance, somehow escaped on their own or were the beneficiaries of some miraculous intervention, given the advertisements clearly show the train lights bearing down at extremely close proximity to the women in the car. A close inspection of the advertisement, particularly the long shot showing the proximity of the train and the mid shot showing the proximity of the lights would seem to indicate that escape would be impossible in the timeframe available, especially an escape which leaves the

women fully dressed and unscathed.

If the final scene is to be taken realistically, there is no indication that the women executed their own escape 'using their own initiative' in such parlous circumstances. The advertisement simply does not offer any explanation for the escape, unlikely as it is under the circumstances. The appellant reiterates that there is no such explanation of the manner of escape. If, on the other hand, the scene is not to be interpreted realistically at all, as the train appears to be far too close for any escape, then the appellant cannot rely on an unrealistic scenario to provide realistic evidence that the women escaped using their own initiative. Whether the scenario is realistic or unrealistic, there is no support for the contention of the appellant that it refutes the quoted findings of the Board.

Regarding 1.5, the appellant claims that the Board's description of the women in the advertisement as 'ridiculous' is subjective 'and only established if one views the advertisement with the most narrowed attitude that is agenda-driven'. It is unclear what the appellant means by its use of the expressions 'narrowed attitude' and 'agenda-driven'. It is not clear whether it is charging that the Board pursued some improper agenda in making its determination. Whatever it does mean, it offers no further elaboration regarding this supposed attitude and agenda and thus no evidence that such an attitude or agenda existed among the Board. The bald statement certainly discloses no substantial flaw in the determination of the Board. Regarding the claim of subjectivity on the part of the Board, the Reviewer has noted above in this review the fact that Board members necessarily bring their individual judgements to the task of making determinations. The appellant offers no further support for the contention and again, the bald assertion does not of itself disclose any substantial flaw in the determination of the Board.

Under 1.5 the appellant makes various points.

1.5.1 is a statement, not a claim against the determination. It is worth observing that whatever the purpose of an advertisement may be stated to be, it is the received execution which must be considered by the Board in any determination.

1.5.2 is a statement, not a claim against the determination. To use the term 'a difficult situation' would seem at the very least a significant understatement and at the worst, a trivialisation of the very dangerous situation portrayed.

1.5.3 is also a statement but one which purports to give a view as to the manner in which the advertisement should be considered. It is difficult to know exactly how the appellant thinks this might be achieved, given that the advertisement does not indicate how the situation actually did eventuate, as in the appellant's own words "no part of the advertisement implies or otherwise suggests the manner of escape from the vehicles [sic]". The Board had addressed the final scene (of the women walking away from the collision) in its determination, making the point that the scene did 'not detract from the overall impression the advertisement gives which is that women are being presented in a manner which incites ridicule on account of their gender'.

1.5.4, again is a statement which purports to give a view as to the manner in which the advertisement should be considered. The appellant makes no claim regarding the Board's determination on this point. The Board specifically noted in its determination its earlier discussion which included the comment that "the Board accepted that the intent of the

advertisement is to show an unrealistic situation”. Again, the Board has quite properly based its decision on the received execution of the advertisement and not its intent of ‘drawing the viewer in and selling a product/service using well-established techniques to create drama’.

1.5.5 is, once again, a statement rather than a claim against the determination of the Board. No further evidence is adduced to support any claim that there was a substantial flaw in the determination related to this statement. The finding of the Board that the advertisements ‘did portray or depict material in a way which discriminates against or vilifies a person or section of the community on account of gender’ is not necessarily a finding that the advertisement intended to make any commentary on gender issues or community values. However, it is worth repeating comments made previously in this review about the difference between the stated intention of an advertiser in making an advertisement and the need for the Board to consider the received execution, when considering whether an advertisement has breached the Code. Whatever the advertisement in this case did or did not seek to do, the Board must consider the received execution when making its decision. The Board did not act outside the scope of the Code or the Practice Note in making its decision as asserted under 1.5.5.

Under 1.6 and sub clauses, the appellant contends that the Board failed to place adequate weight on the use of ‘edited and exaggerated dramatization’ (dubbed ‘the Technique’) of the situation portrayed in the advertisement.

The Board clearly refers in its determination to the advertiser’s submissions that the ‘advertisement employs editing and dramatization to heighten the situation depicted in the advertisement’ so it was well aware of this use of editing and dramatization or what the appellant calls ‘the Technique’. It is unclear from the appellant’s submissions exactly what ameliorating effect it thinks the use of editing and dramatization has on the received effect of the advertisement in respect of consideration of the elements of Section 2.1. Moreover, as noted above, the Board must base its determination on the execution of the advertisement rather than the intent of ‘drawing the viewer in and maintaining the viewer’s attention’.

The appellant further contends in 1.6.1 that:

“Our use of the Technique cannot, in and of itself, constitute vilification of the female actors, by virtue of being a commonly used technique. Furthermore, it is not farfetched or unreasonable to assume that an advertiser would use over dramatization in the creation of advertisements”.

These comments, if intended to go to a criticism of the determination of the Board, are confusing. On the one hand, if the appellant is indicating that in some way the Board made its findings in respect of Section 2.1 because of the use of the ‘Technique’ this would seem to contradict the claim that the Board failed to give adequate weight to the use of the Technique in the advertisement. Nowhere in the determination of the Board is there any statement by the Board that the advertiser’s use of edited and exaggerated dramatization, of itself, constitutes vilification of the women in the advertisement. It is impossible to know from where the appellant derived this notion. Nor are there any comments at all in the Board’s determination that it is either ‘farfetched or unreasonable’ for an advertiser to use over dramatization in the creation of advertisements. The Board constantly deals with advertisements from all sectors which contain degrees of over dramatization, as it is a well-recognised and much utilised element of modern advertising. These comments by the appellant appear misplaced and offer no evidence whatsoever of any flaw in the



determination of the Board.

At 1.6.2 the appellant reiterates an earlier claim that if the advertisement had featured males instead of females the Board would not have found discrimination or vilification. As noted above, this claim is purely speculative. The Board can only consider the advertisement which is before them, not hypothetical advertisements. The Board acted entirely properly in this regard.

Accordingly, the points raised under 1 above do not provide evidence that there was a substantial flaw in the Board's determination, i.e. that the determination was clearly in error having regard to the provisions of the Code, or clearly made against the weight of evidence.

At Point 2 the appellant quotes the determination of the Board regarding the amendment to the advertisement as follows:

“...the Board was of the view that these changes do not alter the overall impression given by the advertisement that the women appear unintelligent and until the last minute are completely unaware of their surroundings or the danger they are in.”

In respect of this quote, the appellant claims that the women in the advertisement: “do not sit passively, nor are they unresponsive or unaware of the issue created in this ‘unexpected situation’ (i.e. the theme of the ad series) ... the women cannot, therefore, be said to be portrayed in an unintelligent or stereotypically helpless depiction”.

“Furthermore, the fact that the car breaks down cannot form a depiction of women as unintelligent or unable to recognise a dangerous situation. There is no suggestion of any nexus between the car breaking down and the fact that the actors are women. We submit that any finding that relates these matters is purely subjective and such a finding is not able to be made on any objective viewing of the advertisement.”

The comments of the appellant on the above quote from the Board's determination are statements of the appellant's interpretation of what happens in certain sections of the advertisement. Those statements do not offer evidence of any substantial flaw in the determination of the Board. The fact that the interpretation of the appellant is not in accord with the findings of the Board does not, of itself, render the Board's determination flawed. The Board had clearly examined the effect of the amendments to the original advertisement and it was entitled to come to the conclusion of the ‘overall impression given by the advertisement’ contained in the determination and quoted above by the appellant.

The Board in its determination does not come to its view about the intelligence of the women or their inability to recognise danger simply because their car breaks down. The Board makes clear that its findings are based on a number of elements throughout the advertisement, including the reaction of the women and their interaction with each other, and not just on one incident.

However, on the specific issue of the breakdown of the car, the suggested reason for the breakdown is also a relevant element. The advertiser itself makes the clear suggestion in the advertisement that regular services from Ultra Tune will prevent such an ‘unexpected situation’. As the women walk away from the implied collision the voice over states:

“Avoid unexpected situations. Get your car serviced at Ultra Tune.”

The voice emphasises the word “your”, reinforcing the suggestion that these women failed to have their car serviced at Ultra Tune and thus ended up in an unexpected breakdown. This is clearly the message of the advertisement, or its ‘theme’. It is the selling point of the advertisement.

In its application for review the appellant states:

“The purpose of the advertisement is to demonstrate that a person should not have to escape an ‘unexpected situation’ in similar manner to that of the actor [sic].”

The logical conclusion from this statement, given the voice over content, is that the way to avoid having to escape such a situation is to have one’s car serviced at Ultra Tune. The Board stated that “the voice over enforces the negative connotation by describing the situation as an unexpected scenario which could have been avoided”. The Board was entitled to take the view that the advertisement, inter alia, suggested that women ‘don’t look after their cars’ and the appellant has submitted no evidence that the Board was precluded from that view. The appellant offers no evidence that the finding of the Board quoted above ‘is not able to be made on any objective viewing of the advertisement’. This review refers above to the issue of subjectivity in the decision making of the Board.

Accordingly, the points raised under 2 above provide no evidence that there was a substantial flaw in the determination of the Board.

In its final point 3, the appellant refers to the Board’s description of the women, in the final scene of the advertisement, walking in a manner reminiscent of Charlie’s Angels and that whilst the women are ‘portrayed as sexy they are also portrayed as confident’. The appellant contends that this description cannot be reconciled with a finding that the advertisement discriminates or vilifies women based on “what the Board classifies as a ‘ridiculous look’ ”.

That finding was of a breach of Section 2.1 of the Code. The above quote from the Board appears in its consideration of whether the advertisement breaches Section 2.2 of the Code, not Section 2.1 of the Code, which is the finding the review application is based on. This is a totally different section of the Code and different criteria apply. No breach of Section 2.2 was found by the Board. The Board’s comments in relation to Section 2.2 in no way preclude its ability to find a breach of Section 2.1.

Moreover, as noted above, the Board has made it quite clear in its determination that the decision is based on the ‘overall impression the advertisement gives’ rather than any one scene or incident. The Board specifically discusses, in its consideration of Section 2.1, the final scene of the women walking away from the implied collision. In summary of its consideration the Board stated, while acknowledging that the women are shown to confidently walk away:

“The Board considered that this final scene does not detract from the overall impression the advertisement gives which is that the women are being presented in a manner which incites ridicule on account of their gender.”

Finally, the appellant also raises a prior statement of the Board from an earlier determination,

that advertisers are free to use whomever they wish in their advertisements and that the use of two women in a car for an automotive product or service is not in itself discriminatory. This statement does not appear in the determination which is the subject of this review and is not directly relevant to this review, which concerns itself with this determination only. The comment itself is not remarkable and would seem self-evident, regardless of the advertiser. Nowhere in this determination does the Board indicate disagreement with such a statement. There is no reason that such a statement would be irreconcilable with the finding of the Board that the advertisement considered in this review breaches Section 2.1.

Point 3 does not establish that there was a substantial flaw in the determination of the Board.

Accordingly, the appellant's application for review discloses no evidence that there was a substantial flaw in the determination of the Board (determination clearly in error having regard to the provisions of the Code, or clearly made against the weight of evidence).

#### Reviewer's Recommendation

I recommend that the decision of the Board in case 0175/16 be affirmed.