



Case Report

1	Case Number	0237/17
2	Advertiser	Sportsbet
3	Product	Gaming
4	Type of Advertisement / media	Internet
5	Date of Determination	24/05/2017
6	DETERMINATION	Upheld - Modified or Discontinued
7	IR Recommendation	Reconfirm original decision

ISSUES RAISED

- Other Social Values
- 2.6 - Health and Safety Within prevailing Community Standards

DESCRIPTION OF THE ADVERTISEMENT

Ben Johnson poised on starting blocks on a race track promoting new Sportsbet app.

THE COMPLAINT

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

*ASADA does not condone the message sent in this advertisement.
This advert makes light of the use of performance enhancing drugs in sport and sends the completely wrong message that the use of drugs in sport is normal.
This advertising campaign belittles the achievements of clean athletes and denigrates those who work to protect clean sport across the world.*

THE ADVERTISER'S RESPONSE

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

The essence of the Complaints assert that:

- *it is not cool to have [Ben Johnson] used in a gambling add: not at all...*

- *Ben Johnson is not a role model*
- *The ad is promoting and glorifying the use of steroids in sport*
- *The ad promotes the use of steroids to enhance your performance, to be a better gambler with the new app for android devices*
- *It promotes to children watching that getting any advantage in betting as a positive and necessary act, like in sports*
- *Promotes banned athletes and puts them in the spotlight*
- *There did not seem to be any implication that using performance enhancing drugs is wrong, bad for your health or just a stupid thing to do*

The ASB has identified section 2.6 of the AANA Code of Ethics (Code) as the section which may have been breached based on the Complaints:

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

Sportsbet's response to the Complaints

Sportsbet has considered the Complaints and strongly considers that the Advertisements do not breach section 2.6, or any other section of the Code for the reasons set out below.

1. First and foremost, the nature of an overwhelming majority of the Complaints is, with respect, irrelevant. The ASB is required to make a determination on whether or not the Advertisements breach the advertising requirements within the Code, particularly section 2.6. However, overwhelmingly, the whole tenure of the Complaints appear to be based on the complainants' own personal preferences, values or tastes and not on whether or not the Advertisements depict material contrary to Prevailing Community Standards on health and safety.

2. A further threshold issue is that the Advertisements are clearly and obviously a spoof and parody. They are in no way intended to be – nor could a viewer reasonably consider them to be – a portrayal of a realistic situation. Viewed in this way, the propensity of the Advertisements to depict material contrary to Prevailing Community Standards is significantly reduced.

3. Further, the Advertisements mock and deride athletes who have taken performance enhancing drugs. In no way, do the Advertisements glorify or promote the use of these substances. Although an attempt has been made to do this in a humorous way, it cannot be properly said that exposing drug cheats and their achievements to such mockery and derision could be said to be contrary to Prevailing Community Standards. On the contrary, ordinarily this sort of ridicule would be considered to have negative connotations and a deterrent effect – something which could reasonably be expected to be in line with Prevailing Community Standards.

4. The fact that Sportsbet has paid Mr Ben Johnson a sum of money to appear in the Advertisements and promote Sportsbet's Android App and that doesn't 'sit well' with a pocket of the community based on their moral compass or otherwise is plainly irrelevant for the purposes of the determination to be made by the ASB.

5. Advertising by its very nature is at times somewhat divisive and not all advertisements

are universally warmly welcomed based on people's own unique personalities and dispositions. Regardless – this simply does not elevate apparent concerns of that nature to advertising which is either relevant to, let alone contrary to Prevailing Community Standards on health and safety within the meaning of the Code.

6. *Sportsbet does not in any way condone or encourage the use of performance enhancing drugs. As a wagering operator, Sportsbet's business is built on the integrity of the underlying sporting and racing events that it offers markets on. Sportsbet works closely with sports controlling bodies, racing bodies and government agencies to eradicate integrity risks. With respect, it is ill-informed to suggest that Sportsbet, or any of the Advertisements, condone or encourage prohibited drugs in sport.*

7. *The Advertisements do not show any drugs, nor do they refer to any drugs or in any way endorse or encourage the use of drugs. Simply showing people who have used, or are suspected to have used, performance enhancing drugs is not 'unhealthy' or 'unsafe', nor in any way in breach of the Code.*

8. *The Advertisements feature Mr Johnson and other 'performance enhancement experts' who are known or suspected to have used steroids to gain an unfair advantage, together with a play on the word 'roid', to promote Sportsbet's new Android App as something that is 'performance enhanced' and something that Sportsbet's Android customers should download.*

9. *Playing on this theme, the Advertisements include humorous steroid-related references such as 'jacked up' and 'juiced up' and 'everyone's on it' to promote the enhanced nature of the Android App. From this, there can be no reasonable deduction that Sportsbet is endorsing the use of illicit drugs.*

10. *The examples of performance enhancement shown in the Advertisements are clearly comical in nature and do not present themselves as real outcomes achievable through taking performance enhancing drugs. This includes showing Mr Johnson at the starting blocks lifting both of his hands off the ground in an unnaturally balanced position, the size of the weight that the Eastern Bloc weightlifter is lifting, and smoke coming from the cyclist's tyres to depict the speed he is generating.*

11. *These performance enhanced outcomes are in no way endorsed by Sportsbet in the Advertisements. If anything, the Advertisements mock the featured athletes by showing muscles in grotesque proportions and showing their performances as overt demonstrations of cheating. This is supported by the references in the Advertisements to an 'unfair' advantage that the Android App provides as an analogy to the unfair effect of taking performance enhancing drugs.*

12. *There is no statement or suggestion in the Advertisements that taking performance enhancing drugs is without consequence. On the contrary, the limited nature of Mr Johnson's limited short-term 'success' as a result of taking performance enhancing drugs is belittled by the subtle reference to the fact that he was awarded the 1988 Olympic gold medal for only 48 hours.*

13. *There is no suggestion in the Advertisements that performance enhancing drugs should be used by anyone. The reference to 'get on it' cannot be reasonably interpreted in the context of any of the Advertisements in totality in conjunction with the product that it is*

advertising as anything other than to download the Android App.

14. *Sportsbet rejects that the Advertisements in any way encourage children to use steroids. The Advertisements depicts adults in adult situations and is clearly targeted towards adults who will understand the humorous and exaggerated nature of the Advertisements, as described above.*

15. *The Advertisements are shown in strict compliance with regulatory requirements for when wagering advertisements are able to be shown. The fact that some pockets of the community object to the ability for wagering companies to advertise their product or that the Advertisements have been shown during a particular sporting event and/or co-viewed with a minor is entirely irrelevant in considering whether or not it breaches section 2.6 of the Code.*

16. *While we acknowledge that the Advertisements have attracted a number of complaints from pockets of the community wishing to express their personal preferences, values or tastes, the broader community sentiments are overwhelmingly positive, including a significant amount of support for the Advertisements through social media commentary. Support for the Advertisement has also come from prominent media personalities and social commentators such as 3AW's Neil Mitchell, who has described complaints about the Advertisements as an 'overreaction' and commented further that 'The only problem I have is that I believe he was paid'. In addition, among the raft of public opinion and commentary that are simply miffed at some of the fuss that has ensued following publication of the Advertisements – we draw your attention to the following:*

- *the opinion article in the Sydney Morning Herald on 20 May 2017 titled 'Critics of Johnson campaign rush to wrong conclusion' (enclosed);*
- *the Your Say section of the Herald Sun on 19 May 2017 titled 'Most HeraldSun.com.au readers don't think the Ben Johnson betting ad crosses the line (enclosed);*
and
- *the Opinion in the Herald Sun by prominent social commentator Susie O'Brien titled 'Johnson just a sideshow on a dubious circus' on 16 May 2017 (enclosed).*

Conclusion

With the above in mind, the Advertisements cannot reasonably be interpreted as in any way depicting material contrary to Prevailing Community Standards on health and safety.

In Sportsbet's submission the Complaints lack foundation and should be dismissed.

THE DETERMINATION

The Advertising Standards Board (the "Board") considered whether this advertisement breaches Section 2 of the AANA Code of Ethics (the "Code").

The Board noted the complainant's concerns that the advertisement makes light of the use of performance enhancing drugs in sport.

The Board noted that the employment of a particular person in an advertisement ie: Ben Johnson is an issue that is not within the Code of Ethics or Wagering Code and that this was

not considered.

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

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 suggests that the use of performance enhancing drugs is normal.

The Board noted that the advertisement shows Ben Johnson poised on the starting blocks on a race track holding a phone with the betting App on screen.

The Board noted that the Australian Sports Anti-Doping Authority and its international counterparts identifies substances and methods that athletes cannot take or use. Steroids and their related substances are on the banned substance list <https://www.wada-ama.org/en/resources/science-medicine/prohibited-list-documents>. The Board noted that the ban on the use of these types of drugs in sport is widely accepted as the community standard on the taking of performance enhancing drugs and noted that substances can appear on this list for reasons including 'The substance or method has the potential to risk the athlete's health.'

The Board also noted that the use of performance enhancing drugs is widely seen as being potentially harmful to the health of athletes and there are a number of government strategies in the community to educate athletes
<http://www.health.gov.au/internet/main/publishing.nsf/content/illicit-drugs-in-sport>.

The Board considered that there are numerous references and double entendres in the advertisement which are intended to mean steroids even though it would also be clear to the consumer that the advertised product is a wagering app.

Specifically the Board noted statements in the advertisement: "nobody knows performance enhancement like Ben Johnson," "unfairly fast android app," and "get on it."

The Board considered that the context of the advertisement is to play on the word 'Android' when promoting the android version of its new app, and create references to 'roids', a slang term for steroids often associated with performance enhancement in sport and fitness.

The Board noted the text on screen next to the image of Ben states "putting the roid in android" which is a direct reference to the use of steroids and that this in conjunction with the depiction of Ben Johnson was a clear connection to his steroid use.

The Board considered that, while there is no depiction of drug use in the advertisement, the advertisement makes numerous clear references to drug use and in the Board's view can clearly be considered to be a reference to drug use and that a strong reference to an activity does amount to 'depiction' within the terms of the Code of Ethics.

The Board then considered whether the drug use is depicted in a manner that appears positive or in a manner that is contrary to prevailing community standards on health and safety.

The Board considered that the advertisement overall suggests that the 'roid' is a positive

element to the new App and encourages people to use the new App and to bet quickly. The Board considered that the impression of the advertisement makes light of drug use and that the use of drugs will enhance performance.

The Board noted the advertiser's response that "the advertisements are clearly and obviously a spoof and parody. They are in no way intended to be – nor could a viewer reasonably consider them to be – a portrayal of a realistic situation." The Board also noted that the advertiser considered that "the advertisement mocks athletes who have used performance enhancing drugs and does not glorify or promote the use of those substances."

The Board considered that the use of a spoof or parody may be the vehicle to deliver the promotion in a humorous way, but that the use of humour does not necessarily outweigh or justify a message that reasonable people in the community might take from an advertisement. The Board also noted that there will be a range of views in the community about how humour in a particular advertisement affects the message of the advertisement.

In the Board's view the use of Ben Johnson in conjunction with a humorous message about drug use conveys a message that there is not a negative side to drug use and cheating and could be seen as a suggestion that there are benefits to gain from cheating or from behaviour that will enhance your performance. The Board also considered that, despite the parody, there is little consequence depicted for these actions as the athlete is portrayed in a positive way, rather than showing a negative side to the choices he made in his sporting career. In the Board's view, the overall tone of the advertisement makes light of the use of performance enhancing drugs and of using performance enhancing drugs to cheat in sport.

The Board did not consider that the advertisement condoned or encouraged drug use, but noted that section 2.6 of the Code requires only that there is a depiction of an activity that is contrary to prevailing community standards on health and safety. The Board considered that the prevailing community standard on health and safety is opposed the use of performance enhancing drugs in sport and to avoid drug use more generally.

In the Board's view the advertisement depicts performance enhancing drug use in sport in a manner that is contrary to prevailing community standards on health and safety and did breach section 2.6 of the Code.

Finding that the advertisement did breach section 2.6 of the Code, the Board upheld the complaints.

THE ADVERTISER'S RESPONSE TO DETERMINATION

Confirming the advertisement from our Android campaign was taken off air from Friday 2nd June onwards and will be modified following the upheld complaints against them.

INDEPENDENT REVIEWER'S RECOMMENDATION

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 above determination of the Board regarding a Sportsbet internet advertisement.

It appears from the review request that the appellant is citing both ground 1 and ground 3 as grounds for its review request.

The appellant states that ‘there are one or more substantial flaws in the Board’s Determination’:

Flaw 1 – The Board applied the wrong test.

“The Board erred in applying the wrong test to assess whether or not the Advertisements [sic] breached Section 2.6 of the Code.

The Board stated that the test to be applied under section 2.6 in the following terms:

“The Board did not consider that the advertisement condoned or encouraged drug use, but noted that section 2.6 of the Code only requires a depiction of an activity that is contrary to prevailing community standards on health and safety”. [emphasis added]

Applying this test, the Board concluded that the Advertisements breached section 2.6 of the Code because they depicted the activity of “performance enhancing drugs in sport”, an activity contrary to the prevailing community standard.

Sportsbet submits that this is the wrong test.

Properly construed, section 2.6 of the Code is not breached simply if the subject matter of an advertisement (in this case, performance enhancing drugs in sport) is contrary to the prevailing community standard on health and safety. It is not the subject matter itself which must be contrary to the prevailing community standard – it is how that subject matter is depicted which must be contrary to the prevailing community standard for section 2.6 to be breached.

An example illustrates the distinction and the Board’s error. An advertisement simply dealing with solariums (an illegal product when operated on a commercial basis in Australia) may or may not be contrary to the prevailing community standards on health and safety – it depends on how the advertisement deals with this subject matter. If the advertisement encourages the use of solariums, it might be considered to be contrary to prevailing community standards on health and safety. On the other hand, an advertisement which conveys the risks associated with frequent solarium use (even if done by “making light” of this activity so as to engage the target audience) would not be expected to be contrary to prevailing community standards on health and safety.”

Flaw 2 – The Board failed to have proper regard to the negative portrayal of sportspersons who had been caught using performance enhancing drugs.

“The Board found that, although the Advertisements did not condone or encourage the taking of performance enhancing drugs in sport, the Advertisements [sic] did “make light” of sportsmen who had been caught using these drugs.

The Board, however, seriously erred in failing to give sufficient – if any – consideration to the Advertisements’ overall depiction of sportsmen caught using performance enhancing drugs.

The Advertisements expose Ben Johnson and the other sporting caricatures depicted to mockery, ridicule and derision. This message is apparent and conveyed by the Advertisements. This sort of treatment has negative connotations, which are entirely consistent with the adverse prevailing community standard to users of performance enhancing drugs in sport.

If the Advertisements invoke feelings of resentment for Ben Johnson and the other caricatures using performance enhancing drugs, which is consistent with the sentiment from the complaints relating to the Advertisements, this reinforces a message that drug use is ill-advised, which is entirely distinct from depicting material contrary to prevailing community standards on health and safety.

This fact – impermissibly overlooked by the Board in its Determination – has been identified by expert social commentators in the media. For example, Susie O’Brien noted that: “The Sportsbet ad is a little corny, but it’s certainly not making light of athletes taking performance enhancing drugs ... the clear message is that drug cheats are a joke; they’re not worthy of being taken seriously in sport.” [Susie O’Brien, Herald Sun, 16 May 2017, p.21]

Similarly, Darren Kane observed that:

“Johnson bouncing up a running track with a mobile phone in hand “putting the ‘roid in Android” doesn’t one iota belittle the achievement of clean athletes, or denigrate those who work in whatever capacity to protect clean sport ... To suggest any of those things misses one crucial point. That Ben Johnson’s life after sport is a complete nonsense, to the point where the only way he can spin a buck is lampooning himself. ... Sportsbet using Johnson to spruik whatever new app the corporate bookmaker has developed makes Johnson look like a bit of a village idiot. An idiot who’s no doubt trousered some serious folding to deaden the embarrassment; but a husk of a man, just the same.”

In these circumstances, the Board’s finding that the use of Ben Johnson, in conjunction with a humorous message promoting its new app, conveys a message that there is no negative side to drug use and cheating not only lacks logic, it is also contrary to a relevant message conveyed by the Advertisements.

Conclusion

For the reasons set out above, Sportsbet considers that the Independent Reviewer should recommend that the Board reconsider its Determination.

REVIEWER’S COMMENTS

Flaw 1 – the Board applied the wrong test

The appellant appears to be invoking either ground 1 or ground 3 in its review application in support of this first claim. Its contentions regarding this claim centre on the wording of Clause 2.6. which states as follows:

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

As quoted above the appellant cites a passage from the Board’s Determination which states:

“The Board did not consider that the advertisement condoned or encouraged drug use, but noted that Section 2.6 of the Code only requires a depiction of an activity that is contrary to prevailing community standards on health and safety” (Reviewer’s emphasis added).

The appellant has interpreted this statement by the Board as a ‘test’ although the Board never uses that terminology. It is certainly an indication of the Board’s view of what, inter alia, might constitute a breach of Section 2.6. In addition, the appellant states that the Board concluded that the advertisements [sic] breached section 2.6 of the Code” because they [sic] depicted the activity of ‘performance enhancing drugs in sport’ an activity contrary to the prevailing community standards”. Quite clearly, the activity the Board refers to in its determination is the use of performance enhancing drugs. Drugs themselves cannot be an activity.

The actual wording of Section 2.6 refers to the depiction of material contrary to prevailing community standards on health and safety. The word ‘material’ is very broad and one can

only assume that it was inserted into the Code with that intent. ‘Material’ can encompass the widest possible range of content. The AANA Practice Note offers no guidance on the wording of Section 2.6 save for comments about Prevailing Community Standards and how they are assessed. On established principles then, the use of the word ‘material’ must be taken to have been chosen intentionally to mandate a very wide approach to the content which might be considered. Such breadth would obviously include an ‘activity’ and though the Board does not actually step through the exercise of stating this, it is implicit in the Board’s comments. The range of content possible in a multitude of different media would be extremely wide. The Section is clearly intended to capture that wide range of possibilities. It is worth noting that the Practice Note offers no ‘test’ in respect of Section 2.6, nor, as noted above, does the Board use this word in its determination. The word ‘test’ is one used by the appellant alone. The quote from the determination of the Board represents less a ‘test’ than the Board indicating one of the possible parameters which might be considered in assessing a breach under Section 2.6.

A close reading of the determination of the Board indicates that its reference to the depiction of an activity being contrary to prevailing community standards was actually focussed on whether a reference to an activity amounted to a ‘depiction’.

The Board states:

The Board considered that, while there is no depiction of drug use in the advertisement, the advertisement makes numerous clear references to drug use and in the Board’s view can clearly be considered to be a reference to drug use and that a strong reference to an activity does amount to ‘depiction’ within the terms of the Code of Ethics.

The above quote from the Board is awkwardly expressed but the focus of its consideration is clear. It is focussed on whether references to an activity can constitute a ‘depiction’ (Reviewer’s emphasis). The relevant depiction, in the view of the Board, was the reference to drug use in the advertisement. The appellant appears to have misunderstood the focus of the Board’s words in this passage.

Moreover, the Board concludes:

In the Board’s view the advertisement depicts performance enhancing drug use in sport in a manner that is contrary to prevailing community standards on health and safety and did breach Section 2.6 of the Code.

The Board in this quote is also clearly indicating that the manner in which the advertisement depicts performance enhancing drugs formed part of its consideration in making its determination.

Given the above, it may be that the reasoning of the appellant’s review request on this ground is at cross purposes with the reasoning contained in the determination of the Board. The appellant, in support of its contention that the Board had ‘applied the wrong test’, states that the Board, in applying its ‘test’ ‘concluded that the Advertisements {sic} breached section 2.6 of the Code because they [sic] depicted the activity of “performance enhancing drugs in sport”, an activity contrary to the prevailing community standards. However, the Board has, in its determination, consistently described the activity depicted as the use of performance enhancing drugs in sport, not the drugs themselves. It appears possible that this confusion by the appellant of what the Board considered constitutes the activity depicted in the advertisement may have contributed to the appellant’s comments relating to what it regards as the proper construction of Section 2.6 when it states:

“Properly construed, section 2.6 of the Code is not breached simply if the subject matter of an advertisement (in this case performance enhancing drugs in sport) is contrary to the prevailing community standard on health and safety (emphasis added). It is not the subject matter itself which must be contrary to the prevailing community standard – it is how that

subject matter is depicted which must be contrary to the prevailing community standard for section 2.6 to be breached. “

The appellant offers no support or evidence for this contention regarding the proper construction of section 2.6. Here again, the appellant identifies performance enhancing drugs in sport as the ‘subject matter’ of the advertisement (presumably meaning the content or ‘material’ of the advertisement) whereas the Board’s determination identifies the use of performance enhancing drugs as the activity depicted (the material or content) which is contrary to prevailing community standards on health and safety.

Regardless of these semantic differences, reference to the actual wording of section 2.6 serves to clarify the issue. As noted above, the use of the word ‘material’ in the Code is clearly intentional and indicates a very wide approach to the content of advertisements. It would perhaps have been helpful for the Board to make reference to this choice of words in the Code but its failure to do so does not constitute any error on its part. Future determinations relating to Section 2.6 may benefit from reference to the actual wording of the section. The word ‘material’ could encompass either the nature of the content or material of an advertisement AND/OR the manner in which that content or material is depicted in the advertisement. The breadth of the word ‘material’ offers no support at all for the contention that in order to decide a possible breach of section 2.6 the Board should focus exclusively on whether the manner in which content is depicted is contrary to the prevailing community standard.

On the contrary, the choice of words of Section 2.6 makes it clear that either the content itself, and/or the manner in which it is depicted, can be considered in assessing a breach of section 2.6.

The appellant offers the example of an advertisement dealing with solariums, stating that such an advertisement for an illegal product may or may not be contrary to prevailing community standards on health and safety depending on how the advertisement deals with the subject matter. Rather than this example illustrating “the Board’s error”, it simply states what amounts to a truism: advertisements featuring myriad forms of content may or may not breach sections of the entire Code depending on the manner in which the advertisement in question deals with the content.

The Board did not apply the ‘wrong test’ in assessing whether this advertisement breached Section 2.6 of the Code. Therefore, there is no substantial flaw in the Board’s determination on this basis and neither ground 1 nor ground 3 is made out.

Flaw 2 – The Board failed to have proper regard to the negative portrayal of sportspersons who had been caught using performance enhancing drugs.

The appellant appears to invoke ground 1 in this claim

The appellant contends as follows to support its claim:

“The Board found that, although the Advertisements did not condone or encourage the taking of performance enhancing drugs in sport, the Advertisements did “make light” of sportsmen who had been caught using these drugs.

The Board, however, seriously erred in failing to give sufficient – if any – consideration to the Advertisements’ overall depiction of sportsmen caught using performance enhancing drugs.

The Advertisements [sic] expose Ben Johnson and the other sporting caricatures depicted to mockery, ridicule and derision. This message is apparent and conveyed by the Advertisements. This sort of treatment has negative connotations, which are entirely consistent with the adverse prevailing community standard to users of performance enhancing drugs in sport”.

The appellant continues:

“If the Advertisements invoke feelings of resentment for Ben Johnson and the other caricatures using performance enhancing drugs, which is consistent with the sentiment from the complaints relating to the Advertisements, this reinforces a message that drug use is ill-advised, which is entirely distinct from depicting material contrary to prevailing community standards on health and safety.”

The appellant goes on in its submission to quote part of two articles in the daily press by what it identifies as ‘expert social commentators in the media’. The views of these individuals are irrelevant to the Board’s task in making its determination in this case and are thus a neutral factor.

The appellant concludes:

“In these circumstances, the Board’s finding that the use of Ben Johnson, in conjunction with a humorous message promoting its new app, conveys a message that there is no negative side to drug use and cheating not only lacks logic, it is also contrary to a relevant message conveyed by the Advertisements”.

In its determination on this case the Board clearly does both acknowledge and quote the appellant’s claim that “the advertisement mocks athletes who have used performance enhancing drugs and does not glorify or promote the use of those substances”. The Board considers this issue in conjunction with the claim by the appellant that ‘the advertisements [sic] are clearly obviously a spoof and a parody”.

The Board refers to its established principle that the use of humour is not necessarily a defence to a breach of the Code, commenting that “the use of humour does not necessarily outweigh or justify a message that reasonable people in the community might take from an advertisement”.

Directly addressing the issue of a positive or negative portrayal of Ben Johnson, including the issue of parody, the Board states:

“In the Board’s view the use of Ben Johnson in conjunction with a humorous message about drug use conveys a message that there is not a negative side to drug use and cheating and could be seen as a suggestion that there are benefits to gain from cheating or from behaviour that will enhance your performance. The Board also considered that, despite the parody, there is little consequence depicted for these actions as the athlete is portrayed in a positive way, rather than showing a negative side to the choices he made in his sporting career. In the Board’s view, the overall tone of the advertisement makes light of the use of performance enhancing drugs and of using performance enhancing drugs to cheat in sport”.

The appellant also raises the issue of resentment towards Ben Johnson and others arising from the advertisement. The appellant is referring to views expressed in the original complaints. These individual views are not material to the task of the Board in making its determination.

It is clear from its determination that the Board did appropriately consider the advertisement’s “overall depiction of sportsmen caught using performance enhancing drugs”. Having done so, the Board has determined that in the advertisement “the athlete is portrayed in a positive way, rather than showing a negative side to the choices he made in his sporting career”. The fact that the Board and the appellant disagree about the impact of the overall depiction of the athlete in the advertisement does not render the determination of the Board flawed. The Board was entitled to its view on this aspect of the advertisement and has appropriately articulated that view in the determination. There is no substantial flaw in the Board’s determination on this ground. Ground 1 is therefore not made out.

Accordingly, the appellant’s application for review discloses no evidence that there was a substantial flaw in the determination of the Board nor that there was a substantial flaw in the process by which it was made.

Reviewer's Recommendation

I recommend that the determination of the Board in 0237/17 be affirmed.