



Case Report

1	Case Number	0238/17
2	Advertiser	Sportsbet
3	Product	Gaming
4	Type of Advertisement / media	Radio
5	Date of Determination	07/06/2017
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

This radio advertisement features a male voiceover reading out a fax supposedly from an Eastern Bloc athletics team which reads that the new Sportsbet App has more power than a nuclear submarine. The letter goes on to say, "We don't know what you're injecting, but congratulations on giving punters unfair advantage". The voiceover ends the advert by saying that Sportsbet put the 'roid in Android and now they have Eastern Bloc athletes endorsing the App.

THE COMPLAINT

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

I object to them using proven and disgraced sports drug cheats as their spokespersons (paid) eg. Ben Johnson; I also object and oppose this sports gambling company associating and / or inferring sports drug enhancement as a positive as it promotes drug cheating or performance enhancement as being a good thing by inference or association.

*I notice they are also posting a radio add with inference to Lance Armstrong (Nova 96.9)
All these adverts should be withdrawn immediately.*

Both the TV and radio ads are based on the idea of steroids/giving people an unfair advantage. The radio ads make reference to Russia and China and doping programs. The fact that this ad campaign makes light of drugs in sport - particularly giving recent issues across various codes of football and the ASADA investigation - in extremely poor taste and highly inappropriate.

THE ADVERTISER'S RESPONSE

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

Sportsbet's response to the Complaints

Sportsbet has considered the Complaints and strongly considers that the Advertisements do not breach sections 2.1 or 2.6 or any other section of the Code for the reasons set out below.

Section 2.1 of the Code:

Sportsbet rejects that the Advertisements in any way breach section 2.1 of the Code. In our view, the Advertisements plainly do not "discriminate against" nor "vilify" any person or section of the community on account of nationality.

To discriminate against or to vilify are both very serious matters. The Oxford and Collins dictionaries support our contention that the Advertisements do not breach section 2.1 of the Code by reason that they provide:

to "discriminate against" is to "make an unjust or prejudicial distinction in the treatment of different categories of people" (Oxford Dictionary) or to "single out a particular person, group, etc., for special...disfavour, often because of a characteristic..." (Collins Dictionary); and

to "vilify" is to "speak or write about in an abusively disparaging manner" (Oxford Dictionary) or to "revile with abusive or defamatory language; malign" (Collins Dictionary).

Although some listeners may not find the Advertisements as humorous as some others might (or at all), they certainly do not go so far as to 'unjustly or prejudicially' treat any nationality, nor do the Advertisements 'abusively disparage' or 'revile' any nationality. Sportsbet also strongly rejects that the Advertisements are in any way racist.

Instead, the Advertisements are merely an attempt at humor by using subtle imperfections in the English language, which are common among people with English as a second language, which includes, for example, people from China and the Eastern Bloc. This portrayal of English as a second language, together with a humorous attempt at a foreign accent, is to emphasise the notion that these overtly fictitious communications, which voice support for the Android App, have come from overseas destinations.

The reference to a 'tiny frame' in the Chinese swimming team Advertisement is in the context

of promoting Sportsbet's expertise in developing a fast user experience within the confines of an App, and if there is any implication of an analogy to a Chinese person having a small frame, this cannot be reasonably interpreted as discriminating against, or vilifying, Chinese people. If anything, a tiny frame is commonly the envy of other people, as is the notion of having significant power within that frame, as the Advertisements suggest.

Playing on such stereotypes in this regard and in this tone are a long way removed from 'unjustly or prejudicially' treating any nationality, or 'abusively disparaging' or 'reviling' any nationality. Sportsbet regrets if the jovial nature of the Advertisements were either misconstrued or may have offended the complainant, but we firmly reiterate our view that the Advertisements do not breach section 2.1 of the Code.

Section 2.6 of the Code:

Sportsbet refers to the ASB's recent determinations for complaint reference numbers 0234/17, 0235/17, 0236/17 and 0237/17 in relation to certain television advertisements for Sportsbet's Android App (TV Advertisements).

Two key reasons for the ASB's determination that the TV Advertisements breach section 2.6 of the Code were:

'...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

'...there is little consequence depicted for these actions as the athlete is portrayed in a positive way...'

Critically, the Advertisements are materially different from the TV Advertisements in that:

Ben Johnson does not feature in any way in the Advertisements; and the Advertisements do not portray any positive effects, exaggerated or otherwise, of the use of performance enhancing drugs (e.g. 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 in the TV Advertisements).

Additionally, Sportsbet further considers that the Advertisements do not breach section 2.6 of the Code for the reasons set out below.

The Advertisements are clearly and obviously a spoof and parody. They are in no way intended to be – nor could a listener reasonably consider them to be – a portrayal of real correspondence that Sportsbet would receive from the Chinese swimming team, an Eastern Bloc athletics team or a yellow jersey winner in relation to its Android App. Considered in this way, the propensity of the Advertisements to depict material contrary to Prevailing Community Standards is significantly reduced.

In no way do the Advertisements demonstrate, glorify or promote the use of performance enhancing drugs. Further, the Advertisements do not portray any positive effects of taking performance enhancing drugs. Instead, the Advertisements mock and deride athletes who have taken performance enhancing drugs, and 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.

The Advertisements do not feature any actual endorsement from anyone who has taken performance enhancing drugs. Instead, the Advertisements feature overtly fictitious communications from international sports teams 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 also 'performance enhanced' and something that Sportsbet's Android customers should download.

Playing on this theme, the Advertisements include humorous steroid-related references such as 'new Android App is dope', 'juiced up' and 'injected millions in the backend' 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. This is supported by the references in the Advertisements to an 'unfair' advantage that the Android App provides, and 'how'd y'all get away with it' as an analogy to the unfair and negative implications of taking performance enhancing drugs.

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, make light of prohibited drugs in sport.

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.

Conclusion

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

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 complainant's concerns that the advertisement makes light of the issue of drugs in sport and infers using performance enhancing drugs is a good thing.

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

The Board considered Section 2.1 of the Code. 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 this radio advertisement features a voiceover referring to a facsimile

from a certain “Eastern Block athletics team” and he then reads out the fax describing the Sportsbet app and the power that the upgraded app has. The supposed fax refers to giving punters an unfair advantage. The end of the advertisement states “download it now.”

The Board noted that the overall tone of the advertisement is constructing an impression of a person or group of people from the Eastern block by referring to the athlete as “Boris” as well as the use of a roughly Russian accent and the term “Sportsbet comrades.”

A minority of the Board considered that the suggestion that the athletic team sent a facsimile was a subtle inference that the particular part of the world was not advanced enough to use email or other more current methods of communication and in conjunction with an implication of supporting steroid use, the depiction of an athlete from a particular country or nationality in this way was a negative depiction.

The majority of the Board however, felt that the detail within the advertisement about the ethnicity of the particular athlete was not detailed enough to be able to determine which country in particular was being suggested and that there was insufficient information about his background to be able to clearly identify where he was from.

The Board considered that the references used in the advertisement were a stereotypical suggestion of steroid use by athletes but that in the context of this advertisement’s depiction of past sporting incidents by particular nations this did not amount to material which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality...and did not breach section 2.1 of the Code.

The Board then 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 considered that there are numerous references and double entendres in the advertisement which are intended to mean steroids or drug use 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: “we don’t know what you’re injecting;” “congratulations on giving punters unfair advantage;” “new android app has more power than nuclear submarine;” “now they’ve got Eastern block athletes endorsing the app” and “Sportsbet put the roid in android.”

The Board considered that as a radio advertisement there is no visual depiction of drug use in the advertisement, however the advertisement makes numerous references to drug use that in the Board’s view can clearly be considered to be a reference to drug use and that a 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 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 and derides athletes who have taken performance enhancing drugs and ordinarily this sort of ridicule would be considered to have negative connotations and a deterrent effect."

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 terms of considering what the community standard on health and safety and the use of steroids in sport, 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 considered 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 noted that the advertisement generally depicts a group of athletes who have been found to use performance enhancing drugs. In the Board's view this depiction is done in a way that makes light of their use of a substance that is banned for use in sport. In the Board's view the use of an athlete from the "eastern block" in conjunction with an implied 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 heard for these actions and as a result the athlete is portrayed in a positive way, rather than showing a negative side to the choices made in their sporting careers.

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 to the use of performance enhancing drugs 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. The Board therefore determined that the advertisement breached section 2.6 of the Code.

The Board considered that the advertisement did depict material contrary to Prevailing

Community Standards and did breach Section 2.6 of the Code.

Finding that the advertisement did breach Section 2.6 the Code the Board upheld the complaints.

THE ADVERTISER'S RESPONSE TO DETERMINATION

Confirming this Radio ad from our Android campaign was taken off air from June 11th onwards and will be modified following the upheld complaints against it.

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 determinations of the Board and has made this request for the two cases together. It appears from the review request that the appellant is citing both Ground 1 and Ground 3 as grounds for its review request. Case 0263/17 concerns a free to air TV advertisement and 0238/17 concerns a radio advertisement.

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 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 connotations associated with 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 did “make light” of performance enhancing drugs.

The Board, however, seriously erred in failing to give sufficient – if any – consideration to the Advertisements’ overall depiction and portrayal of the caricatures used in the Advertisement.

The Advertisements contain only fictitious sporting caricatures who are reduced to mockery, ridicule and derision. They do not, contrary to the Board’s finding, portray these athletes ‘in a positive way’. 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.

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].

Flaw 3 – the Determination is plainly inconsistent with the Board’s determination in relation to similar advertisements

Relevantly, the Determination included the following findings:

1. ‘While there is no depiction of actual drug use in the advertisement, the advertisement makes reference to drug use and in the Board’s view can clearly be considered to be a reference to drug use and that a reference to an activity does amount to ‘depiction’ within the terms of the Code of Ethics’;
2. The ‘athlete [a fictitious character] is shown in a positive way, rather than showing a negative side to the choices made in his sporting careers’; and
3. 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’ and, accordingly the Advertisements breached section 2.6 of the Code.

These findings are plainly inconsistent with the Board’s determinations in cases 0276/17 and 0277/17 issued on 29 June 2017 in relation to similar Sportsbet’s advertisements (Yellow Jersey/Chinese Swimmer Advertisements), where the Board concluded that that:

1. The ‘advertisements’ references to ‘dope’ and ‘roids’ are relevant to the advertised APP and in the Board’s view the minimal references and level of inference regarding a doping scandal do not create a strong message about drug use and cheating and does not suggest that there are benefits to gain from cheating or from behaviour that will enhance performance;

2. The ‘references to ‘dope’ and ‘roids’ are intended to be a double entendre play on words referring to illegal drug use in the form of performance enhancing drugs’; and

3. The advertisement (apparently despite the above) ‘did not depict, encourage or condone drug use and did not depict material that was contrary to prevailing community standards on health and safety’ and, accordingly, did not breach Section 2.6 of the Code.

The separate determinations in relation to the Advertisements and the Yellow Jersey/Chinese Swimmer Advertisements cannot be reconciled, and are plainly at odds, with each other. Neither the Advertisements nor the Yellow Jersey/Chinese Swimmer Advertisements depicted material contrary to prevailing community standards on health and safety. Rather, what they each have in common is the depiction of fictitious characters to advertise, in a humourous way, the technical advantages of the Sportsbet Android app – they do not contain any real athletes (convicted or suspected of illegal drug use) nor do they suggest there are benefits to be gained from cheating or from behaviour that will enhance performance.

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 ground 1 and perhaps 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 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 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 in respect of 0238/17:

The Board considered that as a radio advertisement there is no visual depiction of drug use in the advertisement, however the advertisement makes numerous references to drug use that in the Board’s view can clearly be considered to be a reference to drug use and that a reference to an activity does amount to ‘depiction’ within the terms of the Code of Ethics (emphasis added).

In respect of 0263/17 the Board comments:

The Board considered that, while there is no depiction of actual drug use in the advertisement, the advertisement makes reference to drug use and in the Board’s view can clearly be considered to be a reference] to drug use and a reference to an activity does amount to ‘depiction’ within the terms of the Code of Ethics (emphasis added).

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

Moreover, the Board concludes in both 0263 and 0238:

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. The Board therefore determined that the advertisement breached Section 2.6 of the Code (emphasis added).

The Board in this quote is also clearly indicating that the manner in which the advertisements depict performance enhancing drugs formed part of its consideration in making its determinations.

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 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 standards. However, the Board has, in its determination, consistently in both cases 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 advertisements 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 advertisements (presumably meaning the content or 'material' of the advertisements) 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 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 these two advertisements 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 connotations associated with performance enhancing drugs.

The appellant appears to invoke ground 1 in this claim.

To support its claim the appellant contends as follows:

"The Board, however, seriously erred in failing to give sufficient, if any, consideration to the Advertisements' overall depiction and portrayal of the caricatures used in the Advertisement. The Advertisements contain only fictitious sporting caricatures who are reduced to mockery, ridicule and derision. They do not, contrary to the Board's finding, portray these athletes "in a positive way". 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 goes on to quote part of an article published in the Herald Sun written by what it identifies as an 'expert social' commentator. The view of this individual is irrelevant to the Board's task in making its determination based on the material in the advertisements.

The use of fictitious caricatures in the advertisements appears to be irrelevant to the determination of the Board in these two cases and is thus a neutral factor.

In its determination on both cases, the Board clearly does acknowledge and quotes the advertiser's claim that 'the advertisement mocks and derides the sporting caricatures and that ordinarily this sort of ridicule would be considered to have negative connotations and a

deterrent effect'. In 0263 the appellant claims in its response to complaints, that the Advertisement 'mocks and derides athletes who have taken performance enhancing drugs, including through use of a fictitious name "Vladimir Cheatalotokov" and showing a clearly unnatural and exaggerated outcome'. The Board directly refers to this claim in its determination on 0263 and to a similar claim in 0238.

In both cases the Board considers this issue in conjunction with the claim by the appellant that the advertisements are 'clearly and obviously a spoof and parody'.

The appellant does not indicate in its review request exactly what evidence of mockery, ridicule or derision it claims the Board overlooked or did not fully consider. Nor does the appellant elaborate on this claim in its responses to the complaints for both cases which were submitted to the Board prior to its determination being made. As noted above the claim is presented in conjunction with claims the advertisements are a 'spoof and a parody'. The Board in both cases refers to its established principle that the use of humour is not necessarily a defence to a breach of the Code, in this case commenting: "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 directly addresses the issue of negative connotations as follows:

In 0263 the Board states:

"In the Board's view the use of an athlete in conjunction with a humorous message about drugs conveys a message that there is no negative side to drug use and cheating and could be seen as a suggestion that there are benefits to gain from cheating and from behaviour that will enhance your performance.

The Board also considered that, despite the parody, there is no consequence depicted for these actions and the athlete is portrayed in a positive way, rather than showing a negative side to the choices made in his sporting careers."

In 0238 the Board states:

"In the Board's view the use of an athlete from the 'eastern block' [sic] in conjunction with an implied humorous message about drugs 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 heard for these actions and as a result the athlete is portrayed in a positive way, rather than showing a negative side to the choices made in their sporting careers."

It is clear from its determinations that the Board did appropriately consider the advertisements' 'overall depiction and portrayal of the caricatures used in the Advertisements' in particular the issue of parody. Having done so, the Board has determined that the advertisements portray the athletes in 'a positive way' rather than showing a negative side to career choices. The fact that the Board and the appellant disagree about the impact of the overall depiction and portrayal of the caricatures in the advertisements 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 both determinations. There is no substantial flaw in the Board's determination on this ground. Ground 1 is therefore not made out.

Flaw 3 – the Determination is plainly inconsistent with the Board's determination in relation to similar advertisements.

The contention by the appellant that the Determinations of the Board in cases 0238 and 0263 are flawed on this ground fails at the threshold.

It is impossible to fault the determinations of the Board in cases 0238 and 0263 (both determined on the 7th June 2017) on the basis of inconsistency with determinations in cases 0276/17 and 0277/17, which had not been made at the time the Board decided 0238 and 0263.

The determinations in 0276 and 0277 were made on 21 June 2017.

There is thus no substantial flaw in the Board's determinations on this basis.

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

Reviewer's Recommendation

I recommend that the determinations of the Board in cases 0238/17 and 0263/17 be affirmed.