



Case Report

1	Case Number	0263/17
2	Advertiser	Sportsbet
3	Product	Gaming
4	Type of Advertisement / media	TV - Free to air
5	Date of Determination	07/06/2017
6	DETERMINATION	Upheld - Modified or Discontinued
7	IR Recommendation	Reconfirm original decision

ISSUES RAISED

- Other Social Values

2.1 - Discrimination or Vilification Nationality

2.6 - Health and Safety Within prevailing Community Standards

DESCRIPTION OF THE ADVERTISEMENT

The current advertising slogan and contents of SportsBet ad to promote the Android app. The ad uses the slogan 'putting the 'roid' in Android' and proceeds to show weight lifters as people who have or are perceived to have used performance enhancing drugs.

THE COMPLAINT

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

These ads are glorifying cheating. Ben Johnstone is a disgraced athlete and shouldn't be given any publicity. It could be taken that to win you have to cheat. I have seen them on both pay and free to air some when children would still be up. The ads are a disgrace and should be reoved forthwith.

The ad seemingly promotes the use of performance enhancing drugs/substances which are banned in most levels of sport. I'm also not sure of the drugs legality. The ad also implies that all athletes from 'the eastern block' are users of performance enhancing drugs/substances. There is no comical value in the ad(s).

Features references to illicit drug use in family friendly time slot. Gambling in family time a

lot. Makes fun of drug use as potentially inappropriate to sport but that gambling should be inextricably linked to it

Although the Sportsbet advertisements are always using and tongue in cheek, I found the recent 'putting the roid in android' making light of doping export quite distasteful.

This ad depicts a European weightlifter (apparently who are stereotyped as drug cheats) showed on the 22nd of May at 7:15 PM on Channel 10. Although no actual drug use was shown, calling this man a 'pin cushion,' one would assume he injects drugs for increased performance in the sport of weightlifting.

Notwithstanding gambling ads on TV at an early time slot of 7:15 PM where children could be watching let alone on TV at all, it's reckless for a company to be making light of the serious issue of doping in sports, period. There would be outrage if there was an advertised starring the well-known and recent drug cheat Lance Armstrong, why should the public accept a generic stereotype either?

I look forward to your response,

THE ADVERTISER'S RESPONSE

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

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

First and foremost, the ASB is required to make a determination on whether or not the Advertisement breaches the advertising requirements within the Code, particularly section 2.6. The fact that the Advertisement has received two complaints based on individual preferences and personal tastes is completely irrelevant in assessing whether or not the Advertisement depicts material contrary to Prevailing Community Standards on health and safety.

In no way does the Advertisement glorify or promote the use of performance enhancing drugs or show any realistic achievement or positive outcome as a result of using performance enhancing drugs. Instead, the Advertisement mocks and derides athletes who have taken performance enhancing drugs, including through use of a fictitious name 'Vladimir Cheatalotakov' and showing a clearly unnatural and exaggerated outcome.

Further, in the Advertisement Cheatalotakov demonstrates an angry demeanor with a short temper, which are common negative side-effects of taking performance enhancing drugs. Ordinarily promoting the negative consequences and ridicule of this kind would be considered to have a deterrent effect – something which could reasonably be expected to be in line with Prevailing Community Standards on health and safety.

The Advertisement does not feature any actual endorsement from anyone who has taken performance enhancing drugs. Instead, the Advertisement features a fictitious character from an Eastern Bloc weightlifting team 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 Advertisement includes humorous steroid-related references such as 'juiced up' 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 Advertisement to an 'unfair' advantage that the Android App provides as an analogy to the unfair effect of taking performance enhancing drugs.

The Advertisement is clearly and obviously a spoof and parody. It is in no way intended to be – nor could a viewer reasonably consider it to be – a portrayal of a realistic situation. This is demonstrated in a number of ways, including through use of an overtly fictitious name, showing a grossly exaggerated weight being lifted and including clear statements of 'Paid actor' and 'probably' in the context of purporting that the Android App is endorsed by Eastern Bloc weightlifters. Viewed in this way, the propensity of the Advertisement to depict material contrary to Prevailing Community Standards on health and safety is significantly reduced.

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 the Advertisement, promotes prohibited drugs in sport.

In response to other points raised in the Complaints:

- the Advertisement is shown in strict compliance with regulatory requirements for when wagering advertisements are able to be shown; and*
- the Advertisement exclusively features Eastern Bloc weightlifters. From this, it cannot reasonably be said to convey a message that 'all athletes from 'the eastern block' are users'.*

Relevance of the ASB's initial upholding of complaints regarding reference numbers 0234/17, 0235/17, 0236/17 and 0237/17 relating to Sportsbet's Ben Johnson advertisements (Ben Johnson Advertisements)

It's important to note that the Advertisements are separate advertisements with separate context from the Ben Johnson Advertisements. As such, the ASB's initial upholding of complaints relating to the Ben Johnson Advertisements ought not to bear upon its decision regarding the Complaints.

In any case, in respect of some of the reasoning expressed in the ASB's initial upholding of complaints relating to the Ben Johnson Advertisements, two core reasons for the ASB's determination that the Ben Johnson 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 Advertisement is materially different from the Ben Johnson Advertisements in that:

- *the Advertisement does not feature Ben Johnson or any other athlete who has been found guilty for using performance enhancing drugs; and*
- *the Advertisement does not portray athletes suspected to have used performance enhancing drugs in a positive light by reference to any actual success, such as the 1988 Olympic gold medal temporarily awarded to Ben Johnson referenced in the Ben Johnson Advertisements.*

Conclusion

With the above in mind, the Advertisement 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 complainants concerns that the advertisement makes reference to, and makes light of the use of performance enhancing drugs/anabolic steroids/illegal activity and cheating.

The Board also noted that the advertisement has a B classification. This is a classification meaning: Betting/Gambling "B" Definition:
Commercials relating to betting or gambling
Commercials relating to betting or gambling during a Live Sporting Event.

A commercial relating to betting or gambling must not be broadcast:
In any Program that is broadcast between 5.00 am and 8.30 pm and is principally directed to Children (aged under 15); and

In a P, C or G classified Program on any channel:

- Between 6.00am and 8.30am on any day; and
- Between 4.00 pm and 7.00 pm on any day.

News, current affairs and Sports Programs are not included in these time restrictions. Note that different rules apply for such TVCs during Live Sporting Events.

The Board viewed the television versions 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 makes reference to, condones or encourages the use of performance enhancing drugs/anabolic steroids/illegal activity and cheating.

The Board noted the advertisement features a fictitious Russian weightlifter character ‘Vladimir Cheatalotakov’ promoting the new betting app for Sportsbet. The advertisement shows the athlete lifting weights while talking about the new app.

The Board noted that the advertisement states that “Vlad here knows a fair bit about performance enhancement, which is why he loves Sportsbet’s new juiced up Android App”

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 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 numerous statements in the advertisement: “no stranger to injecting powerful stuff in the back end.”; “new juiced up android app;” and “this human pin cushion can’t stop talking about its unfair advantage.”

The Board noted the advertisement includes the text on screen “putting the roid in android” which is a direct reference to the use of steroids and that this in conjunction with the depiction of the weightlifter was a clear connection to his steroid use.

The Board considered that, while there is no depiction of actual drug use in the advertisement, the advertisement makes references 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. 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 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 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 in “no way does the advertisement “glorify or promote the use of performance enhancing drugs or show any realistic achievement or

positive outcome as a result of using performance enhancing drugs. Instead, the Advertisement mocks and derides athletes who have taken performance enhancing drugs, including through use of a fictitious name ‘Vladimir Cheatalotakov’ and showing a clearly unnatural and exaggerated outcome.”

Additionally, the Board noted the advertiser’s response that “the advertisement is clearly and obviously a spoof and parody. It is in no way intended to be – nor could a viewer reasonably consider them to be – a portrayal of a realistic situation.”

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.

The Board noted that the advertisement depicts a fictitious character- an Elite =105kg class weightlifter (paid actor) who is representative of an athlete who uses performance enhancing drugs. In the Board’s view this depiction is done in a way that makes light of the use of a substance that is banned for use in sport. In the Board’s view the use of an athlete in conjunction with a humorous message about drug use 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 or 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 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 also noted community concern regarding body image and considered that the use of a weightlifter seemingly promoting the use of steroids was not a positive message to send to children and young people regarding the achievement of this type of body shape. However, the Board noted the B Classification of the advertisement and that the advertisement was broadcast during programming appropriate for that rating and considered that the advertisement did not breach section 2.6 on the basis of body image.

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

THE ADVERTISER'S RESPONSE TO DETERMINATION

Confirming this TVC from our Android campaign was taken off air from Thursday 8th June 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 humorous 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.