

Case Report

1. Case Number :	0276-22
2. Advertiser :	Nimble Australia
3. Product :	Finance/Investment
4. Type of Advertisement/Media :	TV - Free to Air
5. Date of Determination	7-Dec-2022
6. DETERMINATION :	Upheld - Modified or Discontinued

ISSUES RAISED

AANA Code of Ethics\2.1 Discrimination or Vilification
AANA Code of Ethics\2.0 Other

DESCRIPTION OF ADVERTISEMENT

This television features a man who is named "Bill Shock", who has a wide open mouth expression throughout the advertisement. His mother speaks to camera about his challenges since he moved out and found out how expensive real life is.

THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

A woman talks about her son who can't close his mouth and shows his mouth full of food and dribbles his drink. This ad is very offensive to children who are affected by a intellectual and, or physical problem and also to their families.

Ad has a man who can not close his mouth, the man appears to have a disability not dissimilar to autism or cerebral palsy. The man has difficulty navigating his environment due to his disability. This is ad is degrading the man and his disability, it appears to be making fun of him because he has a disability.

The ad promotes the notion of a person with a disability, a vulnerable person, being a good candidate for a pay day type loan and I have seen a version with his mother promoting support for it at the end. The ad depicts the person as wide mother and unable to control food or drink intake. It is aimed at vulnerable people in our community and their carers and makes a mockery of the lack of control someone with a disability might experience eating or drinking. I believe it's very inappropriate.

It is degrading to people, such as my daughter who have facial disabilities to gain financial reward for this. Actually it is quite disgusting.

Disgusting showing person who is unable to close his mouth and food and drink dribble down his chin and shirt

THE ADVERTISER'S RESPONSE

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

We refer to the complaints received by the Ad Standards, as outlined in case reference number 0276-22 (Notification of Complaint), concerning our television commercial featuring Josh 'Magikarp Guy' Saunders (Saunders).

1 Background

We thank Ad Standards for bringing the complaints to our attention. We carefully review and consider the content of our advertising with reference to community standards. We are disappointed that some viewers have taken offense to our television commercials (TVCs). Nimble TVCs undergo an internal and external compliance approval process. We will keep the complaints in mind when producing future television commercials.

For the reasons set out below, we respectfully submit that none of the TVCs set out in the Notification of Complaint have breached Section 2 of the AANA Advertiser Code of Ethics (Code). Accordingly, we respectfully ask that all the complaints be dismissed without further action.

2 The advertisements

The TVCs which form the subject matter of the Notification of Complaint feature the comical character, William "Bill" Shock, with the aim of highlighting the impact of the rising costs of living from the perspective of young people who have been plunged into the harsh financial reality of "adulthood".

Saunders plays the aptly named Bill Shock – a character whose jaw is dropped due to the recurring financial shocks he encounters. Saunders rose to online fame when his shocked, open-mouthed expression was featured in a 2015 promotional clip for the 2016 season of Australia's Got Talent. That facial expression was likened at the time to the face of the Pokemon character 'Magikarp'. Since that time, Saunders has been turned into memes and gifs over several social media platforms by millions of people, and his jaw-dropped expression appeared on the big screen at the Super Bowl.

Pedestrian TV recently highlighted that "at 19, Josh [Saunders] was the inadvertent creator of arguably the most recognisable shock-reaction on the web". Appendix A to this response provides further material in respect of Saunders' notoriety.

Leveraging Saunders' notoriety, Bill Shock is a comedic character who expresses a very real emotion that everyday Australians are feeling; panic accompanied by a strange numbness at the escalating costs of living. The TVCs aim is to convey to consumers that Nimble is the "lender in Aussies' corner" during these challenging times.

Within the TVCs specifically, Bill Shock is depicted in a variety of light-hearted and slightly exaggerated versions of real life scenarios, where the emphasis is placed on his perpetual state of shock. Following in the tradition of our lovable, irreverent, and light-hearted approach to the things that Australians care about most, we aim to ensure that the TVCs live up to Nimble's reputation of being an iconic and witty brand.

3 The complaints

There are three specific complaints set out in the Notification of Complaint. The details of the three complaints are as follows:

1. The first complaint was received by Ad Standards on 13 November 2022 (First Complaint) and alleges that:

- a. a woman "talks about her son who can't close his mouth"; and*
- b. the TVC is "very offensive to children who are affected by intellectual and, or physical problems and also to their families";*

2. The second complaint was received by Ad Standards on 14 November 2022 (Second Complaint) and alleges that:

- a. the TVC "has a man who cannot close his mouth";*
- b. the man "appears to have a disability not dissimilar to autism or cerebral palsy";*
- c. the man "has difficulty navigating his environment due to his disability"; and*
- d. the TVC is "degrading the man and his disability, [and] it appears to be making fun of him because he has a disability".*

3. The third complaint was received by Ad Standards on 22 November 2022 (Third Complaint) and alleges that:

- a. the TVC "promotes the notion of a person with a disability...being a good candidate for a payday loan type";*
- b. "the ad depicts the person as wide mother and unable to control food or drink intake"; and*
- c. the TVC is "aimed at vulnerable people...and their carers and makes a mockery of the lack of control someone with a disability might experience eating or drinking".*

(collectively, the Complaints).

The Complaints are addressed specifically within section 5 below.

4 Our response

Nimble has carefully considered the Complaints and appreciates the opportunity afforded by Ad Standards for us to respond prior to the Ad Standards Community

Panel (Panel) reviewing the matter. We are confident that our advertising complies with the Code.

5 Section 2 of the Code

The intention of the TVCs is to draw attention to the jaw dropping increase in the cost of living expenses which Australians are currently facing, in a playful and light-hearted manner. Saunders was cast as our protagonist, Bill Shock, on the basis that the facial expressions for which he is best known, were the perfect exaggerated and humorous demonstration of the everyday person's reaction to the current financial environment.

We are confident that many of our customers recognise Saunders, and are pleased to have received both written and oral feedback as to their adoration of the TVCs.

As a preliminary matter, it must be noted that:

- 1. Saunders is not disabled, whether physically, intellectually or otherwise;*
- 2. Nothing depicted in the TVCs gives any credible basis for assuming that Saunders is disabled, nor gives rise to an interpretation that Saunders is mocking or discriminating against people with disabilities; and*
- 3. It is otherwise absurd to suggest that Nimble would look to produce advertising material which, intentionally or not, sought to depict, reenact or in any way mock or discriminate against people with disabilities.*

Further details are set out below in relation to the specific provisions of section 2 of the Code.

5.1 Discrimination or Vilification

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

Furthermore, the Code Practice Note provides the following useful guidance in respect of the following key terms used in section 2.1:

**Discrimination is defined as "unfair or less favourable treatment";*

**Vilification is defined as "humiliates, intimidates, incites hatred, contempt or ridicule"; and*

**Disability is defined as "a current, past or potential physical, intellectual, psychiatric, or sensory illness, disease, disorder, malfunction, malformation, disfigurement or impairment, including mental illness".*

The Disability Discrimination Act 1992 (Act) provides that discrimination on the grounds of disability occurs when a person is treated less favourably, or not given the same opportunities as others in a similar situation because of their disability. It cannot reasonably be said that any aspect of the TVCs portray Bill Shock 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 (whether that be towards Bill Shock himself or as a representation of a section of the community). Indeed, a shocked facial expression of itself is not a disability, and any finding to the contrary by the Panel would set a dangerous precedent.

If it is found however that a shocked facial expression is somehow reflective of a physical disability, or that Saunders' portrayal of Bill Shock is considered to somehow vilify a section of the community, then it is Nimble's position that at no time during the TVCs is Bill Shock treated unfairly or less favourably than others. The TVCs use light-hearted humour to depict an exaggerated reaction of shock from having to experience the current increase in the costs of living. Bill Shock is not shown to be demeaned or mocked for any of his actions throughout the advertisement, nor is he shown to be embarrassed or offended. In fact, our TVC exudes an overly positive and embracing tone towards the character.

In relation to the specific subject matter of each of the Complaints, and utilising the same numbering as section 3 of this response, we provide the following further commentary:

1. First Complaint

- a. at no point in time does the TVC depict that Bill Shock is unable to close his mouth, should he wish to. Rather, the TVC shows several exaggerated daily scenarios of someone who is in such shock that he cannot help but display a shocked facial expression; and*
- b. the advertisement makes no portrayal of minors. Nevertheless, the millennial generation are well positioned to recognise Saunders and appreciate the humour of the Bill Shock character.*

2. Second Complaint

- a. again, at no point in time does the TVC depict that Bill Shock is unable to close his mouth, should he wish to. Rather, the TVC shows the exaggerated scenario of someone who is in such shock that he cannot help but display a shocked facial expression;*
- b. Saunders is not disabled, and nothing depicted in the TVCs gives any credible basis for assuming that Saunders is disabled, nor gives rise to an interpretation that Saunders is mocking or discriminating against disabled people;*
- c. at no point throughout the TVCs does Bill Shock exhibit or display any kind of behaviour which would suggest that he experiences difficulty in navigating his environment, whether as a result of disability or not; and*
- d. for the reasons set out in this response, there is no vilification of Bill Shock as a result of his physical attributes, whether they are reflective of an actual disability or not.*

3. Third Complaint

- a. please refer to our response in section 5.6 below;*

- b. the physical attributes of Leanne Shock (as the mother of Bill Shock) in the TVC are irrelevant to the purpose of the TVCs, and it is disappointing that a complainant has alluded to the fact that because of someone's weight or size (specifically, that she is "wide"), that they are unable to control food or drink intake; and*
- c. it is untrue and without basis to allege that the TVC is targeted towards vulnerable people. The specific scenes relating to Bill Shock eating popcorn and drinking coffee are quite clearly produced as being exaggerated and humorous real life scenarios, taken in the context of the shock experienced due to cost of living pressures.*

For the reasons above, any complaint on the basis of a contravention of section 2.1 of the Code ought to be dismissed.

5.2 Exploitative or degrading

Section 2.2 of the Code addresses the use of sexual appeal in a manner that is exploitative or degrading. There is no use of sexual appeal in the advertisement. We are therefore of the view that the TVCs comply with the Code in relation to Section 2.2.

5.3 Violence

Section 2.3 of the Code requires that advertising must not present or portray violence unless it is justifiable in the context of the product or service advertised. We do not believe that there is violence depicted in the TVCs. We are therefore of the view that the TVCs comply with the Code in relation to Section 2.3.

5.4 Sex, sexuality and nudity

Section 2.4 of the Code requires that advertising treat sex, sexuality and nudity with sensitivity to the relevant audience. We do not believe there is any reference to sex, sexuality or nudity in the TVCs. We are therefore of the view that the TVCs comply with the Code in relation to Section 2.4.

5.5 Language

Section 2.5 of the Code requires advertising to only use language which is appropriate in the circumstances (including appropriate for the relevant audience and medium). Strong or obscene language shall be avoided. We do not believe there is inappropriate language in the commercial. We are therefore of the view that the advertisement complies with the Code in relation to Section 2.5

5.6 Health and safety

Section 2.6 of the Code advertising to not depict material contrary to Prevailing Community Standards on health and safety. We do not believe the commercial depicts material contrary to prevailing health and safety standards. We are therefore of the view that the advertisement complies with the Code in relation to Section 2.6.

For completeness, and in response to the Third Complaint where the TVC is alleged to "promote the notion of a person with a disability...being a good candidate for a

payday loan type”, Nimble takes pride in being a responsible lender. This means we can and will only lend to customers that meet our strict and regulated criteria. We will only lend to employed individuals with the means to meet the repayment obligations for the entire loan amount and duration.

We therefore refute any suggestion that we are attempting to encourage irresponsible spending and borrowing practices. In fact, prior to consumers being able to access the online application form, a ‘Warning About Borrowing Statement’ is shown to educate consumers about accessing assistance when they are experiencing financial difficulties. Nimble holds an Australian Credit Licence, issued by the Australian Securities and Investments Commission, and is required by law to adhere to the responsible lending rules outlined in the National Consumer Credit Protection Act 2008 (Cth). We do not believe any Code issues are raised in this regard.

5.7 Distinguishable as advertising

We believe the commercial is distinguishable as advertising and as a marketing communication. The advertisement clearly promotes the fact that Nimble is offering consumers the opportunity to apply for a loan which is supported by the offer disclaimer. We are therefore of the view that the advertisement complies with the Code in relation to Section 2.7.

Advertising & Marketing Communications to Children Code

We are of the view that the advertisement does not contravene the Advertising & Marketing Communications to Children Code as the advertisement is not directed primarily to children, having regard to the theme, visuals and language used. In particular:

- a. this is an advertisement which is directed to adults; the offer promoted (and the associated call to action) relates to an adult target market;*
- b. there is nothing in the theme of the advertisement which is directed towards children; and*
- c. the advertisement depicts an adult man and adult female only.*

Food & Beverages Advertising & Marketing Communications Code

The Food and Beverages Advertising and Marketing Communications Code does not apply to the advertisement. The advertisement is not advertising Food or Beverage Products.

6 Conclusion

For the reasons set out above, it is our firm belief that the TVCs comply with Section 2 of the Code. We trust that the Panel will share that view, and we look forward to receiving the determination. Should the Panel take a different view or require further clarity, we would be pleased to discuss this matter further.

Please do not hesitate to ask if we can be of further assistance to the Panel.

ANNEXURE A

A digital copy of the advertisement has also been attached as an MP4 upload. Further details of Saunders' appearances in the media can be found at the following URLs:

- <https://www.dailymail.co.uk/video/news/video-1241078/Promo-guy-denies-hired-Channel-Nine-ad.html>
- <https://www.tyla.com/tv-and-film/josh-saunders-shocked-surprised-reaction-meme-australias-got-talent-20211209>
- <https://knowyourmeme.com/memes/magikarp-guy>
- <https://www.dailymail.co.uk/news/article-3383139/21-year-old-Josh-Saunders-affectionately-known-promo-guy-received-landslide-unflattering-compliments.html>
- <https://twitter.com/thepromoguyoz?lang=en>
- <https://www.pedestrian.tv/news/josh-saunders-human-gif-15-minutes/>
- <https://www.youtube.com/watch?v=dxlX7MvDE48>
- <https://campaignbrief.com/nimble-talks-taking-it-on-the-chin-jaw-dropping-cost-of-living-in-new-work-via-cyclone-creative/>
- <https://www.dailymail.co.uk/tvshowbiz/article-3426220/Australia-s-Got-Talent-audience-member-react-shock-Inside-magic-trick-jaws-drop.html>
- <https://www.dailymail.co.uk/news/article-3379751/Why-mug-TV-Australia-s-Got-Talent-audience-member-hailed-internet-promo-guy-bizarre-facial-contortions-revealed-young-dance-instructor.html>

THE DETERMINATION

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

The Panel noted the complainants' concerns that the advertisement:

- Is vilifying of people with disabilities
- Is gross due to the depiction of eating and drinking with an open mouth

The Panel viewed the advertisement and noted the advertiser's response. The Panel noted that the advertiser had responded to three complaints specifically, however noted that further complaints had been received with similar concerns.

Issues outside the Code

The Panel noted the complainants' concerns that the advertisement depicts inappropriate and gross behaviour.

The Panel acknowledged that some members of the community would prefer not to see a person eating with their mouth open, however the Panel noted that issues of taste and decency by themselves do not fall within the Code.

Section 2.1: 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 orientation, religion, disability, mental illness or political belief.

The Panel noted the Practice Note to Section 2.1 provides the following definitions:

- Discrimination – unfair or less favourable treatment
- Vilification – humiliates, intimidates, incites hatred, contempt or ridicule.
- Disability – a current, past or potential physical, intellectual, psychiatric, or sensory illness, disease, disorder, malfunction, malformation, disfigurement or impairment, including mental illness.

The Panel noted the advertiser's response that the advertisement was leveraging the shock meme the actor was known for, and was not a portrayal of someone with a disability.

The Panel considered that while the man may be recognisable to some members of the community, not everyone viewing the advertisement would be familiar with the actor or reference to the meme.

The Panel considered that the man's name and the theme of the ad are intended to portray that the man is unable to close his mouth due to the financial shocks he has encountered. The Panel considered that while this was intended to be humorous and fantastical, the man's inability to close his mouth is consistent with the physical impact of some disabilities. The Panel considered that the man is seen to be unable to keep his mouth closed, even when a financial solution is presented, and this is an indication that he is not reacting to something but has a permanent condition.

The Panel considered that the way the man's mother speaks about him and interacts with him would be recognised by many members of the community as the way a carer or family member may speak about a person with a disability.

The Panel considered that while it was not the intent of the advertiser, the portrayal of the man in the advertisement could be seen to be a portrayal of a person with a disability.

A minority of the Panel considered that the man is portrayed in a positive light, shown to be fully independent, living out of home and working. The minority of the Panel considered that the tone of the advertisement was positive and did not portray the man in a disparaging or discriminatory way.

The majority of the Panel considered that while the tone of the advertisement was positive, the portrayal of someone in a manner that gives the impression that he has a disability, for the purposes of humour, suggests that such conditions are humorous and open to ridicule. The Panel noted that the actor does not identify as having a

disability, but considered that his portrayal of a person who has a disability is insensitive to people who have conditions that may result in facial difference or disability. Overall, the Panel considered that the advertisement did portray the man in a way which incites ridicule of people with disabilities.

2.1 Conclusion

The Panel considered that the advertisement did portray or depict material in a way which discriminates against or vilifies a person or section of the community on account of disability and determined that the advertisement did breach Section 2.1 of the Code.

Conclusion

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

THE ADVERTISER'S RESPONSE TO DETERMINATION

While reiterating our position that Nimble would never intentionally produce advertising material that would discriminate against or vilify any section of the community, we are committed to making the following changes to our TVCs (both 30s and 15s versions):

1. Editing the opening scene such that Bill Shock is not shown to have an open mouth in the photo frames;
2. Creating further emphasis to the television set in the advertisement, which shows the humorous and unrealistic price per gallon of mayonnaise as clearly being worthy of a shocked expression;
3. Removing the scene with Bill Shock wearing a face mask;
4. Extending the scenes containing Leanne Shock, such to avoid the unnecessary focus on Bill Shock;
5. Removing the scene involving Bill Shock spilling coffee;
6. Removing the scene involving Bill Shock eating popcorn; and
7. Editing the final scene, such that the scene ends when Bill Shock's mouth is closed.

In addition to modifying the TVCs, we will make a concerted effort with our overall marketing strategy to veer away from using still photographs of Bill Shock with his mouth open that could be wrongly construed as being discriminatory, so as to ensure that the mistaken view isn't perpetuated across other forms of media. We are confident that, with the benefit of the above, the TVCs clearly only contain a number of highly exaggerated scenes which are not to be taken seriously by a reasonable audience.

We anticipate being able to have these modifications made by 14 December 2022, with the modified TVC scheduled to air on TV by 20 December 2022 (subject to CAD approval). Furthermore, we will ensure that the TVC campaign does not continue beyond 31 January 2023.