



Case Report

1	Case Number	0311/13
2	Advertiser	General Mills Australia Pty Ltd
3	Product	Food and Beverages
4	Type of Advertisement / media	TV
5	Date of Determination	11/09/2013
6	DETERMINATION	Dismissed
7	Date of reviewed determination	23/10/2013
8	Determination on review	Dismissed

ISSUES RAISED

2.1 - Discrimination or Vilification Nationality

DESCRIPTION OF THE ADVERTISEMENT

The advertisement sets up the fictional problem that because Mexican meals are so often eaten by hand (tacos / burritos), people had no use for forks at dinnertime. Rather than as eating implements, the community tried to find other uses of the fork – throwing at a dartboard or knitting. A young girl suggests eating rice as a way to bring the fork to its original purpose at dinnertime, and the community celebrates the idea.

THE COMPLAINT

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

As with the previous ads in this style I find this ad highly insulting to the Mexican people, suggesting that they are so stupid that it is only recently they worked out what to do with a fork and only because a little girl said something.

This is one of many ads where Old El Paso depicting Mexicans as unintelligent and backwards, the ad uses what would be considered racist stereotypical depictions of Mexicans through the use of stereotypical accents and actions by actors who are obviously not Mexican. I find this very offensive as a Mexican and would find it difficult to envision a similar ad created depicting other more populous cultures in Australia such as Chinese or Indian. I have complained directly to the company whose response was along the lines of "we like to have fun with our ads" and "it was not supposed to be taken seriously".

THE ADVERTISER'S RESPONSE

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

We firstly wish to confirm that General Mills takes its advertising obligations very seriously. It is General Mills' submission that the advertisement complies in all respects with the Advertising Code and therefore the complaints should be dismissed. In this regard, we make the following points:

- This Advertisement is part of a long running campaign involving a series of television advertisements for Old El Paso Mexican products that have been well received in Australia for approximately 8 years. The central theme of the campaign is to celebrate the fun and entrepreneurial spirit of Mexico. Each advertisement involves a common mechanic in the form of a fictitious and quirky problem relating to the consumption of Mexican food. The problem is solved by the light-bulb inspiration of a young girl, which sparks the invention of a new Old El Paso product that is celebrated in the community. The most recent Advertisement is an extension of that well known, well received campaign in Australia and follows the standard formula.*

- The campaign has always been presented in a light hearted, fictitious and humorous way, and is purposefully endearing of the characters in the advertisement. We believe that there is no suggestion in either the content or spirit of the advertisement that discriminates against or vilifies Mexican people.*

General Mills also submits that the advertisement complies with all aspects the AANA Code for Advertising and Marketing Communications to Children and the AANA Food and Beverages Marketing and Communications Code.

THE DETERMINATION

The Advertising Standards Board (“Board”) considered whether this advertisement breaches Section 2 of the Advertiser Code of Ethics (the “Code”).

The Board noted the complainants’ concerns that the advertisement is offensive in its depiction of Mexican people unable to use a fork and uses racist stereotypes in the accents and actions.

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

The Board considered whether the advertisement was in breach of Section 2.1 of the Code. Section 2.1 of the Code states: “Advertising or Marketing Communications 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 preference, religion, disability, mental illness or political belief.”

The Board noted that the advertisement features Mexican people trying to find ways to use a fork such as using them instead of darts or knitting needles before a child suggests using them to eat rice.

The Board noted the complainants’ concerns that the advertisement is insulting to Mexicans

because it suggests they don't know how to use a fork. The Board noted the advertisement depicts a Mexican family eating traditional tacos and fajitas which don't require a fork and considered that the most likely interpretation is that Mexicans use their hands to eat tacos and fajitas and therefore have no requirement for a fork. The Board considered that whilst it could be considered a stereotype to suggest that Mexicans only eat food with their hands, in the Board's view this is a light-hearted suggestion with no negative undertones. The Board considered that the advertisement did not suggest that Mexican people could not use forks but rather that the advertisement suggested that forks are of lesser utility to Mexican people as eating implements.

The Board noted the complainants' concerns about the stereotypical accents and actions depicted in the advertisement and considered that whilst the Mexican people are presented in a stereotypical manner this depiction is not negative and presents the Mexicans in the advertisement as a positive, happy family.

Based on the above the Board determined that, in this instance, that the advertisement did not depict any material that discriminated against or vilified any person or section of society on account of their nationality.

The Board determined that the advertisement did not breach Section 2.1 of the Code.

Further finding that the advertisement did not breach the Code on any other grounds, the Board dismissed the complaints.

THE INDEPENDENT REVIEWER'S RECOMMENDATION

This is an application for review of the decision of the Advertising Standards Board (the Board) dated 11 September 2013, 0311/13, dismissing a complaint against a television commercial made by General Mills Australia Pty Ltd. The complainants claimed that the advertisement breached section 2.1 of the AANA Code of Ethics (the Code) in that it portrayed Mexican people in a way that vilified them on account of their race or nationality.

The advertisement is described in the Board's Case Report as follows:

The advertisement sets up the fictional problem that because Mexican meals are so often eaten by hand (tacos / burritos), people had no use for forks at dinnertime. Rather than as eating implements, the community tried to find other uses of the fork – throwing at a dartboard or knitting. A young girl suggests eating rice as a way to bring the fork to its original purpose at dinnertime, and the community celebrates the idea.

The grounds on which a decision of the Board may be reviewed are:

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.

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).

Where there was a substantial flaw in the process by which the determination was made.

The appellant's appeal was based on ground (3) above.

The original complainants commented generally that the advertisement presented Mexicans as being unintelligent and backwards in not knowing how to use a fork. It was said that this lack of intelligence was reinforced by the use of stereotypical accents and actions.

The advertiser defended the advertisement by saying that it was a part of a long running series that presented the manufacturer's Mexican food products in a light hearted, fictitious and humorous way. It was not intended to, nor, in the view of the advertiser, did it vilify Mexican people.

The Board dismissed the complaint. In regard to the use of the fork it said:

The Board noted the complainants' concerns that the advertisement is insulting to Mexicans because it suggests they don't know how to use a fork. The Board noted the advertisement depicts a Mexican family eating traditional tacos and fajitas which don't require a fork and considered that the most likely interpretation is that Mexicans use their hands to eat tacos and fajitas and therefore have no requirement for a fork. The Board considered that whilst it could be considered a stereotype to suggest that Mexicans only eat food with their hands, in the Board's view this is a light-hearted suggestion with no negative undertones. The Board considered that the advertisement did not suggest that Mexican people could not use forks but rather that the advertisement suggested that forks are of lesser utility to Mexican people as eating implements.

In regard to what was described as the stereotypical presentation of Mexicans it said:

The Board noted the complainants' concerns about the stereotypical accents and actions depicted in the advertisement and considered that whilst the Mexican people are presented in a stereotypical manner this depiction is not negative and presents the Mexicans in the advertisement as a positive, happy family.

The appellant asserted that these conclusions constituted substantial flaws in the process by which the Board's decision was made. It said that just because the group was depicted as being happy did not mean that the advertisement was not racist. The appellant re-asserted the view in the original complaint that the humour in the advertisement was based on the stupidity of a stereotypical Mexican family. Significantly, the appellant said "The determination of racism should be if it causes or is likely to cause offence to the cultural group being depicted".

Section 2.1 of the AANA Code of Ethics provides:

2.1 Advertising or Marketing Communications 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 preference, religion, disability, mental illness or political belief.

Section 2.1 is supplemented by a Practice Note issued by the AANA. Relevant to the present matter, the Note provides:

This section describes types of behaviour and restricts depictions of those types of behaviour against people within certain groups.

The types of behaviour are:

Discrimination – unfair or less favourable treatment

Vilification – humiliates, intimidates, incites hatred, contempt or ridicule

The groups are:

Race – viewed broadly this term includes colour, descent or ancestry, ethnicity, nationality, and includes for example ideas of ethnicity covering people of Jewish or Muslim origin.....

Nationality – people belonging to a particular nation either by birth, origin or naturalisation....

A negative depiction of a group of people in society may be found to breach section 2.1 even if humour is used. The depiction will be regarded as negative if a negative impression is created by the imagery and language used in the advertisement.....

Advertisements can suggest stereotypical aspects of an ethnic group or gender with humour provided the overall impression of the advertisements is not a negative impression of people of that ethnicity or gender.

The determination of what constitutes vilification on the ground of race or nationality is a difficult issue. The Board has had to consider the question in previous determinations: see 0006/11; 0267/11 and 0484/12. The decision in 0267/11 is the closest factual situation to this case and in that case the Board upheld the complaint that the advertisement breached section 2.1 of the Code.

Consistency in findings in relation to an alleged breach of a code or standard is important for the credibility of the Board. Where a like issue has been previously considered by the Board, it is desirable for it to refer to that previous consideration so that advertisers and the public may be informed of the approach being taken by the Board. It would have been appropriate for the Board to have referred in particular to decision 0267/11 in its consideration of this case.

The Code does not spell out any test for determining what action might constitute vilification on account of race but the Practice Note indicates that behaviour that humiliates, intimidates, incites hatred, contempt or ridicule will constitute vilification.

Further guidance as to what conduct might fall within vilification and how it may be determined can be obtained from the Commonwealth Racial Discrimination Act 1975 (the

Act) and the decisions of the courts under it. Section 18C of the Act provides:

Offensive behaviour because of race, colour or national or ethnic origin

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

While the expression “vilify” is not used in the section, the Act is intended to give effect to the International Convention on the elimination of all forms of racial discrimination. It is the principles underlying this Convention which presumably form the basis for the inclusion of the proscription in the Code directed to advertisements that vilify persons on the basis of race. The approach adopted in the Act of racial discrimination occurring where the act in question is reasonably likely to offend, insult or humiliate a group of people because it is connected with their race or national origin is a useful approach for the Board to follow in considering a claim of vilification in an advertisement. As indicated above, the Practice Note suggests very similar criteria for determining whether behaviour should be regarded as vilification.

Assistance may also be obtained from the Australian Human Rights Commission publication Racial Vilification Law in Australia. In that document it is said:

The victim's perspective is the measure of whether an act is likely to offend, insult, humiliate or intimidate. For example, if derogatory comments are made against Indigenous people, the central question to ask is whether those comments are likely to offend or intimidate an Indigenous person or group, not whether they have this effect upon a non-Indigenous person.

At the same time, the victim's response to the words or image must be reasonable. That is, the "yardstick should not be a person peculiarly susceptible to being roused to enmity, nor one who takes an irrational or extremist view of relations among racial groups." This is called the 'reasonable victim' test. The 'reasonable victim' test allows the standards of the dominant class to be challenged by ensuring cultural sensitivity when deciding the types of comments that are considered offensive.

This probably states the position at its strongest from the viewpoint of the person asserting vilification. The decisions of the Federal Court relating to the application of the Act in *Bropho v Human Rights & Equal Opportunity Commission* [2012] FCAFC 16 and *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 seem to pitch the standard that is required for an adverse finding of vilification to be made under the Act a little higher. Kiefel J in the latter case said that s 18C, required the nature or quality of the act in question to be tested by the effect which it is reasonably likely to have on another person of the racial or other group against which the conduct is directed. However, “To ‘offend, insult, humiliate or intimidate’ are profound and serious effects, not to be likened to mere slights. Having said that, the court would of course be conscious of the need to consider the reaction from that person or group's perspective.”

Both cases refer to the need to approach the issue objectively. The subjective intention of the

person whose conduct is in question is not relevant.

These various statements are not binding on the Board because the Board is applying the Code and not the Racial Discrimination Act. Significantly, the s 18C of the Act requires the offensive actions to be done “because of” the race, colour or national or ethnic origin of the other person or of some or all of the people in the group. This qualification is not to be found in the Code. Mere vilification is sufficient without the requirement to have regard to the reason why the act was done. Nevertheless, the terms of the Act and its interpretation by the courts provide some assistance to the Board as to how it should go about determining whether an advertisement offends section 2.1 of the Code.

The cases indicate that references to racial vilification must be read in the context of the document in which they appear. The Racial Vilification Act lays heavy emphasis on the need to balance freedom of speech and the right to discuss political and social issues against the racial content of the statements about which a complaint is made. In the present context it needs to be borne in mind that the Code is concerned with an advertisement, ie something that has commercial purposes. The need to balance freedom of speech against the racial content of the material called into question does not have the same significance. This would point to the Code being breached by a lower level of adverse conduct than that which would attract the sanctions provided by the Act.

It is apparent that, when considering whether there has been a breach of the Code, it is necessary to pay considerable heed to the point of view of the person who asserts that the advertisement is racist. The cases under the Act make it clear that it is not sufficient to consider the issue solely from the perception of a member of the community who is not a party to the group claiming to be affected. This approach would seem to be applicable to the Code also. The impact on the affected group must be considered most carefully. The matter is not to be resolved by the Board reaching a conclusion based on its own perception of the likely impact of the advertisement on the persons or group of persons concerned. This is particularly pertinent when considering an advertisement where the conduct portrayed purports to be humorous. The Board must take into account the reasonable victim’s perspective of the content of the advertisement. What may seem funny to one group may not have the same impact on the group being portrayed. This is acknowledged in the Practice Note as set out above.

This is not to say that mere assertion by complainants that they or their group are offended by an advertisement or that they feel that an advertisement lowers them in estimation or importance is sufficient to establish that they or their group have been vilified. The test is an objective one. Mere slights are insufficient. The objections of the reasonable victim are what are to be taken into account.

As noted above, the task of the Board in reaching a conclusion in a case of this kind is never going to be easy. However, in this case it does not appear on the face of its Determination that the Board approached the issue having regard to the complexities set out above. Nor did it appear to have regard to its previous decisions on the application of section 2.1 of the Code. If it did reach its decision having regard to these matters, the Determination needed to spell out its reasoning more fully. These constitute substantial flaws in the process by which the Board’s decision was made.

I recommend that the Board reconsider its decision taking into account the matters referred to

above.

THE DETERMINATION ON REVIEW

The Board noted the request for review, the complainant's points of concern about the Board's first decision and the information provided by the advertiser, and also noted the recommendation of the Independent Reviewer that it reconsider its decision on the basis that there was a substantial flaw in the process by which the decision was made.

The Board noted that the Independent Reviewer considered that the Board should reconsider the complaint after determining that:

- (a) the Board does not appear on the face of its Determination to have approached the issue having regard to the complexities set out above, and
- (b) did not appear to have regard to its previous decisions on the application of section 2.1 of the Code (in particular 0267/11).

The Board noted that under Section 2.1 of the Code: 'Advertising or Marketing Communications 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 preference, religion, disability, mental illness or political belief.'

The Board also noted the AANA Code of Ethics Practice Note which provides, in relation to racial vilification:

- Vilification – humiliates, intimidates, incites hatred, contempt or ridicule
- A negative depiction of a group of people in society may be found to breach section 2.1 even if humour is used. The depiction will be regarded as negative if a negative impression is created by the imagery and language used in the advertisement.
- Advertisements can suggest stereotypical aspects of an ethnic group or gender with humour provided the overall impression of the advertisements is not a negative impression of people of that ethnicity or gender.

The Board noted the significant information regarding interpretation and application of discrimination and vilification law provided by the Independent Reviewer as outlined in the recommendation.

The Board considered that the Independent Reviewer's information provided the following key points to the Board:

- The Code does not spell out any test for determining what action might constitute vilification on account of race but the Practice Note indicates that behaviour that humiliates, intimidates, incites hatred, contempt or ridicule will constitute vilification.

- the Code is concerned with an advertisement, ie something that has commercial purposes. The need to balance freedom of speech against the racial content of the material called into question does not have the same significance. This would point to the Code being breached by a lower level of adverse conduct than that which would attract the sanctions provided by the Act.

- The Board must take into account the reasonable victim's perspective of the content of the advertisement. What may seem funny to one group may not have the same impact on the group being portrayed.

The Board considered again the current advertisement.

In the Board's view this advertisement clearly describes in the voiceover the characters as being of a particular race 'Mexican'. The Board noted that the advertisement is part of a series of advertisements where the young girl of the family comes up with an idea that varies the depicted traditional food of the family and is well received by the rest of the family. The Board noted that the scenes in the advertisement depict two men trying to play darts using forks, then switches to a family (described as Mexican in the voiceover) attired in every day clothing seated at a table eating a meal of tacos. There is an image of a grandmother attempting to knit using forks instead of knitting needles and the girl is holding her fork in her hand. There is then a scene of the girl being held up by her family in celebration of her suggestion to eat rice. Finally there are depictions of a Mexican rice dish.

The Board noted that the advertisement states 'for years Mexicans tried to find a fun use for forks at dinner ...'Why don't we eat rice?....introducing new Old El Paso Mexican rice kits – true genius Mexican Style.'

The Board considered that this advertisement depicts a family eating tacos - which do not generally require use of utensils to eat. The family are seen in modern clothing typical to a warm climate with some colourful scarves which are clearly intended to create an impression of the setting being in Mexico. The voice over makes a reference to 'finding a fun use for forks' which in the Board's view is in the clear context of forks not being necessary to use if you are eating tacos.

The Board considered that the advertisement does not suggest that Mexican people do not know how to use forks – rather, that in consuming tacos, there is no need for forks.

The Board considered that the depiction of people using forks for purposes other than eating is not a suggestion of ignorance regarding the use of forks. The Board considered that the depiction of the grandmother endeavouring to knit with forks is an intentionally ridiculous depiction of what has been resorted to in an attempt to 'find a fun use for forks.'

The Board considered that in this advertisement the depiction of the Mexican family was an overall impression that the family members found great joy in the suggestion of the little girl to "eat rice", thereby finding a fun use for forks, and that the overall impression is not one of ridicule or stupidity.

In the current case the complainant has interpreted the advertisement as suggesting that the advertisement depicts people of this race as unintelligent people who do not know how to use a fork. In the Board's view this is not a view that reasonable members of the Australian

Mexican community would take.

In the Board's view, reasonable members of the Australian Mexican community may well be annoyed by the perpetuation of tacos as a typical food for Mexican people - however in the Board's view most members of the Australian Mexican community would recognise that the stereotype is used to create a context for explaining a new range of Mexican style rice products.

The Board considered that the advertisement is a lighthearted and humorous depiction of how a new food may be introduced to a family within an Australian context and considered that the depictions of the Australian Mexican family in the advertisement did not amount to depictions that reasonable Australian Mexican people would find insulting or humiliating.

The Board noted that in other contexts, such as in some other countries such as the United States of America, the views of reasonable Mexican people may be different and more negative of stereotypical portrayals.

The Board also noted the Reviewer's recommendation that it should reconsider the previous Board decision, particularly in regard to the previously considered case 0267/11 where complaints about the depiction of the door to door salesman as an Indian man with a strong accent was considered to perpetuate a stereotype, and is one that would generally be considered to be a negative stereotype of a person from a particular racial background and were held to breach Section 2.1 of the Code.

The Board considered its approach in some similar cases.

The Board noted that in the previously considered case 0267/11 it had stated:

“the depiction of the door to door salesman as an Indian man with a strong accent does perpetuate a stereotype, and is one that would generally be considered to be a negative stereotype of a person from a particular racial background. The Board also considered that the subtle suggestion that the Indian man may not be completely honest is also offensive and that is vilifying Indian people.

The Board determined that, in this instance, the advertisement does depict Indian people with a negative stereotype about their occupation and honesty..”

The Board noted that the key element in this decision is that the Indian man is presented as being unwelcome and not completely honest in his dealings as a door to door salesman. In the Board's view this element of the advertisement makes the stereotype a negative stereotype which does amount to vilification of people of a particular racial background.

The Board also considered a number of other advertisements in which it had been required to consider whether the content of the advertisement depicted material likely to be considered discriminatory to or vilifying of people on account of race or ethnicity.

The Board noted that in 0128/12 (AAMI) it had considered that the depiction of a Balinese woman massaging feet was a realistic depiction of the service provided to guests of a resort while on holiday in Indonesia, was not a negative depiction of a Balinese woman and did not breach the Code.

The Board also considered a similar style of advertisement in 0016/12 (Mars Food Australia) in which scenes of puppets are shown with an Italian Mama in the kitchen passing on secret family recipes to her Italian family. In that case the Board considered: ‘the depiction of puppets portraying an Italian family could be considered offensive to some people. However the Board considered that the puppets used in the advertisement were characters based on brand icons of the Dolmio range used for many years. The Board considered that the depiction of the puppets was affectionate and that there was no derogatory or demeaning treatment of the characters based on their ethnicity.’

The Board considered that there is quite a significantly different feel and approach between 0267/11 and 0016/12 – in 0267/11 the Board considered that a person of a particular racial background was presented in a manner which had negative suggestions regarding his occupation and his honesty. In 0016/12 the Board considered that the tone of this advertisement was light hearted humour of a stereotypically depicted Italian heritage grandmother who had discovered that a particular product will be just as good as her own traditional meals.

The Board noted that it had upheld the complaints on 0267/11 in its negative depiction of an Indian door to door salesman and had dismissed complaints about 0016/12 and its stereotypical depiction of an Italian Mama.

The Board reiterated that it has consistently determined that it is not usually prohibited to use stereotypical aspects of an ethnic group, individual or gender provided the overall impression of the advertisements is not a negative impression to a reasonable person from a particular ethnic group of the person/s being portrayed.

The Board considered that it was consistent with previous decisions to consider that the depictions of an Australian Mexican family in the advertisement currently under consideration were depictions that reasonable members of the Australian Mexican community would consider did not create a negative impression of Mexican people and did not discriminate against or vilify Mexican people.

The Board considered that the depiction of the Australian Mexican family finding a new fun use for forks is not a depiction that amounts to discrimination or vilification and that the advertisement did not breach section 2.1 of the Code.

Based on the above, the Board reconfirmed its original decision to dismiss the complaint.