



Case Report

1	Case Number	0400/13
2	Advertiser	Murray Goulburn
3	Product	Food and Beverages
4	Type of Advertisement / media	TV
5	Date of Determination	27/11/2013
6	DETERMINATION	Upheld - Modified or Discontinued
7	IR Recommendation	Reconfirm original decision

ISSUES RAISED

2.3 - Violence Bullying

2.6 - Health and Safety Within prevailing Community Standards

DESCRIPTION OF THE ADVERTISEMENT

In this ad we see a montage of all the mischievous things kids get up to when their parent aren't watching.

We see a group of kids in masks and costumes running through long grass, a boy getting skateboards strapped to his feet by his friends, like giant roller-skates, a boy with a blindfold across his eyes putting on a bike helmet, some kids duct taping their friend to a wall as he watches on amused.

We cut to some kids standing next to their dad's car. They eye it off mischievously. They start painting the car with some house paint.

We then see various other scenes which include children having a sword fight with bread sticks, a boy with a hosepipe down his pants, girls dancing in long grass and a group of children preparing to use a skateboard on a ramp to jump over their friends.

An image of Devondale Flavoured Milk appears on screen and a male voiceover says, "Flavoured Milk from Devondale. As sensible as kids get."

THE COMPLAINT

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

The content disturbs me - especially seeing a young child being 'duct taped' to a wall! There is enough bullying happening amongst young people without giving them more ideas via this

ridiculous ad.

THE ADVERTISER'S RESPONSE

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

The concerns raised by the complainant relate to Section 2 of the AANA Advertiser Code of Ethics.

Section 2

2.3 Advertising or Marketing Communications shall not present or portray violence unless it is justifiable in the context of the product or service advertised.

CAMPAIGN CONTENT

The 'Cape' TVC in question is part of a broader campaign of seven TV commercials for the Devondale brand that have been aired since August 2013. The other ads featured are called 'Glow Girl'; 'Cat Lady'; 'Jumpers'; 'Stepdad Steve'; 'Sunshine Bubble' and 'Man Child'. All spots in the TV campaign are intended to be humorous and not to be taken literally. The use of humour and exaggeration is consistent across all ads. Therefore, the intent of the whole campaign is to provide a light touch and engage viewers using humour whilst promoting Devondale's range of products to parents.

CAPE TVC

The 'Cape' advertisement in question portrays the mischievous activities that children get up to when left to their own devices. The TVC features a montage of activities which include: wearing costumes, painting a car, riding bikes, using bread sticks as swords, and filling their pants with water. The children featured in the advertisement are shown laughing and enjoying themselves throughout, as they delight in playing together outdoors.

TARGET AUDIENCE

The TVC is targeted at parents, and intended to tap into the universal insight that children get up to mischievous things from time to time (perhaps as they did when they were young). The solution in this instance is that flavoured milk is 'as sensible as kids get' further reinforcing the lighthearted and non sensible nature of the events.

COMMITMENT TO CHILDCARE AND SAFETY

Advertiser and Agency sought the advice and guidance of CAD prior to creating the TVC to ensure that the scenes we were proposing would not depict children in any situations which would cause them harm.

RESEARCH

Additionally research undertaken confirms community opinion around the scenes used in the advertisement. IPSOS (independent research company) confirmed that over 45% of those surveyed (n=161) rated the scenes in 'Cape' as "kids just having fun", confirming that the situations selected and portrayed were not seen as violent or bullying. Less than 12% of those surveyed believed the children were acting irresponsibly, which over 40% of those surveyed not concerned (indifferent) to the situations presented.

'DUCT TAPE' SCENE

The particular scene referenced by the complainant features a young boy being taped to a brick wall by two friends. At no point does the young boy express any distress at being taped to the wall – on the contrary he appears very relaxed, inclusive and amused as he plays along with the game and his friends.

BULLYING AND VIOLENCE

We contend that the duct tape scene and the advertisement in general do not portray

violence or bullying**.*

It is our view that there is no evidence of bullying and violence in the 'Cape' TVC, as the child is not being forcibly taped to the wall, and his friends are not intending to hurt him. Rather, they are all enjoying a game together, which is further demonstrated through the lighthearted and humorous tone of the advertisement.

Both the advertiser Murray Goulburn and agency DDB went to great lengths to ensure all scenes featured in the TVC would not encourage violent or dangerous behaviour – it was never the intention of the advertisement to give young people ideas for bullying.

PG RATING

Further, the expected PG classification from CAD, reiterates our strategy to target parents not children with this advertisement. The advertisement has not been aired during children's programs or G-rated movies.

Both the creative advertising agency DDB and the advertiser Devondale are strong supporters of self-regulation and the AANA Codes of Ethics.

** Oxford Dictionary (Oxford University Press, n.d. Web. 13 November 2013) defines "violence" as: behaviour involving physical force intended to hurt, damage, or kill someone or something.*

*** Oxford Dictionary (Oxford University Press, n.d. Web. 13 November 2013) defines "bullying" as: using superior strength or influence to intimidate (someone), typically to force them to do something.*

THE DETERMINATION

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

The Board noted the complainant's concerns that the advertisement features a boy being duct-taped to a wall which is bullying and that this could encourage children to copy this behaviour.

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

The Board considered whether the advertisement was in breach of Section 2.3 of the Code. Section 2.3 states: "Advertising or Marketing Communications shall not present or portray violence unless it is justifiable in the context of the product or service advertised".

The Board noted that the advertisement features various scenes of children playing, including scenes showing a young boy being duct taped to a wall.

The Board noted the complainant's concerns that the children in the advertisement are displaying bullying behaviour when they duct tape a boy to a wall.

The Board noted that the boy who is duct taped to the wall does not appear to be distressed or concerned about what is happening to him and considered that overall the advertisement depicts children getting up to naughty things as part of a group rather than bullying one another.

The Board considered that the depiction would be unlikely to lead to copycat bullying behaviour.

The Board considered that in the context of an advertisement which depicts children playing games the depiction of the boy being happily duct taped to a wall is not a depiction of bullying behaviour.

The Board noted that in another scene we see children painting a vehicle and considered that this behaviour is portrayed in a manner which suggests that the children know that what they are doing is wrong and that they are trying not to get caught.

Although it was not of the nature of Vodaphone 0430/06, where the Board upheld the image of a car covered with graffiti, the Board considered that the depiction of children painting a car is a depiction of vandalism.

The Board considered that the advertisement did present vandalism in the form of graffiti and that this is in breach of Section 2.3 of the Code.

Based on the above the Board determined that the advertisement did breach Section 2.3 of the Code.

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 that the advertisement depicts a range of actions being undertaken by children. In particular the Board noted the following scenes: a boy’s feet being taped to a skateboard, a boy riding a bicycle with a tea towel blindfold and then seen lying on the pavement, a boy being taped to a wall where he is off the ground, and the boy who has his feet taped to the skateboard appearing to be about to skate onto a ramp jump and over children lying on the ground.

The Board noted that the end of the advertisement refers to ‘flavoured milk from Devondale: as sensible as kids get.’ The Board recognised that the intent of the advertiser is to create a montage of images of children doing things which are not sensible and then to contrast that behaviour with a new low fat chocolate milk which is suggested as being a relatively sensible choice.

A minority of the Board considered that the message of the advertisement is for adults to acknowledge what children get up to when they are unsupervised and that the advertisement does not portray or encourage unsafe behaviour.

A majority of the Board however considered that the advertisement does present material which is contrary to prevailing community standards on safety. In particular the majority considered that the depiction of a boy wearing a blindfold and then putting on a bicycle helmet which suggests he is about to ride a bike, duct taping a child to a wall at height and having feet taped to a skateboard about to undertake a jump are all activities which are potentially unsafe. The majority of the Board considered that the advertisement’s suggestion that this is not ‘sensible’ behaviour is insufficiently clear to child viewers that the behaviour is unsafe and should not be copied.

The Board noted that the advertisement has a CAD rating of PG which means that it is

recommended for broadcast under parental guidance. The Board noted its previous decision in Medibank 77/07 which depicted a girl ironing her hair. In that case:

‘The Board considered whether the advertisement breached Section 2.6 of the Code concerned with community standards of health and safety. The Board viewed the advertisement and noted the image of a girl ironing her own hair. The Board agreed that the image depicted a practice which was unsafe and would generally be regarded by the community as against prevailing health and safety standards.

The Board took account of the intended adult audience of the magazine but agreed that children could and probably would easily access the magazine. Hence the Board held that the advertisement breached Section 2.6 of the Code.’

For the same reasons, the majority of the Board determined that the advertisement depicted scenes contrary to prevailing community standards on safety and breached Section 2.6 of the Code.

Finding that the advertisement did breach Sections 2.3 and 2.6 of the Code the Board upheld the complaint.

INDEPENDENT REVIEWER'S RECOMMENDATION

This is an application by Murray Goulburn (the advertiser) for review of the decision of the Advertising Standards Board (the Board) dated 27 November 2013 Case Number 0400/13 finding that a television advertisement was in breach of sections 2.3 and 2.6 of the Advertiser Code of Ethics (the Code).

The advertisement is described in the Case Report as follows:

In this ad we see a montage of all the mischievous things kids get up to when their parents aren't watching. We see a group of kids in masks and costumes running through long grass, a boy getting skateboards strapped to his feet by his friends, like giant roller-skates, a boy with a blindfold across his eyes putting on a bike helmet, some kids duct taping their friend to a wall as he watches on amused. We cut to some kids standing next to their dad's car. They eye it off mischievously. They start painting the car with some house paint. We then see various other scenes which include children having a sword fight with bread sticks, a boy with a hosepipe down his pants, girls dancing in long grass and a group of children preparing to use a skateboard on a ramp to jump over their friends. An image of Devondale Flavoured Milk appears on screen and a male voiceover says, “Flavoured Milk from Devondale. As sensible as kids get.”

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

- (1) 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.

(2) 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).

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

The appellant's appeal was based on ground (2) above.

The original complaint to the Board read:

The content [of the advertisement] disturbs me - especially seeing a young child being 'duct taped' to a wall! There is enough bullying happening amongst young people without giving them more ideas via this ridiculous ad.

This complaint was forwarded to the advertiser on 7 November 2013. The Board's accompanying letter said that the "complaint(s) raise issues under Section 2 of the AANA Advertiser Code of Ethics". It requested the advertiser to provide to the Board certain information about the advertisement. It invited "Your comprehensive comments in relation to the complaint (taking into account the need to address all aspects of the advertising codes)". It also said:

In addition to considering the specific issues raised by individual complainants, the Board will also review the advertisement in its entirety against Section 2 of the Advertiser Code of Ethics. ...Accordingly your response should address any issues within your advertisement that fall broadly within Section 2 of the Code.

Section 2 of the Code reads:

SECTION 2 CONSUMER COMPLAINTS

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.

2.2 Advertising or marketing communications should not employ sexual appeal in a manner which is exploitative and degrading of any individual or group of people.

2.3 Advertising or Marketing Communications shall not present or portray violence unless it

is justifiable in the context of the product or service advertised.

2.4 Advertising or Marketing Communications shall treat sex, sexuality and nudity with sensitivity to the relevant audience.

2.5 Advertising or Marketing Communications shall only use language which is appropriate in the circumstances (including appropriate for the relevant audience and medium). Strong or obscene language shall be avoided.

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

The advertiser responded to this letter by arguing a case that was directed to the effect of section 2.3 of the Code on the advertisement. It picked up the reference in the original complaint to a child being duct taped to a wall and denied that this presented or portrayed violence as referred to in section 2.3. It also referred generally to the other activities that the children were being depicted as undertaking and described these as being indicative of children having fun. It supported its arguments that this was the purport of the advertisement by reference to research undertaken on its behalf by IPSOS (an independent research company).

In its Determination, the Board accepted that the duct-taping activity should not be regarded as breaching section 2.3. However, the Board determined that the scene depicting children painting a car was a depiction of vandalism and was thereby in breach of section 2.3. In reaching this conclusion, it referred to a previous decision of the Board in Determination 0430/06 (the Vodafone case) where it had concluded that an image of a car that had been covered with graffiti breached section 2.6.

A majority of the Board also considered that the advertisement breached section 2.6 of the Code in that it depicted scenes contrary to prevailing community standards on safety. It referred to the depiction of a boy wearing a blindfold and then putting on a bicycle helmet which suggested he was about to ride a bike, duct taping a child to a wall at height and having feet taped to a skateboard about to undertake a jump were all activities that were potentially unsafe. The majority considered that the advertisement's suggestion that this was not 'sensible' behaviour was insufficiently clear to child viewers that the behaviour was unsafe and should not be copied. The majority noted that the advertisement had a CAD rating of PG meaning that it was recommended for broadcasting under parental guidance. However, it considered that children would have access to the advertisement.

The advertiser has appealed against the Determination on the basis that there was a substantial flaw in the Board's Determination. It says that in regard both to the car painting scene and the finding that the advertisement had breached section 2.6 of the Code, the Board had failed to give the advertiser the opportunity to present its view of the case.

In regard to the car painting activity it says that the Vodafone case was very different from

the present advertisement. In that case the advertisement depicted the result of a violent act of vandalism whereas in this case the actions depicted are the mischievous acts of naughty children.

In regard to the breach of section 2.6, the advertiser says that it was not given the opportunity of a full right of reply. It says that “the original complaint only referenced Section 2.3 of the Code and [it] was therefore not given the opportunity to respond to the Board’s concerns regarding Section 2.6 before a decision was reached”. It says that it could have submitted evidence that the actions set out in the advertisement did not breach section 2.6 but it was not provided with the chance to do so.

It is a fundamental principle of the rule of law that persons who may be adversely affected by a decision must be afforded procedural fairness by the decision-maker. The consideration and determination of a complaint by the Board affects the parties involved and they are entitled to procedural fairness.

Under the rules of procedural fairness, if the decision-making involves the formulation of a charge to which a person must respond, the charge must indicate all the grounds upon which the final decision will be made. A person cannot be charged with offence X and then convicted of charge Y, even though they may be related or arise from the same facts.

Aronson and Groves, *Judicial Review of Administrative Action*, 5th ed, 2013, Law Book Co, at 518 put the obligation of adequate notice in terms that:

...if a right to be heard is worth anything, it must carry with it the right to know the case that has to be met. ...[the] notice should alert the recipient to the issues which need to be addressed, and provide sufficient information to enable adequate participation. A key element of adequate notice is certainty [case citations omitted].

The significance of this in the present context is that a party whose action is under review by the Board should not be placed in the position of being uncertain of the basis on which its conduct is to be determined. The person should be fully informed of the case it has to meet which includes the provision of the relevant Code under which its conduct is to be adjudged.

Dealing with the two findings of the Board to which the appeal relates, first, was there adequate notice of the intention to apply section 2.3 to all conduct depicted in the advertisement?

The original complaint which was conveyed to the advertiser referred specifically to the duct taping conduct but the criticism of the advertisement was expressed in general terms. It referred to “bullying”. Section 2.3 of the Code was not mentioned. The letter from the Board to the advertiser also did not refer to section 2.3 but to section 2. In its response, the

advertiser directed its comments to the proscription in section 2.3. This was understandable in the light of the reference to bullying in the original complaint. The advertiser referred to the conduct portrayed in the advertisement saying that “we contend that the duct tape scene and the advertisement in general do not portray violence or bullying”. It then cited the Oxford Dictionary definition of “violence”: “behaviour involving physical force intended to hurt, damage, or kill someone or something”. (The words underlined should be noted.)

I consider that there was adequate notice to the advertiser that the Board would review all aspects of the advertisement under section 2.3 of the Code. The nature of the original complaint was sufficient to alert the advertiser to the fact that the Board was being invited to view the advertisement as a whole against the proscription on violence in the Code. The advertiser’s response to the Board also indicated that it understood this to be the basis on which the Board would consider the issue. The advertiser was told that the Board would not be limited in its consideration of the advertisement to the specific issues raised by the complaint. The advertiser did not limit its response to the duct taping incident but dealt with the content of the advertisement generally, albeit in the context only of section 2.3.

I also consider that the Board acted within the bounds of its discretion in coming to the conclusion that the car painting conduct breached section 2.3. The definition of violence embraces the infliction of damage to something. Painting a car could fall within this description. The Board demonstrated no substantial flaw in reaching that conclusion.

The finding of a breach of section 2.6 of the Code is more problematic. If the Board’s letter to the advertiser had referred to a breach of Section 2.3 only, there would have been no doubt that the Board would not have complied with its procedural fairness obligations in so far as making a finding under section 2.6 was concerned. However, the letter to the advertiser was not so limited. The advertiser was invited “to address all aspects of the advertising codes”. It was also advised that “In addition to considering the specific issues raised by individual complainants, the Board will also review the advertisement in its entirety against Section 2 of the Advertiser Code of Ethics Accordingly your response should address any issues within your advertisement that fall broadly within Section 2 of the Code.”

The advertiser was thus alerted to the fact that the Board would consider whether the advertisement was in breach of other aspects of section 2 of the Code.

The issue of the adequacy of the notice requesting a response to a complaint made to the Board was considered on an Independent Review in Case 0454/11 (the Unilever Paddlepop case). The advertiser had based its appeal on a number of grounds including a failure to identify the provisions of the Code that it was found to have breached. The Independent Reviewer found that adequate notice had been given. It is to be noted that the original complaint in that matter was much more detailed than in this case and went much further in alerting the advertiser to the claimed breaches of the relevant codes.

Section 2 covers a wide range of matters relating to discrimination, sexual exploitation, sex

and nudity and inappropriate language. It concludes in section 2.6 with a reference to prevailing community standards on health and safety.

It could well be claimed that if section 2.6 were to be invoked in regard to the advertisement, the Board needed to give notice to an advertiser that set out the conduct that it considered might fall within the description in the section. It could be thought insufficient to rely upon a general notice that the Board would consider the advertisement under that heading without some indication of the nature of the conduct depicted in the advertisement that might be thought to be in breach of community standards on health and safety. In this case, the original complaint which was communicated to the advertiser was directed to bullying, not to health and safety. There was nothing specifically in the Board's letter to the advertiser that directed its attention to the possibility of the advertisement being considered to be in breach of section 2.6 other than the general statement that the advertisement would be considered under section 2.

However, the issue has to be considered in its total context. The request to address all aspects of section 2 was clearly given to the advertiser. In addition, I note that the notification letter also refers advertisers to the ASB website for further information regarding the handling of complaints. On that website, on the Advertiser Know-How page, under "Information we need", the second sentence states "advertisers should provide a detailed response that addresses not just the issues raised by the complaint but all elements of the relevant Codes and initiatives."

This issue is also mentioned specifically on the ASB website, in the Complaint Process Steps under 4. Board Meetings, which states:

"The Board considers complaints in light of all of the Codes and accordingly may apply any part of those Codes in reaching a determination. The Board is not limited, in its considerations, to issues raised by the complaint."

I consider the matter to be evenly balanced. However, the rulings of the courts indicate that the requirements of procedural fairness/natural justice must take into account the circumstances of the particular case. It is apparent that the scheme established for the review of complaints by the Board contemplates that they will be resolved quickly. It is not expected that there will be extended correspondence passing between the parties. The Board deals with a large number of complaints each year. It is not a full time body and its members are drawn from the community at large. It is expected that the Board will consider a matter once only and will not return to the advertiser to seek further explication of its initial response to the request to comment on a complaint.

In a more legalistic environment it would probably be incumbent on the Board to bring to the attention of an advertiser, and perhaps also a complainant, its intention to deal with a complaint under a different provision of the relevant code from that which the original complaint raised. However, I think it sufficient in the environment in which the Board

operates for it to adopt a more broad brush approach. Its advice to an advertiser indicates that all relevant code requirements should be addressed in the response to the complaint, not just those that are raised directly by the complaint. Further, the general information applicable to all advertisers whose activities are subject to oversight by the Board refers to the role of the Board in dealing with complaints as being to consider them against all the relevant codes.

As is set out above from Aronson and Groves, a notice should alert the recipient to the issues which need to be addressed, and provide sufficient information to enable adequate participation. However, the adequacy of the notice has to be determined having regard to all the circumstances of the case. In the context in which the Board operates, including the rules and procedures that it has adopted and of which an advertiser must be taken to be aware, I consider that the form of notice that the Board gives to an advertiser is sufficient to apprise it of the fact that a complaint will be reviewed against a wider range of provisions of the codes than a complainant has raised.

This being so, the Board was entitled to review the complaint in this matter under section 2.6 without specifically bringing that intention to the notice of the advertiser.

I find that the advertiser has not made out a case for review of the Board's Determination and the appeal is accordingly dismissed.