



CASE REPORT

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| 1. Complaint reference number | 419/09 |
| 2. Advertiser | Advanced Medical Institute |
| 3. Product | Professional services |
| 4. Type of advertisement | Outdoor |
| 5. Nature of complaint | Portrayal of sex/sexuality/nudity – section 2.3 |
| 6. Date of determination | Wednesday, 23 September 2009 |
| 7. DETERMINATION | Dismissed |

DESCRIPTION OF THE ADVERTISEMENT

Outdoor advertisement in a billboard, with big red writing on a yellow background: **MAKING LOVE? DO IT LONGER ... Call or SMS "TRY"**.

THE COMPLAINT

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

Very bad taste. Inappropriate for children to read. Especially inappropriate on billboards beside the road or shopping centres. On TV you can turn it off but on billboards it is staring you in the face every day. Turns sex into merely a mechanical action divorced from relationships, moral, religious, human values or even health considerations.

I don't want to be driving around with my three children being exposed to billboards that promote the benefits of longer sex. For that matter, I don't believe any parent would want their children exposed to this crass advertising.

I find it offensive on many levels. It appears to be encouraging people to take medication for a normal function. A bad message re "performance enhancing" at every level. It undermines the readers self confidence to make them seek help for a problem which might not exist. It contributes to the sexualisation of children. (I was aghast at how many had decided that the advert was about viagra and how they should know that). It is probably offensive and damaging to women and interpersonal relations in general.

I am writing because i am dismayed at the continual bombardment by AMI regarding their impotence medications for men.

In particular the recent billboard that was erected (no pun intended), that is inordinately enormous for the built up intersection (corner of railway rd & Princess highway Sydenhan Sydney NSW says Making Love....Do it Longer.... call or SMS try 1800.....

I am in on way a prude, however i am tired of reading what i believe is offensive (their last billboard there said something about "Sex do it now" ...on it). They also have ads on TV at night, and on the radio.

I am sick and tired of hearing and being subjected to looking at offensive billboards in my face (it is on a corner where i turn daily) about men's erectile issues. With all due respect, this sort of information should be confined to men's magazines, GO's and or Urologists surgeries. I think it is a very poor indictment on the morals of our society that an intimate matter is displayed so openly. Children read it, see it, hear it on tv and the radio. One can't seem to escape it! Please can you do something about it once and for all. Most people i speak to find them offensive too.

THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

The billboard referred to in the advertisement is identical to the billboard referred to in matter 289/09 with the exception that the word "Doctor" has been replaced by the word "Try". It is our view that this change does not raise any code issues and note that we make exactly the same submissions as were made in 289/09. We also note that this billboard was in use at the same time as the billboard referred to in 289/09. We believe that any difference in rulings between these two matters will raise serious issues regarding the consistency of decision making by the board and note in any event that the advertisement does not breach the code for the reasons set out in our submission on 289/09 (see below).

It is our understanding that several complaints have been received in relation to AMI's Making Love billboard advertisement. We attach a copy of the advertisement as requested.

We note that several of the complaints relate to the location of the billboard. In particular, several complaints relate to the narrowness of the streets where the billboards are located as well as the illumination of the billboards. As you will appreciate, AMI is not the owner of the billboard sites and was not involved in the planning processes involved in obtaining approval to these billboard locations nor to the priming issues relating to the illumination of those billboards. In any event, such matters are not regulated by the Code and we accordingly submit that such matters should not be considered by the board in considering these issues as they are more appropriately addressed by regulators with planning law responsibilities.

Subject to our comments above, we understand that the issues raised in relation to the advertisement relate to section 2 of the code.

Based on past decisions made in relation to AMI, we understand that the core sections of the code which are relevant are:

1. section 2.1 of the code which requires that the advertisement not contain material which discriminates against or vilifies a person;

2. section 2.3 of the code requires advertisements to treat sex, nudity and sexuality with sensitivity to the relevant audience and the relevant programme time zone; and

3. section 2.6 of the code which requires that advertisements not depict material which is contrary to prevailing community standards on health and safety.

Please let us know if the board intends to consider any other section of the code so that our client is afforded a reasonable opportunity to make submissions on the matter as it is our present understanding that no other section of the code is relevant to this advertisement. Without limiting the foregoing, we note that the communications are not directed to or targeted at children and does not contain any obscene or coarse language. We accordingly submit that neither section 2.4 nor section 2.5 of the Code are relevant to this advertisement.

The advertisement does not use humour or discriminatory language of any kind. We accordingly submit that the advertisement does not infringe section 2.1 of the code in anyway.

The advertisement does not contain any statements which are factually inaccurate or which involves any dangerous activities. We accordingly submit that the advertisement does not infringe section 2.6 of the code in any way.

The only part of the advertisement which could be considered to have a sexual reference is the phrase "Making Love". Whilst the phrase "Making Love" may be considered to relate to sexual love, it may also be considered to involve an emotional connection. In any event, the phrase "Making Love" is a phrase which is commonly used by adults to discuss sexual topics with children and the phrase is not alarmist or offensive. We believe this is reflected by the relatively low number of complaints which have been received by the Board notwithstanding the widespread use of this billboard by our client.

As you are aware, AMI has previously commissioned an independent market research report from Galaxy Research on these types of issues, a copy of which has previously been provided to you. Galaxy Research is an independent Australian marketing research and strategy planning consultancy. Galaxy Research's credentials are widely recognised and it is the polling organisation of choice for The Daily Telegraph, The Sunday Telegraph, Herald Sun and The Courier Mail. Galaxy Research are also the most frequently quoted source of PR survey

information in Australia and Galaxy Research has earned an enviable reputation as the most accurate polling company in Australia, steering largely from their election polls.

The scope and methodology used by Galaxy Research in undertaking the reply was determined independently by Galaxy Research. As you will see from Galaxy Research's report:

- 84% of Australian adults do not find the word "sex" offensive in the context of advertising products which treat sexual health problems;

- 68% of Australians do not find the phrase "want longer lasting sex" offensive in the context of advertising products which treat sexual health problems. This phrase has become synonymous with AMI and respondents to the survey would have been well aware of this connection in responding to the survey;and

- 51 % of Australians believe the phrase "want longer lasting sex" should be permitted on billboard advertisements for products which treat sexual health problems. Billboards are considered to be the most invasive form of advertising as billboards are unable to be switched off and the report provides clear evidence that significantly more than 50% of Australian adults have no problems with AMI's TV or radio advertising.

The phrase "Making Love" is much less direct than the phrase "Sex" and we submit that, as a result, a significantly lower proportion of Australians are likely to find the phrase "Making Love" offensive than the phrase "Sex". The phrase is also relevant to the services provided by our client and has not been selected gratuitously.

As a result, we submit that whilst the advertisement might be considered to portray issues of sex and sexuality, we submit that it does so with the appropriate level of sensitivity having regard to the audience and medium in which it has been presented. We also note that it has considerably less sexual references than many other billboards which have been approved by the board.

For all of the reasons set out above, we submit that the advertisements do not breach section 2.3 of the 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 complainants' concerns about the size, colour and placement of the billboard and inappropriate references to sex.

The Board noted that the size and colour of a billboard are not matters that are, of their own, within the jurisdiction of the ASB. The Board also noted that the advertiser is currently able to advertise their product, provided that such advertisements are within the Code, and that some complaints are directed to the size of the advertisement for this particular product, which is not a matter for the Board.

The Board noted that this billboard is a mixture of a number of phrases that have been used by the advertiser in the past. In particular the phrase 'want longer lasting...' was used as part of a billboard that had complaints upheld against it in 2008 - although that billboard also used the word 'sex'. At that time the Board considered that the reference to 'sex' in conjunction with the size and placement of the advertisement did bring the issue of sex before children and was inappropriate. At the time the Board also determined that '... the advertiser's statement that the advertisement was dealing with a medical disorder or a male health issue. The Board determined that the words want longer lasting sex were not medical or clinical in nature and were in fact a blatant message about a sexual act.'

The Board noted that it has previously considered the use of the words 'do it longer' and had considered that the advertisement does not use any direct or overt references to sex or sexuality, using only the words "Do It" to direct adults to the relevant meaning. The Board previously considered that children would not be aware of what 'do it' was supposed to refer to.

Turning to the current advertisement, the Board noted that the placements, size, and bold colours of the current advertisement do make the advertisement very visible. However in contrast to the previous advertisement, this version of the advertisement was not so blatant - with 'making love' and 'do it longer' being more subtle references to sex.

The Board noted that the billboard format means that the entire community may be exposed to it, with its messaging reaching beyond that of the target audience. Whereas advertisements in other mediums may limit the relevant audience, the nature of billboards means that there is no practicable way for the

community to control their exposure, or their children's exposure, to their content. The Board again noted that debate within the community about the sexualisation of children has crystallised community concern about the unsolicited exposure of children to advertisements dealing with sexuality.

The Board noted that some of the level of community concern about the advertisement is concern over the product and the fact that it can be advertised. The Board stated that this issue has to be separated from the content of the advertisement as it is not an issue that is within the jurisdiction of the Board.

The Board agreed that some members of the community will argue that this billboard is not much more subtle than the previous billboard, and that it does not treat the issue of sex with sensitivity to the relevant audience. A minority of the Board also considered that the Billboard did not treat the issue of sex with sensitivity to the relevant audience.

The majority of the Board considered however that the references do not mention sex, are, at the most, ambiguous about mentions of sexuality and do not bring the issue of sex to the attention of children.

Again the Board considered that the prominent location, size and visual impact of the advertisement contributes to the impact that the advertisement has and to the extent to which it can be said to treat the issue of sex 'with sensitivity to the relevant audience.' The Board considered that this advertisement is at the upper end of acceptable but that it does not breach section 2.3 of the Code.

Finding that the advertisement did not breach the Code on other grounds, the Board dismissed the complaint.

INDEPENDENT REVIEWER'S RECOMMENDATION

Following the Board's decision, an original complainant requested a review of the Board determination. The Independent Reviewer accepted the request, considered all information submitted and made the following recommendation:

The complainant who seeks review relies upon a perceived misinterpretation of section 2.3 and 2.5 of the relevant code. He argues that "there was a substantial flaw in the Board's decision (decision clearly in error having regard to the Provisions of the Code or clearly made against the weight of the evidence)".

In my view, the Board has in their decision dealt very effectively with the issues raised in section 2.3. This section involves the use of discretionary judgement and the basis of that decision is very clear.

However, section 2.5 was not dealt with in the reasons. Section 2.5 relevantly states "Advertising or Marketing Communications shall only use language which is appropriate in the circumstances AND (my emphasis) strong or obscene language should be avoided."

The advertiser in a submission dated 2/11/09 states that this advertisement does not use strong or obscene language. He submits that section 2.5 should be confined in its interpretation to the use of strong or obscene language as he submits has been the case in respect of past complaints.

I do not consider that a plain reading of section 2.5 leads to that inevitable conclusion. The section says that language in advertisements has to be "appropriate in the circumstances". Strong or obscene language shall be avoided (not banned). The Board must in reviewing advertisements consider the appropriateness of language used in advertisements in the context of the advertisement.

The appellant submits the language in this advertisement "is inappropriate" and this is a matter the Board must consider. The individual words in the advertisement are not, of themselves, strong or obscene. However, they may on billboards be inappropriate.

As this issue was not dealt with by the Board in its reasons for the decision, I refer the matter back to the Board for it to do so.

DETERMINATION ON REVIEW

The Board accepted the recommendation of the Independent Reviewer and agreed to reconsider its earlier determination. In reconsidering the earlier determination the Board has regard to the comments

provided by the Independent Reviewer as well as the additional material provided by the complainant in his/her request for review and the advertiser's response.

The Board noted that it was required to specifically consider whether or not the advertisement complied with section 2.5 of the Code. Section 2.5 of the Code states:

"Advertising or marketing communications shall only use language which is appropriate in the circumstances and strong or obscene language shall be avoided."

The Board noted that the reference to 'language' is a reference to all of the words and phrases used in the advertisement and takes into account actual and implied meanings of the words and phrases.

The Board noted that in relation to 'language' there are two requirements in section 2.5.

The first requirement is that the language used should be appropriate in the circumstances. What is 'appropriate' is determined by considering the context of the advertisement, the product advertised, the medium used for the advertisement, the audience, and the manner in which the words are used in the advertisement.

The Board reiterated its previous view which is that the language 'making love' and 'do it longer' are euphemisms for 'sex'. There is no explicit prohibition on reference to 'sex' or 'sex-related' issues or themes in advertising. The Board noted that the product is a sex related product and considered that it is reasonable for the advertisement to make reference to sex, although the medium in which the advertisement is displayed will affect whether or not the use of language suggestive of sex is 'appropriate'. The Board noted that this language is used on billboards around Australia. The Board noted that the advertisements are very bold and attention seeking and are likely to be noticed by passers-by. The Board considered that children will be exposed to the advertisement. The Board considered that as the terms are euphemisms for 'sex' they would not be understood by younger children. The Board noted the complainant's concern that the language is also not appropriate considering that older children may understand the terms and understand that the advertisement is referring to sex. The Board considered that many euphemisms and references to sex are understood by adults and older children. The minority of the Board considered that the language in this advertisement is not appropriate in the circumstances of the Billboard and large attention grabbing format. The majority of the Board however considered that the nature of the product meant that the relatively mild euphemisms were not inappropriate. As noted in its original decision however the Board considered that this advertisement is at the upper end of what is considered acceptable. The Board considered that the advertisement did use language that was appropriate in the circumstances and that the advertisement did not breach this element of section 2.5.

The second requirement is that the advertisement should avoid language which is strong or obscene. The Board noted that this is not a prohibition on language which is strong or obscene but rather a caution against using it - implying again that the Board should consider whether the overall context of the advertisement justifies the use of strong or obscene language. The Board considered that in this instance, the particular wording on the billboard was not in and of itself indecent or offensive, although the allusion to sex be a topic that some members of the community consider strong. The Board considered that the phrase 'making love' or 'do it longer' on their own or together are language that most people in the community would consider is not strong or obscene. The Board determined that the advertisement complied with this element of section 2.5.

The Board determined that the advertisement did not breach section 2.5 of the Code and affirmed its previous decision to dismiss complaints.