



CASE REPORT

- | | |
|-------------------------------|---|
| 1. Complaint reference number | 564/09 |
| 2. Advertiser | Advanced Medical Institute (mobile cold call) |
| 3. Product | Professional Services |
| 4. Type of advertisement | |
| 5. Nature of complaint | Portrayal of sex/sexuality/nudity – section 2.3 |
| 6. Date of determination | Wednesday, 9 December 2009 |
| 7. DETERMINATION | Dismissed |

DESCRIPTION OF THE ADVERTISEMENT

This mobile cold call advertisement is for the sale of AMI services. For a free consultation with one of our AMI consultants. If you are a female and not happy with your partner's performance, press 2. Looking to enhance your performance in the bedroom and put the smile back on your partner's face please press 1 if you are male and 2 if you are female, now.

THE COMPLAINT

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

I have children in this house and I object to this sort of unsolicited call as any child could press 1 or 2 & hear about sexual dysfunctions or what ever without my ever knowing. I was offended that these people could do this. How can a tape recorder know whether I was over 15? I care for my elderly mother and if she had taken this call she would have been deeply hurt as she was brought up to be proper and these things do not get discussed. How DARE they.

Cold calling on my personal mobile phone. Inappropriate content of the ad that cannot be "policed" by an over 18 year old person. After the statement about the ad being meant for people over 18 there was no request to state your birth date to continue the call. Any child hearing that comment would stay on line to listen.

THE ADVERTISER'S RESPONSE

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

As an initial matter, we query whether calls made by or on behalf of companies to consumers constitute advertising or marketing communications for the purposes of the code. AMI's communications are not made broadly to the public and are limited to persons listed on marketing databases. We do not believe that it was intended for outbound calls made by companies to persons on a database to be regulated by the code. As a consequence, we submit that the communication does not constitute an activity which is or is intended to be an activity which is regulated by the code.

To the extent that this submission is not accepted by you, we understand that the issues raised in relation to the communication 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 would be relevant are:

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

2. section 2.3 of the code requires advertisements and/or marketing communications to treat sex,

nudity and sexuality with sensitivity to the relevant audience and the relevant programme time zone;

3. section 2.5 of the code requires advertisements and/or marketing communications to only use language which is appropriate in the circumstances and to not use strong or obscene language; and

4. section 2.6 of the code which requires that advertisements and/or marketing communications 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 and/or marketing communication. Without limiting the foregoing, we note that the communications are not directed to or targeted at children. We accordingly submit that section 2.4 of the Code is not relevant to this advertisement and/or marketing communication.

Content of communication

The recording is broken into 2 parts - the second part is only played if the person has already selected 1 twice and elected to receive a marketing call. There is no CAD number relevant to these communications and there is no advertising agency or media buyer involved as the communication is not an advertisement.

The first communication simply states:

"Hello, this is an important message from the Doctors at the Advanced Medical Institute, if you are over 18 please press 1 to continue" If 1 is not pressed the communication ceases. If 1 is pressed the communication then states:

"AMI complies with the Do Not Call Register, if you would like to stop receiving telemarketing calls, please go to www.donotcall.gov.au. If you have any enquiries, please call 13 00 60 90 90".

This gives recipients of the call a second opportunity to opt out of the call and puts the caller on notice that the call is a marketing call. If the caller elects to proceed the communication then states either:

"Men if you would like to enhance your bedroom performance press 1 for a free consultation with one of our AMI consultants, if you are female and not happy with your partner's performance press 2"; or "Looking to enhance your performance in the bedroom and put the smile back on your partners face please Press 1 if you are male and Press 2 if you are female to speak to one our consultant to find how".

If 1 or 2 is pressed the consumer is then transferred to an operator who then asks questions of the consumer to confirm that they are over 18 prior to any further communication occurring.

Application of code

The communication does not use discriminatory language of any kind. It does not seek to be critical of persons in any way and simply invites people to speak with AMI if they would like assistance. We accordingly submit that the communication does not infringe section 2.1 of the code in any way.

The communication does not contain any statements which are factually inaccurate or which involves any dangerous activities. We accordingly submit that the communication does not infringe section 2.6 of the code in any way. The communication does not contain coarse or obscene language. The communication asks consumers to confirm that they are over 18 and advises consumers that the call includes marketing material and that they can register with the Do Not Call Register if they do not want to receive these types of calls. These prequalification confirmations have been included to minimise the risk of a child continuing with a call. Without limiting the following, it is our view that the inclusion of the statement regarding marketing communication and the do not call register significantly reduces the likelihood of a person under 18 (or a person who does not wish to receive a marketing communication) from continuing with the call.

Even if a person elects to continue past this point, the communication only makes non-inflammatory, subtle references to "bedroom performance" and "partner performance". These terms have been selected deliberately so that the call does not contain any over 18 content and so that any potential complaints from calls are minimised. In particular, the script does not contain any reference to sex, erectile dysfunction or similar terms. If a person then elects to continue with the call they are then transferred to an operator who confirms that they are over 18 and wishing to have a discussion regarding AMI's treatments.

AMI submits that the language which has been used in the circumstances of the communication is appropriate and is compliant with section 2.5 of the code.

The communication does not contain nudity. AMI also submits that the communication treats sex and sexuality with sensitivity to the relevant audience and the relevant programme time zone. The terms used are extremely subtle and have been deliberately selected to minimise offence.

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, stemming largely from their election polls. The scope and methodology used by Galaxy Research in undertaking the report 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.

This particular communication uses terms which are much less direct and consumers only hear these phrases after they have confirmed that they are over 18 and want to receive marketing material. Consumers are free to cease the call at any time by hanging up and consumers are directed to a physical operator who is able to confirm they are over 18 prior to any detailed material being provided.

For each of the reasons set out above we submit that the communication does 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 the content of the advertisement and noted the complainant's concerns that the advertisement is sexist and demeaning to men and that the communication by AMI was a pervasive form of advertising.

The Board noted that advertising a sex related product is not prohibited in Australia but that such advertisements must comply with the Code of Ethics.

The Board noted that the advertisement was delivered to consumers via a recorded message to the person's mobile telephone. The Board noted that it is not its role to determine whether a particular mode of delivery of an advertising or marketing communication is appropriate. The Board considered however that the communication is clearly a marketing communication within the scope of the Code.

The Board considered the content of the advertisement and whether it is in line with 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, sex, age, sexual preference, religion, disability or political belief."

The Board discussed the mode of communication and the female voice introducing the answerer of the mobile to the AMI product. The Board considered that the advertisement is directed to people who are unhappy with their own or their partner's sexual performance but that the mere reference to these groups did not amount to discrimination or vilification. The Board considered that the advertisement did not ridicule or demean men or women and determined that the advertisement did not breach section 2.1 of the Code.

The Board considered this advertisement in relation to Section 2.3 of the Code which states:
Advertising and Marketing Communications shall treat sex, sexuality and nudity with sensitivity to the relevant audience and, where appropriate, the relevant programme time zone.

The Board noted that there are references in this advertisement to 'performance in the bedroom' and performance. While many people would understand that this is a reference to sex the Board noted that these references to sexual performance were not of themselves necessarily unable to be used in advertising, and that advertisements dealing with a medical disorder or a male health issue may require some of this content.

The Board considered that these sexual references were very mild. The Board also noted that section 2.3 of the Code does require that sexual references are treated with sensitivity to the relevant audience. The Board noted that persons under the age of 18 could press the correct buttons which would enable them to hear the entire message and eventually to be put through to the AMI call centre. The Board considered that the content of the prerecorded message was very mild - even if it was a person under the age of 18 who took the call. While some people may be offended by receiving the call, or by the subject matter of the call, the Board considered that the content of the advertisement itself did treat sex and a message about a sex related product, with sensitivity to the relevant audience. In this regard, the Board determined that this advertisement did treat sex, sexuality or nudity with sensitivity to the relevant audience and that the advertisement did not breach section 2.3 of the Code.

The Board noted that this advertisement is distributed by a call agency and that people could subscribe to the do not call register if they did not wish to receive the call in the future.

The Board also considered the advertisement under section s.2.5 of the Code in relation to language. In relation to section 2.5 the Board considered that the use of the language 'performing in the bedroom' is not of itself language that is generally considered offensive or would be considered strong or obscene and is appropriate to the advertised product and the media concerned.

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