

Case Report

1. Case Number :	0142-24
2. Advertiser :	Sportsbet
3. Product :	Gambling
4. Type of Advertisement/Media :	TV - Free to Air
5. Date of Decision:	5-Jun-2024
6. Decision:	Upheld - Modified or Discontinued
7. IR Recommendation:	Panel to Reconsider
8. Date of reviewed decision:	7-Aug-2024
9. Decision on review:	Upheld - Modified or Discontinued

ISSUES RAISED

AANA Code of Ethics\2.6 Health and Safety
AANA Wagering Code\2.8 Excess participation

DESCRIPTION OF ADVERTISEMENT

This television advertisement depicts a man watching racing on his phone while on a golf course. A voice-over states, "Nobody does it easier than Tee Time Tim Callaghan. He streams Sky Racing on the Sportsbet app. All while tackling the Southern Hemisphere's scariest slice. Yep. Whether he's driving a buggy or trying to dig one out of a bunker, this Sultan of swing doesn't miss a second."



THE COMPLAINT

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

Blake looking at phone while playing golf. Commentary with words to the effect - you'll never miss a thing whether you're taking a swing or driving a (golf) buggy... my complaint is that people are being encouraged to use a phone while driving a conveyance. I acknowledge the golf course is not a road however, the advertisement sends the wrong message about driving and road safety.

THE ADVERTISER'S ORIGINAL RESPONSE

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

Summary of response

Ad Standards have identified that the Complaint raised is potentially bearing on the following section of the AANA Code of Ethics (Code):

Section 2.6 – Health and Safety| Motor vehicle related.

Sportsbet disagrees with any suggestion that the Advertisement breaches section 2.6 (or indeed, any other section) of the Code for the reasons set out below.

What does the Code prohibit?

The AANA's Practice Note in respect of the s2.6 of the Code (Practice Note) provides that:

'Advertising shall not depict material contrary to Prevailing Community Standards on health and safety.'

The Advertisement

The Advertisement does not depict any material that could be said to be contrary to prevailing community standards on health and safety.

Rather, the Advertisement depicts a group of golfers participating in a round of golf while occasionally watching Sky Racing through the Sportsbet platform at different sections of the course.

The nature and intended purpose of the Advertisement

The purpose of the Advertisement is to promote access to Sky Racing on Sportsbet's online wagering platform.

To play on the concept of accessibility of Sky Racing on Sportsbet's platform, the voiceover states that a character could even watch it whilst "driving a buggy or trying to dig one out of a bunker". The intent of the advertisement is to be portrayed as humorous and light-hearted and does not actually depict any person driving a golf

buggy and watching Sky Racing at the same time or using a mobile phone (rather, the main character in the Advertisement Tee Time Tim, is a passenger in a golf buggy).

Section 2.6 – the Advertisement does not depict or promote unsafe driving with a motor vehicle

Sportsbet submits that the Advertisement does not breach section 2.6 of the Code. The Advertisement does not promote ‘unsafe driving’ for the following reasons:

- The context relating to the kind of vehicle being used and where it is being driven is highly relevant. Presentation of the golf buggy is used in an appropriate setting of a golf course without depiction of unsafe driving or use of mobile phone when driving. At no stage in the advertisement are characters depicted driving a motor vehicle while talking on the phone or watching Sky Racing. The scene with the buggy lasts less than three seconds, and it is not possible to see any individual using their mobile phone while driving. As referenced above, the protagonist, Tee Time Tim, who throughout the Advertisement is the only person holding his phone, can be seen sitting in the passenger seat during this clip.

- The Complaint states that the Advertisement “sends the wrong message about driving and road safety”. For clarity, Sportsbet agrees that the depiction of a person, for example using their mobile phone whilst driving a car on a public road would be contrary to prevailing community standards. However, this Advertisement does not do that or anything similar to that - the Advertisement merely references a person “driving a buggy” on a golf course (without even depicting that conduct on screen).

Conclusion

For the reasons outlined above, Sportsbet disagrees with any assertion that the Advertisement breaches section 2.6 of the Code (or any other section) and submits that the Community Panel should dismiss the Complaint.

THE DECISION

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches Section 2 of the AANA Code of Ethics (the Code) and the AANA Wagering Advertising and Marketing Communication Code (Wagering Code).

The Panel noted the complainant’s concern that the advertisement encourages using a phone while driving.

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

Section 2.6: Advertising shall not depict material contrary to Prevailing Community Standards on health and safety.

The Panel noted the Practice Note for this section of the Code includes:

“Images of unsafe driving, bike riding without helmets or not wearing a seatbelt while driving a motor vehicle are likely to be contrary to prevailing community standards relating to health and safety irrespective of whether such depictions are for the product/service being advertised or are incidental to the product.

The Panel noted the complainant’s concern that the advertisement encouraged using a phone while driving.

The Panel noted the advertiser’s response that the advertisement did not depict the man with the phone driving, as he was in the passenger seat of the vehicle.

The Panel considered that the voice-over described the character as watching racing on his phone while driving, and this creates the overall impression that the man uses his phone while driving the buggy. The Panel considered that while the man was not depicted as driving while using his mobile phone, the overall impression is that he does do so.

The Panel considered that while the depictions in the advertisement are exaggerated, they are not unrealistic. The Panel considered that while golf buggies are not driven on public roads, care should still be taken when driving them to prevent accidents and injuries. The Panel considered that it was widely recognised that using mobile phones while driving any moving vehicle is unsafe. The Panel considered that there are public awareness campaigns relating to the dangers of driving while distracted by phones, and the depiction in the advertisement is contrary to this messaging.

The Panel considered that the suggestion the character was using his phone while driving was contrary to prevailing community standards on safety when using a moving vehicle, even when not taking place on a public road.

Section 2.6 conclusion

The Panel considered that the advertisement did breach Section 2.6 of the Code.

Wagering Code

The Panel noted that the advertiser is a company licensed in a State or Territory of Australia to provide wagering products or services to customers in Australia and that the product advertised is a wagering product or service and therefore the provisions of the Wagering Code apply.

Wagering Code Section 2.8 - Advertising or Marketing Communication for a Wagering Product or Service must not portray, condone or encourage excessive participation in wagering activities.

The Panel considered whether the advertisement portrayed 'excessive' participation in wagering activities.

The Panel noted the Practice Note to Section 2.8 of the Wagering Code which provides:

“Simply depicting regular wagering, for example as a routine weekend pursuit during a sporting season, does not equate to portraying excessive participation. An advertisement or marketing communication would portray, condone or encourage excessive participation in wagering activities where it depicts:

- *participants wagering beyond their means;*
- *wagering taking priority in a participant's life;*
- *prolonged and frequent wagering to improve a participant's skill in wagering.”*

The Panel considered that the man in the advertisement was depicted watching racing through the SportsBet app, and there was no depiction of him actually wagering.

However, the Panel considered that it is unlikely that anyone would watch racing through a wagering app without having a bet on the outcome of the races. The Panel considered that using a wagering app was a wagering activity.

The Panel considered that the advertisement depicted the man engaging in the wagering activity to an excessive degree, being unable or unwilling to put the phone down to play golf with his friends.

The Panel acknowledged that the depiction was exaggerated and was intended to be humorous, however considered that the overall message of the advertisement was that you shouldn't "miss a second" of racing. The Panel considered that this was portraying, encouraging, and condoning excessive participation in wagering activities.

Wagering Code Section 2.8 Conclusion

The Panel concluded that the advertisement did breach Section 2.8 of the Wagering Code.

Conclusion

Finding that the advertisement breached Section 2.8 of the Wagering Code and Section 2.6 of the Code of Ethics the Panel upheld the complaint.

THE ADVERTISER'S RESPONSE TO ORIGINAL DECISION

Sportsbet confirms that it has discontinued use of the video advertisement that is the subject of the Panel's decision. Sportsbet has removed the advertisement from all media channels including social media pages.

INDEPENDENT REVIEW REQUEST

Sportsbet respectfully requests that the Independent Reviewer conduct a review of the Determination and to this end considers:

- there is an overwhelming (and most certainly a prima facie) case for review, such that Sportsbet's request should be accepted by the Independent Reviewer; and
- after conducting appropriate investigations, that the Independent Reviewer should recommend that the Panel review the Determination and dismiss the original complaints regarding the Advertisement.

We refer to our previous correspondence regarding the Advertisement, including most recently your letter dated 26 June 2024 enclosing the final case report of the Panel's determination dated 5 June 2024 (**Determination**).

Sportsbet takes its obligations under the AANA Code of Ethics (**Code of Ethics**) and AANA Wagering Advertising & Marketing Communication Code (**Wagering Code**) very seriously. Notwithstanding our commitment to compliance with the Code of Ethics and Wagering Code, Sportsbet is deeply concerned by the Determination insofar as it concluded that the Advertisement breached sections 2.6 of the Code of Ethics and 2.8 of the Wagering Code.

Sportsbet respectfully requests that the Independent Reviewer conduct a review of the Determination and to this end considers:

- there is an overwhelming (and most certainly a prima facie) case for review, such that Sportsbet's request should be accepted by the Independent Reviewer; and
- after conducting appropriate investigations, that the Independent Reviewer should recommend that the Panel review the Determination and dismiss the original complaints regarding the Advertisement.

The relevant prohibition and subsequent Determination

Section 2.6 of the Code of Ethics – prevailing community standards

Section 2.6 of the Code of Ethics prohibits wagering advertising that depicts material contrary to prevailing community standards on health and safety.

In the Determination, the Panel concluded that the Advertisement does so on the basis that:

- *"the voice-over described the character as watching racing on his phone while driving, and this creates the overall impression that the man uses his phone while driving the buggy. The Panel considered that while the man was not depicted while using his mobile phone, the overall impression is that he does do so";*
- *"the suggestion the character was using his phone while driving was contrary to prevailing community standards on safety when using a moving vehicle, even when not taking place on a public road."*

Sportsbet respectfully submits that this conclusion was incorrect. The intent of Section 2.6 is to stop advertisers from depicting material contrary to prevailing community standards on health and safety. Sportsbet contends that the Advertisement has not contravened this section of the Code of Ethics and the decision pays insufficient regard to wording contained in the Code of Ethics in relation to "prevailing community standards". Instead, Sportsbet contends that the Panel has overemphasized the wording in the Practice Note in relation to "using a mobile phone while driving", which is clearly intended to reflect the legal prohibition on using a mobile phone while driving a registered motor vehicle.

This advertisement is set on a golf course. The voice over that references driving a golf buggy incorporates other humorous golfing references, such as "all while tackling the Southern Hemisphere's scariest slice" and "digging one out of a bunker". The context relating to the kind of vehicle being used and where it is being driven is highly relevant. Presentation of the golf buggy is used in an appropriate setting of a golf course without depiction of unsafe driving or use of mobile phone when driving. In fact, as noted in Sportsbet's initial response to the Panel, the main character in the Advertisement, Tee Time Tim, is a passenger in a golf buggy.

Guidance can be drawn from previous Panel decisions where section 2.6 has been considered relating specifically to the depiction of unsafe driving practices. Relevantly, these all relate to unsafe driving practices while driving a registered vehicle on public roads, which depicts not only conduct that could be deemed dangerous, but relevantly, conduct that is illegal. That is, legislation and road rules are deemed to be determinative factors as to what constitutes a community standard. See for example:

- Case 0039-20 where in an advertisement for Ola Cabs, several road laws were infringed. In this decision, the Reviewer’s recommendation noted the following key application of the Code of Ethics:

*Thus, community standards on an issue such as road safety are reflected and represented by legislation and road rules. There is no evidence that this is not the case. If the Road Rules did not reflect community standards, those rules would not be tenable and would be subject to widespread resistance and non-compliance. **When attempting to ascertain what prevailing community standards are in the area of road safety, the legislation and road rules supply the threshold answer** [emphasis added].*

- Case 0151/21 where in an advertisement for Tourism NT depicts an image of a woman leaning out the passenger side window of a vehicle looking backwards whilst travelling down a public road. As above, it is the illegality of this conduct that pushes this action into the realm of impinging on community standards; and
- Case 0183-21 where in an advertisement for Door Dash, a phone is depicted sitting on the ledge of a vehicle display screen with no apparent method of attachment. The complaint concerned the fact that the advertisement promotes using a mobile phone without a phone mount while driving. The reference to phone mounts here is relevant because the law permits the limited use of mobile phones in a registered motor vehicle where they are held in a phone mount. Again, the legality of the conduct is the primary concern in determining the prevailing community standard.

Across various states in Australia, golf buggies/carts are not classified as a motor vehicle and are exempt from registration and other standard road rules. By way of a few examples, Vic Roads does not classify golf buggies/carts as motor vehicles on the basis that they are designed mainly for use outside of the road system, provided that they are being used for the purpose for which they were manufactured (i.e. driven on a golf course). In all other states or territories in Australia, a golf buggy designated to be used on the golf course does not require a motor vehicle registration and is not subject to public road laws.

It is not illegal to use a phone whilst driving a golf buggy, nor is it a prevailing community standard that it is inappropriate to do so. Community standards that are applied in one context (in this case, not using a mobile phone while driving a registered motor vehicle on a road), do not automatically equate to community standards in a totally different context. It follows that the Panel’s finding that “it was widely recognised that using mobile phones while driving any moving vehicle is unsafe” is a misinterpretation of the Code of Ethics.

Sportsbet respectfully submits that the Advertisement does not depict any conduct that is contrary to prevailing community standards. If the legislation and road rules supply the threshold answer, then there should not be any doubt that the depiction of ordinary and legal activity that occurs on a golf course is consistent with community standards.

Section 2.8 of the Wagering Code – Encouraging excessive participation in wagering activity

Section 2.8 of the Wagering Code prohibits wagering advertising that portrays, condones or encourages excessive participation in wagering activities. In its previous correspondence to the Panel, Sportsbet did not address this provision as the original complaint only concerned the previous provision (see submission above in relation to Section 2.6 of the Code of Ethics) and Sportsbet did not consider that the advertisement breached any wagering code provisions.

In the Determination, the Panel concluded that the Advertisement depicts:

- *“the man engaging in the wagering activity to an excessive degree, being unable or unwilling to put the phone down to play golf with his friends.”*
- *“the overall message of the advertisement was that you shouldn’t “miss a second” of racing”.*

Sportsbet respectfully submits that this conclusion was incorrect. The intent of Section 2.8 of the Wagering Code is to stop advertisers from depicting material that portrays excessive participation in wagering activities, including portraying participation in wagering activities that depicts participants wagering beyond their means, wagering taking priority in a participant’s life, or prolonged/frequent wagering to improve a participant’s skill in wagering.

This advertisement is set on one hole of a golf course and, *inter alia*, showed footage of a group of friends watching Sky racing whilst enjoying their golf game. The Advertisement depicts three elements of a golfing hole (a) the protagonist’s tee off, (2) the travel to the protagonist’s shot in a bunker and (3) putt on the green. The tagline of the Advertisement “Watch Live Anywhere” speaks to the availability of the streaming service as opposed to any encouragement to wager excessively. The context relating to the extent of gambling activity (and whether or not such activity has historically been considered ‘excessive’ by the Panel) is highly relevant. Presentation of the wagering activity, as a portion of the advertisement as a whole is, in our view, not excessive, not the central theme of the advertisement, and is fleeting at best as part of the overall presentation of the advertisement.

Guidance can be drawn from previous Panel decisions where section 2.8 of the Wagering Code has been considered relating specifically to the depiction of excessive gambling activities. See for example:

- Case 0098-22, where in an advertisement for Sportsbet, a group of emergency services workers were depicted huddled around a vehicle, with a complaint received that *“suggested that gambling whilst ‘on the job’ is an acceptable activity”*.
 - The Panel considered that this advertisement did not demonstrate excessive gambling activity and considered that the *“unrealistic nature of the scenario meant that most members of the community would not interpret the advertisement as a realistic depiction of people prioritising wagering over their work or an emergency situation”*.
 - Relevantly, the wagering activity advertised in Case 0098-22 far exceeded that which is contained in the Advertisement – both in duration and intensity, insofar as the central theme of the advertisement – and is the subject of the Determination. And similarly, the unrealistic nature of attempting to hit golf balls with one hand, whilst holding a phone with the other suggests the Advertisement is an unrealistic depiction of people prioritising wagering over their lives.
 - Additionally, the Panel contrast to case 0447-16 (discussed below) which was found to have breached the standard.
- Case 0282-22, where in an advertisement for Sportsbet, two men are depicted lost in a desert, and subsequently find cellular reception, only to place a wager rather than calling for help.
 - Again, the Panel considered that this advertisement did not demonstrate excessive gambling activity on the basis that *“the unrealistic nature of the scenario meant that most members of the community would not interpret the advertisement as a realistic depiction of people prioritizing wagering over an emergency situation and that overall the advertisement does not convey the message that wagering is taking priority in the people’s lives”*.
 - Whilst it is not unrealistic that individuals may choose to watch racing whilst on a golf course, the suggestion (as depicted in the Advertisement) that the individuals cannot put down their phone, even whilst taking their golf shots, is beyond the realistic realms of possibility.
 - This lends to the exaggerated and humorous nature of the Advertisement which the Panel acknowledged in its Determination (at page 5). Again, the Panel contrast to case 0447-16 which was found to have breached the standard; and
- Case 0447-16, where in an advertisement for Tabcorp, a group are depicted on a camping/fishing weekend away in bushland/river.

- During the advertisement, dramatized/exaggerated footage depicted fish jumping from the river where the group were fishing and food burning on a barbecue, having been distracted by the gambling activity depicted (e.g. watching horse races).
- The Panel, in this instance, did find that the advertisement demonstrated excessive gambling activity.
- Sportsbet supports the Panel's finding in case 0447-16 but considers that there are various distinguishing features of case 0447-16 when compared to the Advertisement the subject of the Determination.
- In Case 0447-16,
 - the advertisement depicts a group of participants over the course of a weekend prioritizing gambling activity over important life tasks (in the context of camping), such as cooking meals and sleeping. Food is seen burning, suggesting excessively long periods of wagering without sufficient attention being paid to cooking. Additionally, the fact that the scenario is presented as a weekend away, suggests that the wagering conduct was undertaken for the duration of the entire weekend.
 - In this case, the Panel rightly found that this was excessive in the circumstances.
 - By contrast, in the Advertisement the subject of the Determination, the footage depicts the availability of the streaming service by demonstrating Tee Time Tim using the Sportsbet application during three shots in a round of golf.
 - It isn't clear from the Advertisement, given the relative brevity of the Advertisement as a whole, but the conclusion that the footage depicts anything other than brief moments on the golf course wouldn't be factually founded on the basis of the Advertisement footage alone.
 - Indeed, the final scene shows the characters putting the phone down and having a laugh when their friend missed his putt, clearly enjoying the golfing experience together.

Finally, as to whether the Advertisement depicts wagering taking priority in a participant's life, we note that the characters in the advertisement are depicted watching racing during their leisure activity. This scenario is vastly different to circumstances where an individual is prioritising wagering over their work (see case 0459/17) or where a participant is hiding his wagering activity from his family, such as hiding under a table to place a bet (see case 0552/16). It is Sportsbet's view that the depiction of watching racing with friends on a golf course, and arguably only on one hole of the golf course does not meet the same threshold level as other infringing cases.

Sportsbet respectfully submits that the Advertisement does not depict any conduct that is contrary to excessive gambling activity prohibitions.

Conclusion

For these reasons outlined above, Sportsbet respectfully submits that there were substantial flaws in the Determination such that it is appropriate for the Independent Reviewer to conduct a review.

Thank you in advance to the Independent Reviewer for your due consideration of this request. Please do not hesitate to contact me if you have any further queries, or if any further information would assist the investigation.

INDEPENDENT REVIEWER'S RECOMMENDATION

I recommend that the Community Panel review its determination in this matter that the advertisement breached both Section 2.6 of the Code of Ethics and Section 2.8 of the Wagering Advertising Code.

As to the Wagering Advertising Code finding, my view is that the advertiser has satisfactorily explained why it did not address that issue in its initial submission to Ad Standards. Consequently, the submission on the request for review constitutes relevant and significant evidence that was not considered by the Panel.

As to the Code of Ethics finding, my view is that the Panel should more directly address the argument of the advertiser that its advertisement was not in breach of prevailing community attitudes on health and safety for the reason that the advertisement did not depict motor-vehicle related activity that contravened motor traffic laws.

Issues in dispute

Ad Standards received a complaint about a Sportsbet television advertisement that was a short video clip of a person streaming and watching a horse racing event on his mobile phone while on a golf course with friends. The complaint related to the voice-over commentary which could be understood as saying the golfer was continuously watching the racing event, when attempting golf shots as well as driving a golf buggy from one part of the golf course to another. The video clip showed the featured golfer as a passenger in a moving golf buggy, but it could not be seen if he was watching the streaming app at that time.

The complaint alleged the advertisement encouraged people *'to use a phone while driving a conveyance'* in contravention of road safety messaging even though a golf course is not a road.

The advertiser interpreted the complaint as alleging a breach of the Code of Ethics relating to health and safety.

The Community Panel found there was a breach of two AANA Code provisions:

Section 2.6 of the Code of Ethics: Advertising shall not depict material contrary to Prevailing Community Standards on health and safety.

Section 2.8 of the Wagering Advertising Code: Advertising or Marketing Communication for a Wagering Product or Service must not portray, condone or encourage excessive participation in wagering activities.

The advertiser has requested review of both adverse findings, submitting that the Panel's reasoning was flawed in both instances. The advertiser supported its argument by reference to previous Community Panel decisions.

It is convenient to consider the Wagering Advertising Code decision first, as the advertiser's initial submission to Ad Standards in response to the complaint did not address this Code.

The Community Panel finding of a breach of the Wagering Advertising Code

It is not disputed that the advertiser provides wagering products and services to Australian customers, nor that it was advertising a product of that kind. Consequently, the Wagering Advertising Code can apply to this advertisement. The issue in dispute is whether the advertisement breached the Code by portraying, condoning or encouraging *excessive* participation in wagering activities.

The Community Panel ruled that the advertisement did breach the standard:

The advertisement depicted the man engaging in the wagering activity to an excessive degree, being unable or unwilling to put the phone down to play golf with his friends. ... [T]he overall message of the advertisement was that you shouldn't "miss a second" of racing.

The advertiser's submission disagreed with the Panel's portrayal of the advertisement by drawing attention to several features of the advertisement:

- it was set on one hole of a golf course
- the golfers were engaged in a leisure activity
- the wagering activity was depicted in only one part of the video clip
- the central message was that the streaming service was readily accessible, not that a person is encouraged to gamble excessively.

Having regard to those features, the advertiser argued that the advertisement did not fall within the three examples of excessive wagering given in the Practice Note to

Section 2.8 of the Code – wagering occurring beyond a person’s means, taking priority in a person’s life, or being prolonged and frequent.

The advertiser argued that this ruling was at odds with three earlier Community Panel rulings regarding section 2.8 of the Wagering Advertising Code:

- Case 0098-22: the Panel found that excessive wagering was not depicted in an advertisement that showed a group of emergency workers engaged in a gambling activity, as the advertisement was a fantasy scene that did not realistically depict people prioritising wagering over emergency services work.
- Case 0282-22: the Panel found that excessive wagering was not depicted in an advertisement that showed two men lost in a desert using unexpected cellular reception to place a bet rather than call for help, as the scenario was unrealistic and did not convey that wagering had taken priority in people’s lives.
- Case 0447-16: the Panel found (in a split decision) that an advertisement did depict excessive wagering, by showing a group of men on a weekend camping trip being absorbed by a betting app and being oblivious to surrounding activity.

Analysis of the Community Panel finding on the Wagering Advertising Code

The phrase ‘*excessive participation in wagering activities*’ is a supple and open-ended phrase. There is scope for reasonable minds to differ as to whether a wagering activity is excessive, particularly where the activity is depicted briefly, as a one-off activity, and in a humorous and atypical setting. That, essentially, is how this advertisement could be characterised.

On that basis it is hard to conclude, as the advertiser has argued, that there was a substantial flaw in the Panel’s reasoning. It is likely that some people would agree with the Panel’s ruling, while others would disagree.

On the other hand, in my view the advertiser has forcefully made some points that were not considered by the Panel in its initial ruling. The explanation is that the advertiser had, understandably in my view, assumed the complaint related only to the use of a mobile phone while driving a conveyance. Although advertisers are on notice that a Community Panel is not limited to issues raised by a complaint and can consider all relevant Advertising Industry Codes, the complaint in this case was cast as a road safety issue rather than an excessive wagering issue.

I am therefore of the view that the advertiser has pointed to new additional evidence that was not earlier considered by the Panel. In particular, I think the Panel should consider the following points in the advertiser’s submission:

- that the Panel's ruling is at odds with earlier Panel rulings
- the wagering activity depicted in the advertisement was of short duration
- the setting in which the wagering activity occurred was humorous and unrealistic, and consequently did not depict wagering taking priority in a person's life (as noted in the Practice Note to the Wagering Advertising Code).

The Community Panel finding of a breach of community standards on health and safety

There were two elements to the Panel finding that the advertisement was in breach of prevailing community standards, contrary to Section 2.6 of the Code of Ethics:

- Though the video clip did not depict a person driving while using a phone, but the overall impression from the voice-over is that this was occurring
- Though golf buggies are not ordinarily driven on public roads, an accepted public awareness message is that it is unsafe to use a mobile phone while driving any moving vehicle.

The advertiser's submission principally disagreed with the second element of the Panel finding. The following points were made:

- The advertisement did not depict unsafe driving or using a mobile phone when driving.
- Golf buggies are not classified as motor vehicles in Australia, and they are exempt from registration requirements and other road rules. Consequently, it is not illegal to use a mobile phone while driving a golf buggy. Nor is there any prevailing community standard that it is inappropriate to do so.
- The Panel decision goes further than earlier Panel rulings on the same issue – notably Case 0039-20, Case 0151/21 and Case 018321. The focus of those three rulings was upon whether activity in a motor vehicle was being used contrary to law. A relevant comment by an Independent Reviewer in Case 0039-20 is that *'When attempting to ascertain what prevailing community standards are in the area of road safety, the legislation and road rules supply the threshold answer.'*

Analysis of the Community Panel finding on prevailing community standards regarding health and safety

The starting point in applying Section 2.6 of the Code of Ethics is that it aims to uphold community standards on health and safety. Motor vehicle safety is one important aspect, but the focus is upon health and safety more generally. Further, the standard adopted by Section 2.6 is compliance with *'prevailing community standards'*.

Inescapably, those standards can change over time, for example, to become more demanding or to set a higher compliance standard.

Against that background, it cannot be said there was a substantial flaw in the Community Panel finding or reasoning in this case. The Panel decision applied its view of prevailing community attitudes on use of mobile phones. That view was not inherently irrational or unreasonable.

The main remaining argument of the advertiser is that the Panel should have been guided by motor vehicle laws regarding use of mobile phones in vehicles. The advertiser claims that earlier Panel decisions differentiated between lawful and unlawful activity in a motor vehicle.

It is debatable whether that is an accurate representation of earlier Panel decisions. For example, Case 0151-21 found that the activity depicted *'is against both the law and community standards'*. Similarly, Case 0039-20 found that scenes in an advertisement *'did not clearly depict any breach of Road Rules and did not other[wise] depict behaviour that would be contrary to prevailing community standards on road safety'*.

The Practice Note for the Code of Ethics is also cast broadly – for example, *'Images of unsafe driving ... are likely to be contrary to prevailing community standards relating to health and safety'*.

On the other hand, the earlier Panel rulings do (as the advertiser claims) focus principally on whether the activity depicted was a breach of road rules. There is no clear and separate discussion in the current Panel decision of circumstances in which motor vehicle related activity that is not in breach of road rules may nevertheless be contrary to prevailing community standards on health and safety.

Bearing in mind that I have recommended the Panel review this decision as regards breach of the Wagering Advertising Code, I think it would be appropriate for the Panel to reconsider in addition whether the advertisement – which does not itself display unlawful use of a motor vehicle – nevertheless displays activity that is contrary to prevailing community standards on health and safety. I agree with the advertiser's submission that the earlier Panel decisions are a relevant matter to consider in deciding whether the advertisement breaches section 2.6 of the Code of Ethics.

THE DECISION ON REVIEW

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches Section 2 of the AANA Code of Ethics (the Code) and the AANA Wagering Advertising and Marketing Communication Code (Wagering Code).

The Panel noted the Independent Reviewer's recommendation that the Panel reconsider the case, specifically looking at:

- The fact that the behaviour shown would not be a breach of Road Rules, and as such, and whether it would still be considered to be against prevailing community standards on health and safety.
- The new evidence in the form of a response to the Wagering Code

Section 2.6: Advertising shall not depict material contrary to Prevailing Community Standards on health and safety.

The Panel noted the Independent Reviewer's comments that previous decisions by the Panel have shown that Road Rules are an indication of community standards in this area, and more consideration should be given to whether a driving behaviour can be against prevailing community standards even if it is not a breach of Road Rules.

The Panel acknowledged that Road Rules are an indication of community standards when it comes to road safety. However, the Panel noted that community standards are not the same as laws, and in some situations can be more comprehensive.

The Panel considered that although they may not be covered by Road Rules, golf buggies are a vehicle which if driven in an unsafe manner can cause accidents or injuries. As such, the Panel considered that promoting unsafe driving of these vehicles would be against prevailing community standards.

The Panel considered that the voice-over described the character as watching racing on his phone while driving, and this creates the overall impression that the man uses his phone while driving the buggy. The Panel considered that while the man was not depicted as driving while using his mobile phone, the overall impression is that he does do so.

The Panel considered that the suggestion the character was using his phone while driving was contrary to prevailing community standards on safety when using a moving vehicle, even when not taking place on a public road.

Section 2.6 conclusion

On review, the Panel considered that the advertisement did breach Section 2.6 of the Code.

Wagering Code Section 2.8 - Advertising or Marketing Communication for a Wagering Product or Service must not portray, condone or encourage excessive participation in wagering activities.

The Panel considered whether the advertisement portrayed 'excessive' participation in wagering activities.

The Panel noted the Practice Note to Section 2.8 of the Wagering Code which provides:

“Simply depicting regular wagering, for example as a routine weekend pursuit during a sporting season, does not equate to portraying excessive participation. An advertisement or marketing communication would portray, condone or encourage excessive participation in wagering activities where it depicts:

- *participants wagering beyond their means;*
- *wagering taking priority in a participant’s life;*
- *prolonged and frequent wagering to improve a participant’s skill in wagering.”*

The Panel noted the independent reviewer’s comments that the Panel should take into account the advertiser’s response to this Code section, in particular that

- the Panel’s ruling is at odds with earlier Panel rulings
- the wagering activity depicted in the advertisement was of short duration
- the setting in which the wagering activity occurred was humorous and unrealistic, and consequently did not depict wagering taking priority in a person’s life (as noted in the Practice Note to the Wagering Advertising Code).

The Panel noted the precedent cases referenced by the advertiser in the review request. The Panel noted that while they are guided by previous decisions, each case is still reviewed on its own merits according to current community standards.

The Panel noted the advertiser’s reference to case 0098-22 in which people a group of people in emergency uniforms are huddled around a vehicle speaking urgently about a decision which needs to be made, which ends up being a wagering decision. In this case:

“The Panel noted that the people are wearing uniforms that are obviously not associated with a legitimate emergency services group. The Panel also noted that there is no indication of what emergency is taking place, or given the fantasy scene depicted, whether there is an emergency at all. The Panel considered that the unrealistic nature of the scenario meant that most members of the community would not interpret the advertisement as a realistic depiction of people prioritizing wagering over their work or an emergency situation and that overall the advertisement does not convey the message that wagering is taking priority in the people’s lives.”

The Panel also noted the advertiser’s reference to case 0282-22 which depicted a group of people lost in a desert, and when they find reception, place a wager instead of calling for help. In this case:

“The Panel noted that the advertisement depicts a highly exaggerated scenario of men lost in the desert. The Panel considered that the ad is quite fast paced with a lot of speaking, and the lack of visuals make the overall scenario less impactful. The Panel noted that the second man does not appear concerned that the first is making a wager rather than calling for help, only surprise at the wager the man has placed (as opposed to him making it at all). The Panel considered that the unrealistic nature of the scenario meant that most members of the community would not interpret the advertisement as a realistic depiction of people prioritizing wagering over an emergency situation and that overall the advertisement does not convey the message that wagering is taking priority in the people’s lives.”

Unlike cases 0098-22 and 0282-22, the Panel considered the golfing scenario depicted in the current advertisement was a realistic scenario in a real setting, and as such differed to the previous case. The Panel considered that depicting a person so preoccupied with wagering they cannot put their phone down to play golf is not unrealistic and is a depiction of excessive wagering.

The Panel noted the advertiser’s reference to case 0047-16 which depicted a group of friends ignoring other activities in favour of wagering over the course of a weekend, which was found by the Panel to depict excess wagering. The Panel noted the advertiser’s submission that in contrast, the current advertisement only depicts wagering over a short period of time.

The Panel noted that in the current advertisement the voice-over saying that the character “doesn’t miss a second” of watching racing when added to the visuals of him not looking away from his phone at critical moments to his golf game, created an overall impression of excessive participation.

The Panel considered that while his behaviour is exaggerated, it is not unrealistic, and the overall suggestion is that the man is engaging in the wagering activity to an excessive degree. The Panel considered that while he briefly puts down his phone at the end of the advertisement, this is only after his reaction to watching the racing has caused his friend to miss his shot.

The Panel noted that the advertisement only showed part of a game of golf, however considered that the man’s participation in a wagering activity during this short period of time was excessive and prioritised a wagering activity over participation in a social activity with his friends.

The Panel acknowledged that the depiction was exaggerated and was intended to be humorous, however considered that the overall message of the advertisement was that you shouldn’t “miss a second” of racing. The Panel considered that this was portraying, encouraging, and condoning excessive participation in wagering activities.

Wagering Code Section 2.8 Conclusion

On review, the Panel concluded that the advertisement did breach Section 2.8 of the Wagering Code.

Conclusion

Finding that the advertisement breached Section 2.8 of the Wagering Code and Section 2.6 of the Code of Ethics the Panel confirmed the original determination and upheld the complaint.