

ANISIMOFF LEGAL ADVERTISING STANDARDS BOARD BULLETIN – AUGUST 2013

By Matt Hansen, Solicitor

Below are some of the recent interesting Australian Advertising Standards Board (ASB) decisions that were released in June and July 2013:

1. **0195/13, 0203/13, 0204/13, 0205/13, 0230/13 (modified) and 0246/13 (modified) – Nissan – FCAI Code – Upheld:** A TVC for Nissan Pulsar depicted a young couple racing to hospital, with the female passenger in labour and encouraging her partner to hurry. Once they arrive at the hospital, it is revealed the pregnancy was fake and the couple were simply timing themselves on how quickly they could reach the hospital. The TVC received several complaints in 4 media: TV, PayTV, Cinema and Internet. The complaints claimed that the TVC encouraged irresponsible, reckless and dangerous driving. The Board upheld the complaints in all 4 media as follows: "The Board noted that in the driving scenes the audio includes the female passenger encouraging the driver to drive faster ('Go, go go!') and we can hear sounds of high engine revs which is suggestive of the vehicle moving quickly. The Board also noted that when the car comes to a halt outside the hospital we can hear the tyres squealing. The Board noted that we do not see what speed the car is driving at however the Board considered that these audio effects in conjunction with the visual images of the vehicle driving in a manner which suggests they are in a hurry are suggestive of driving which is not appropriate for the urban environment depicted and is unsafe and reckless ... the suggestion of a driver timing a route and trying to beat his own time is not appropriate and is a depiction of driving which is unsafe ... it is not appropriate to depict a woman faking pregnancy as an excuse to drive in a manner which is unsafe."

NOTES:

- Nissan challenged one of the decisions to an independent review (0195/13 – TV). Nissan submitted that the Board's reasoning was flawed as the TVC did not depict unsafe driving, as all road rules had actually been followed during filming, and at no time did the car actually speed or break any other rules. This has for some time been considered a very valid position by the ASB (even if not a perfect defence in all cases). However, the independent reviewer did not accept this in this case and upheld the Board's decision: "When considering whether an advertisement has been in breach of an advertising code it is the impact on the viewers of the advertisement that has to be considered, not the actual circumstances in which the advertisement was made. The fact that, in making the advertisement, the car was driven in compliance with all road rules is irrelevant to the issue whether there was a breach of the FCAI Code. The test is the impression that the advertisement would have on viewers." This is an interesting position but time will tell whether this decision is a sign of things to come from the ASB or is a one-off, based purely on the facts here.
- Nissan also took steps to modify the TVC, by removing the "go go go" line, lowering the sound of the revving engine, removing the screeching tyres sound effect, and inserting a disclaimer stating "Filmed under controlled conditions."

Driving shown adheres to all road safety regulations." However, the modified version still attracted complaints in 2 media, TV and Internet, and the Board upheld these complaints again as follows: "...despite the amendments made by the advertiser there is still an audio indicator of speed, and this accompanied by the visual footage of the car being driven down narrow streets is still suggestive of a vehicle driving in a manner which is not appropriate for the urban environment depicted and is unsafe ... The Board noted the advertiser's inclusion of a disclaimer on the screen ... disclaimers cannot be used to justify the inclusion of material which otherwise does not comply with the provisions of the FCAI Code ... the overall theme of racing against the clock to beat a previous time taken for the journey to the hospital is a depiction of unsafe driving that is inconsistent with the FCAI Code."

2. **0184/13 – Just Group – Section 2.5 – Language – Upheld:** A series of in-store window posters for Jay Jays retail outlets featured several headlines that used the acronyms "OMG" and "OMFG". Complaints were raised that these acronyms were offensive as most people know what the "F" stands for in "OMFG". The Board agreed, and upheld the complaints on the basis that the public has an understanding of what the acronyms stand for: "...the Board noted that the position of the posters in store windows meant that the advertisement would easily be viewed by a large audience that would likely include children. The Board considered that there was no relevance to the use of this term to signify a sale when there are a multitude of other words that could be used for the same effect ... The Board noted that OMFG is a common acronym for the target audience and probably used frequently. The Board noted that the term is used in a manner that is consistent with its colloquial usage and not threatening or hostile. However, because the term is so well known, the Board considered it is not subtle and that it is a clear reference to the term "Oh my Fucking God". The Board considered that most people would find these words when associated together as offensive and strong and certainly not appropriate in a prominent public location."

NOTES:

- Conversely, the Board had no issue with the acronym "OMG" itself.
 - The key issue was the wide audience that the in-store window posters had. The Board dismissed the same headlines in case no. 0187/13, as in that case, the complaints related to the headlines as they appeared on Jay Jay's Facebook page, and the Board considered that use of the acronym in this medium was more appropriate, as it was aimed more succinctly at the target audience that would not be offended by the term.
3. **0220/13 – Nando's – Section 2.4 – Sex – Dismissed:** A TVC for Nandos featured a family eating dinner in the restaurant, with a young boy asking his father "where he came from". The mother makes an excuse to leave, leaving it to the father to explain procreation, which he does so in an awkward and humorous way using the food in front of them. The boy, confused, says he thought they "came from England", leaving the father mortified. Complaints were raised that the subject matter of the conversation between the father and his son was not appropriate for dinner. The Board dismissed the complaints as follows: "...the boy's reaction to his father's explanation is one of bemusement and considered that young children who saw the advertisement would be equally unlikely to fully understand the meaning behind the father's explanation. The Board noted that at the end of the advertisement the boy clarifies his question as being about their country of origin rather than about the biological process involved in being born. The Board noted that the overall tone of the

advertisement is humorous and considered that the reference to sex is mild and not inappropriate in the context of an advertisement which has been rated PG by CAD".

4. **0164/13 – Unilever Australasia – Sections 2.3 and 2.6 – Violence and Health and Safety – Dismissed:** A TVC for Lynx deodorant depicted a beach with a woman who had swum out too far in the ocean calling for help, whilst being approach by a shark. A lifeguard rescues her, punching the shark into submission and carrying her to shore. Once ashore, she is grateful, but then notices an astronaut and flocks to him, completely ignoring the lifeguard. The tagline "Nothing beats an astronaut, ever" is displayed as well as details about a competition to win a trip to space. Complaints were raised about the violence directed at the shark and the unsafe portrayal of the woman having swum out too far. The Board dismissed these complaints as follows: "The Board noted that the product being advertised is a male deodorant and that the likely target market for the product is young men. The Board noted that the depiction of the lifeguard in a heroic role is sensationalised for the advertisement and is fanciful and entertaining. The Board noted that there is genuine community concern regarding the safety of swimmers at the beach and that shark attacks are very real and that the incidence of shark attacks is increasing. The Board considered however that the approach and ease that the man shows in deterring the shark is clearly unrealistic and is designed to make him look impressive and heroic. The Board agreed that the attack on the shark was not a portrayal of violence or cruelty to animals and was justifiable in the context of the product advertised and did not breach section 2.3 of the Code ... The Board noted that there is very serious concern regarding entering deep water and the large number of drowning victims in Australia. The Board noted that the advertisement does not show the woman entering the water and that the apparent cause for alarm is in relation to the presence of the shark and not related to her inability to return to the shore. The Board noted that the man enters the water in at a speed and in a manner that would be indicative of how a lifeguard would react to a call for help. The Board noted that the man is portrayed as a lifeguard and that most members of the community would assume that he is capable of handling the situation in the appropriate manner. The Board noted that the advertisement is not encouraging or condoning irresponsible behaviour at the beach and that the material depicted is not contrary to prevailing community standards on health and safety and did not breach section 2.6 of the Code."

If you have any queries or would like to discuss the above please contact any of the ASB experts detailed below.

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