

Advertiser	Safcol Australia Pty Limited
Complainant	Unilever Australasia
Type of Advertisement	Television
Nature of Complaint	Breach of Clauses 1.2, 1.3 and 1.5 of Code of Ethics.
Panel of Members	Odette Gourley (Chairperson), Minter Ellison Louise Castle, Allens Arthur Robinson Ian Robertson, Holding Redlich
Determination	Complaint Dismissed

Background

The complainant, Unilever Australasia lodged a complaint ("**the Complaint**") with the Advertising Standards Bureau ("**ASB**") regarding a television commercial ("**the Advertisement**"). The Complaint was referred to the Advertising Claims Board ("**the Claims Board**") and a panel of legal practitioners ("**the Panel**") was convened to deal with the complaint in accordance with the Board's procedural guidelines.

The Complainant and the Advertiser were given an opportunity to serve submissions on each other in accordance with the procedural guidelines. These submissions are detailed below.

Complaint

The Complainant submitted that the Advertisement contained a number of misrepresentations and that the Advertisement was in breach of the Australian Association of National Advertisers Code of Ethics, specifically sections 1.2, 1.3 and 1.5. Unilever specifically claimed that the Advertisement implied that the product was 'sourced in South Australia' and secondly, gave the impression that 'Northern Bluefin tuna is sold in the Safcol Fish Markets in South Australia'.

The Complainant submitted that it would be reasonable for consumers after viewing the commercial to believe that the product is South Australian sourced. This is due to the fact that reference is made to Safcol's ownership of the South Australian Fish Markets, and also that Northern Bluefin tuna was shown on display at the Adelaide Fish Markets.

The Complainant also submitted that the display of Northern Bluefin tuna was misleading as this fish is not sold at the Adelaide fish markets. The Complainant maintained that the display of this fish served to strengthen in the mind of the consumer that the Advertiser's product is caught off the shores of South Australia. As the Complainant's product is caught off the shores of South Australia, it was submitted that this advertisement was likely to cause damage by placing the Advertiser's product in the same position as that of the Complainant's product.

Advertiser's Response to Complaint

The Advertiser responded to the first submission by saying that the reference to the fish market was merely introductory and served only to establish in consumers' minds Safcol's long heritage and good reputation. Safcol explained that it did own the Adelaide Fish Markets and that the name of the company stood for 'South Australian Fishermans' Co-op Limited' and justified this backdrop for the commercial. Safcol explained that the

commercial contained absolutely no direct reference to the source of the tuna. It maintained that there was no misrepresentation in this regard.

Safcol submitted that the display of the Bluefin tuna was immaterial, as the commercial was wholeheartedly dedicated to promoting Safcol canned tuna to the public and made no reference to the sale of fresh tuna.

Safcol denied the allegations made by Unilever.

Complainant's Response

The Complainant rejected the Advertiser's submissions and maintained that the backdrop of the Adelaide Fish Market represented 25% of the commercial's length and was not merely an introduction. It submitted that a generic fish market could have been used as a backdrop. It claimed the effect of the backdrop was to draw a direct link between Safcol and South Australia thereby suggesting a link between the product and South Australia. The Complainant also maintained that the display of Bluefin tuna strengthened in the consumer's mind that the product was sourced or canned in South Australia.

Advertiser's Response

The Advertiser maintained that the commercial did not make any representations as to the origin of the goods or where they could be purchased. It claimed that the choice of location served only to confirm its heritage as an Australian Company and its reputation for quality fresh and packaged seafood. The Advertiser maintained that it was unnecessary to choose a generic fish market in which to advertise when the Advertiser already owned and managed the Adelaide Fish Market.

The Advertiser also disagreed that the effect of the commercial was to draw a direct link between Adelaide and Safcol. The Advertiser explained that this was not a message portrayed by the commercial and that the Advertisement focused solely on the freshness and quality of the product.

It was also submitted that there was no obligation to disclose the source of the tuna. The main representation was that goods were caught fresh and canned shortly thereafter without being frozen.

Determination of the Panel

In accordance with the Board's Guidelines, the Complaint and submission of the Advertiser and the Complainant were referred to the Panel for determination.

The Panel made the following determination on 19 April, 2002.

Determination of the advertising claims board in the matter of

Unilever Australia Limited –v- Safcol Australia Pty Limited

Introduction

1. This is a determination of the Advertising Claims Board in relation to an advertising dispute between Unilever Australia Limited (“**the Complainant**”) and Safcol Australia Pty Limited (“**the Advertiser**”) concerning a television commercial for the Advertiser's Safcol-brand canned tuna products. The claims board is constituted of a panel comprising Odette Gourley (Chair), Louise Castle and Ian

Robertson. Each of us is a lawyer who has certified that he or she has experience in and expertise in advertising and/or trade practices law.

2. Readers are referred to the discussion in earlier board decisions in *Jalna Dairy Foods Pty Limited v Pauls Limited* (matter reference JAL/PAU/99, dated 22 September 1999) and *International Dynamics Pty Limited v Sony Australia Limited* (matter reference INT/SON/00, dated 10 November 2000) in relation to the role and approach of the board. We agree with the observations of the panels in those decisions.
3. In the case of the present complaint, we take the view that the major issue is whether the misrepresentations complained of are in fact conveyed by the telephone commercial. In doing so we follow the approach outlined by the Federal Court of Australia in *George Western Foods Limited v Goodman Fielder Limited & Anor* [2000] FCA 1632 (a decision in part regarding television advertisements) of ‘consider[ing] the impression created... by the advertisement viewed in its entirety’.

The Complaint

4. We now turn to the advertisement that is the subject of the complaint. The complaint relates to a 30 second television commercial for the Advertiser’s Safcol-brand canned tuna products (“the TVC”). The market for canned tuna products is mainly retail end consumers.
5. The TVC consists of a short 7 second introduction and a 23 second segment forming the ‘body’ of the TVC. The TVC opens in a fish market and quickly introduces the viewer to Geoff Jansz, food expert. Jansz identifies the fish market as “the Adelaide Fish Markets, owned and operated by [the Advertiser] for over 50 years”. Jansz mentions the freshness and quality of the fish market produce. Images of a variety of fish on ice are displayed.
6. Jansz says “lets talk tuna” and the focus of the TVC narrows to Jansz and tuna fish below. Jansz discusses the content of the Advertiser’s canned tuna products while the screen features visuals of cooked tuna and Jansz holding a can of tuna. Jansz comments on the freshness of the tuna in the Advertiser’s product, informing the viewer that the tuna in the Advertiser’s product is “fresh” at the point of canning, while the tuna in competitors’ products are often snap-frozen. Visuals of fresh Northern Bluefin tuna on ice are displayed. The final visual is a close up of the Advertiser’s canned food products.
7. The Complainant says that the TVC may breach clauses 1.2, 1.3 and 1.5 of the Code and contains the following misleading implications:
 - (a) that the product is sourced in or is a product of South Australia; and
 - (b) that Northern Bluefin tuna is sold in the Advertiser’s fish markets in South Australia.
8. In relation to the first complaint the Complainant asserts that it would be reasonable for consumers watching the TVC “to believe the fish [the Advertiser’s] product is South Australian sourced”. The complainant claims that the viewers are likely to derive this implication from the references in the TVC to fish on display at the South Australian fish markets and to the Advertiser owning that fish market. The Complainant also claims that the lack of any clear reference to the actual source of the product promotes this implication further.
9. In relation to the second complaint the Complainant asserts that, in featuring three Northern Bluefin tuna on ice at the fish market, the TVC implies that Northern Bluefin tuna are sold in the Advertiser’s South Australia fish markets. It is common ground between the parties that the South Australian fish markets do not sell this variety of tuna.
10. In reply to the first complaint, the Advertiser states that the TVC makes no claim regarding the source of the product, nor is it required to do so. The Advertiser states that there is no direct reference to the

source of the tuna and that given its operation of the market, any reference to the fish market merely, sets an appropriate scene and establishes its long heritage in the seafood industry.

11. In reply to the second complaint, the Advertiser states that this issue is irrelevant as the TVC “promotes canned tuna and makes no reference to the sale of fresh tuna fish”.

The Determination

12. The Claims Board has given careful consideration to each complaint and carefully reviewed the material received from the Complainant and the Advertiser. In this case, the Claims Board has been able to reach a determination without seeking further assistance from the Complainant or the Advertiser. Ultimately, each area of complaint has depended on the Claims Board reaching a view as to the messages conveyed to the consumer by the TVC as a whole. That whole comprises a “story” which the TVC relates to consumers.

First Complaint – Product sourced in South Australia

13. As to the first area of complaint the Claims Board does not believe that the TVC conveys the misleading implication complained of. Looking at the TVC as a whole we think an ordinary viewer would be unlikely to believe that the Advertiser’s product is sourced in South Australia. This implication simply does not fall within the “story” of the advertisement.
14. We find the TVC focuses on canned tuna products and conveys the following messages in relation to the Advertiser’s products:
 - (a) the Advertiser has owned and operated the South Australian fish market for over 50 years;
 - (b) the tuna in the Advertiser’s canned tuna products is only Northern Bluefin tuna; and
 - (c) the tuna in the Advertiser’s canned tuna products is ‘fresh’ at the point of canning and has never been frozen unlike its competitors.
15. The Claims Board does not think that an ordinary viewer would believe the tuna in the Advertiser’s product are sourced in South Australia. The TVC makes no statement about where the tuna is sourced. The source of the tuna is clearly not part of the “story” of the advertisement. As such, implications about the source of the tuna are irrelevant and are unlikely to be discerned by the viewer.
16. Further, even if consumers saw a connection between the content of canned products and the fish sold at the market depicted in the opening scene of the TVC, the Claims Board believes that ordinary viewers are generally aware that fish in seafood markets are often sourced from a variety of regions and territories. It is unlikely that the general public would presume that all fish sold in a South Australian fish market are sourced in South Australia simply because they are sold in that market. Similarly, it is unlikely that ordinary viewers of the TVC would believe that the tuna is South Australia sourced.
17. Finally the Claims Board does not accept the Complainant’s submission in using the South Australian fish market as a backdrop and displaying the particular tuna in that setting suggest the Advertiser’s product is sourced in South Australia. The Advertiser must set a relevant scene. The Claims Board can see little reason for the Advertiser to use a generic fish market when it operates one of its own. The Advertiser’s fish market provides an appropriate backdrop to the TVC while highlighting the Advertiser’s considerable experience in the seafood industry.

Second Complaint – Sale of Northern Bluefin tuna at the Advertiser’s fish market

18. In relation to the second area of complaint, the Claims Board determines that the TVC does not imply that Northern Bluefin tuna is sold in the Advertiser’s fish market.

19. The Claims Board does not accept the Complainant's argument that, in featuring three Northern Bluefin tuna on ice at the Advertiser's South Australian fish market, the TVC implies that the fish markets sells that variety of tuna. While we accept that such an implication could be constructed, the question for the Claims Board is whether, viewed as a whole, the TVC is likely to convey this implication to the ordinary viewer. The Claims Board does not consider that the implication is conveyed in this case.
20. Whether or not the public can purchase Northern Bluefin tuna at the Advertiser's fish market is outside the field of reference or "story" of the TVC. As discussed above, the TVC does not promote fresh fish, but focuses on canned tuna products. For example, after Geoff Jansz says "lets talk tuna":
 - (a) the focus narrows only to Geoff Jansz and his discussion of tuna;
 - (b) the monologue concentrates solely on canned tuna: "Nearly all canned tuna in your supermarket contains Yellow-fin or your common skipjack, whereas Safcol can only Northern Bluefin, the most prized and delicious tasting tuna"; and
 - (c) the TVC features visuals of cooked tuna and Geoff Jansz holding a can of tuna; and
 - (d) the final visual is a close up of the Advertiser's canned tuna products.
21. The implication complained of relates to fresh fish and, as such, is outside the TVC's field of reference and unlikely to be conveyed to the viewer. Accordingly the Claims Board is not satisfied that an ordinary viewer would understand that the Advertiser's South Australian fish market sells Northern Bluefin tuna.

Conclusion

22. Given that the TVC does not contain the implications complained of, the Claims Board concludes that the TVC is not misleading or deceptive or likely to mislead or deceive.
23. In accordance with the procedural guidelines, the Claims Board will proceed to notify the Advertiser and the Complainant of the determination.

Date: April 2002