

## Advertising Claims Board Panel Determination

<b>Advertiser</b>	Subway Franchisee Advertising Fund of Australia Pty Ltd (ABN 21 071 190 317) (" <b>Advertiser</b> ")
<b>Complainant</b>	McDonald's Australia Limited (ABN 43 008 496 928) (" <b>Complainant</b> ")
<b>Type of Advertisement</b>	Television and Radio
<b>Nature of Complaint</b>	Section 1.5 of AANA Code of Ethics (" <b>Code</b> ")
<b>Panel Members</b>	- Mary Still (Chair), Clayton Utz - Lyndon Sayer-Jones, Lyndon Sayer-Jones & Associates - Andrew Sutherland, Eakin McCaffery Cox
<b>Determination</b>	Complaint dismissed

### Background

The Complainant lodged a complaint ("**the Complaint**") on 21 December 2004 with the Advertising Claims Board ("**ACB**") concerning the Advertiser's television and radio advertisements titled "*Fries and Burgers*" ("**the Advertisements**"). The Advertisements aimed to promote Subway products by implying that the products sold by Subway's competitors, other quick service restaurants, do not contain healthy ingredients. The parties' submissions suggest that the Advertisements aired in late 2004 although no precise date range is given.

The ACB has referred the matter to this panel of legal practitioners ("**the Panel**") which was convened to deal with the Complaint, in accordance with the ACB's Procedural Guidelines for participants ("**Guidelines**").

The Complaint was brought pursuant to section 1.5 of the Code which states:

*"1.5 Advertisements shall not make claims about the Australian origin or content of products advertised in a manner which is misleading."*

It is alleged that the Advertisements breach section 1.5 of the Code because they misrepresent that the Complainant does not offer for sale:

- (a) capsicum and/or cucumber in its Deli Choices Rolls; and
- (b) lettuce and/or tomato in either the Salads Plus or Deli Choices ranges.

The Complaint is premised on the argument that the *Fries and Burgers* outlet featured in the Advertisement represents McDonald's or, alternatively, all quick service restaurants in competition with Subway stores which includes McDonald's.

The Advertiser denies that the Advertisements are misleading in this way, arguing that they feature a fictitious Subway competitor titled "*Fries and Burgers*" represented to sell only fries and burgers and that there is no representation made regarding McDonald's or its products.

## Determination of the Panel

In accordance with the Guidelines, the submissions of each of the Complainant and the Advertiser were referred to the Panel for determination. The Panel made the following determination on 16 March 2005:

### DETERMINATION OF THE ADVERTISING CLAIMS BOARD PANEL

Advertiser            Subway Franchisee Advertising Fund of Australia Pty Ltd (ABN 21 071 190 317)

Complainant        McDonald's Australia Limited (ABN 43 008 496 928)

#### 1.            **Determination**

This is the determination of the Panel in a dispute between the Complainant and the Advertiser in relation to a radio advertisement and a television advertisement titled "*Fries and Burgers*".

#### 2.            **Claims Board**

The Advertising Claims Board ("**ACB**") has appointed the Panel to determine this dispute. The Panel comprises the following legal practitioners: Mary Still (Chair), Lyndon SayerJones and Andrew Sutherland, each of whom has confirmed that he or she is a lawyer with experience and expertise in advertising and/or trade practices law.

#### 3.            **The Advertisements**

The Advertisements feature a Subway employee prank-calling a competitor quick service restaurant named "*Fries & Burgers*", with two fellow Subway employees listening on. The television advertisement shows the interior of a Subway store and at certain times there is a split screen showing the interior of the *Fries and Burgers* outlet as well. The *Fries and Burgers* employees wear uniforms coloured red and yellow and there is a red and yellow coloured picture on the wall of the *Fries and Burgers* outlet that the camera sweeps past as the *Fries and Burgers* employee picks up the telephone. The subject telephone conversation establishes that *Fries and Burgers* do not:

- bake their own bread on their premises fresh every day;
- offer a product with "capsicum and cucumber";
- offer either olives or jalapenos in their products; or
- offer their customers "a Sub any way [they] want".

Baker Advertising & Marketing Pty Ltd ("**BAMPL**") represent the Advertiser and its submission included the script for the television advertisement. The contentious dialogue is as follows:

*"[Subway] Sandwich Artist:*  
**Can we have capsicum and cucumber?**

*Male at 'Fries & Burgers':*  
**No."**

When the line "*Can we have capsicum and cucumber?*" is stated, pieces of falling cucumber, tomato and lettuce are displayed on the television screen. It is not clear to us whether or not pieces of capsicum are included in this shot.

#### 4.            **The Complaint**

The Complainant claims that the Advertisements breach section 1.5 of the AANA Advertiser Code of Ethics ("**the Code**") which provides:

"1.5        *Advertisements shall not make claims about the Australian origin or content of products advertised in a manner which is misleading.*"

We understand the Complainant to believe this claim to fall within section 1.5 because that section refers to "*claims about ... the content of products ... which is misleading*".

The telephone conversation featured in the Advertisements refers to *Fries and Burgers* not offering a product with "capsicum and cucumber". The Complainant views this statement to represent McDonald's Deli Choices Rolls as not containing capsicum and/or cucumber. Further, it is the Complainant's view that the television screen display of tomato, lettuce and cucumber when the words "capsicum and cucumber" are stated, implies that *Fries and Burgers'* products (representing McDonald's Deli Choices Rolls and Salads Plus range) do not contain lettuce and/or tomato either.

The Complainant therefore alleges that the Advertisements breach section 1.5 of the Code because they misrepresent that the Complainant does not offer for sale:

- (a)        capsicum and/or cucumber in its Deli Choices Rolls; and
- (b)        lettuce and/or tomato in either the Salads Plus or Deli Choices ranges,

The Complaint is premised on the argument that the *Fries and Burgers* outlet featured in the Advertisement represents McDonald's or, alternatively, all quick service restaurants in competition with Subway stores which includes McDonald's.

## 5.        **Submissions**

In accordance with the Guidelines, both the Complainant and the Advertiser served the following submissions:

- letter of complaint sent to the ACB by the Complainant dated 21 December 2004;
- letter from the Advertiser together with a reply letter on behalf of the Advertiser from BAMPL dated 26 January 2005, sent to ACB's solicitors;
- letter from the Complainant to the ACB dated 11 February 2005; and
- an email from BAMPL to ACB's solicitors dated 23 February 2005.

These submissions are discussed in further detail below.

### 5.1        **The Complainant's Submissions**

The Complainant submits that:

- (a)        the *Fries and Burgers* outlet represents a McDonald's restaurant because of the use of red and yellow being McDonald's corporate colours for the *Fries and Burgers* outlet and on the uniforms worn by the *Fries and Burgers* staff (and that this association with McDonald's is reinforced by McDonald's having over 700 red and yellow road signs placed around Australia);
- (b)        as a result, the representation that *Fries and Burgers* does not offer a product with capsicum and/or cucumber is a representation that McDonald's does not offer Deli Choices Rolls containing those products;
- (c)        for the same reason, the screen display of tomato, lettuce and cucumber when the words "capsicum and cucumber" are stated, implies that McDonald's Deli Choices Rolls and Salads Plus range do not contain lettuce and/or tomato; and

- (d) these representations are false and misleading because McDonald's does offer products within its Deli Choices and Salads Plus ranges which include capsicum and/or cucumber, or lettuce and/or tomato.

## 5.2 The Advertiser's Submissions

The Advertiser submits that:

- (a) *Fries and Burgers* is a fictitious quick service restaurant that is represented in the Advertisements as an outlet selling only fries and burgers, not sandwiches or salads;
- (b) *Fries and Burgers* is intended to represent any Subway competitor "*ranging from the corner take away fish and chip/fries and burgers shop to the large chain competitors*";
- (c) the Advertisements do not represent that *Fries and Burgers* is a McDonalds outlet because:
  - (i) there is no specific reference to McDonald's, or its Deli Choices or Salads Plus products;
  - (ii) the interior of all McDonald's stores has neutral multi-tones with very little red and almost no yellow;
  - (iii) many quick service restaurant brands have either or both yellow and red in their branding e.g. Hungry Jack's and Pizza Haven;
  - (iv) McDonald's staff wear blue and/or black uniforms whereas *Fries and Burgers* staff are shown in the Advertisements as wearing red and yellow uniforms. (BAMPL's submission included photos of the interior of a McDonald's restaurant including staff wearing blue uniforms.); and
- (d) even if it is accepted that *Fries and Burgers* represents a McDonald's outlet, the Advertiser denies that the Advertisements could be seen to represent that McDonald's Deli Choices and Salads Plus products do not contain capsicum, cucumber, lettuce or tomato, because the wording used in the Advertisements is "*capsicum and cucumber*" (emphasis added). The Advertiser asserts that no product in the McDonald's Deli Choices and Salads Plus range contain **both** capsicum and cucumber, a contention which is not denied by the Complainant in its reply dated 11 February 2005.

## 6. Factors to be considered in making this Determination

The Panel views this dispute to require consideration of the following issues:

- (a) whether this claim is properly brought under section 1.5 of the Code;
- (b) whether the *Fries and Burgers* outlet featured in the Advertisements represents a McDonalds outlet or an outlet of a class that includes McDonald's
- (c) if (b) is satisfied, whether the representation made about *Fries and Burgers'* products that they do not contain "capsicum and/or cucumber" would mislead consumers to believe this to be a representation about McDonald's Deli Choices Rolls; and
- (d) if (c) is satisfied, whether the representation alleged by the Complainant that its Deli Choices and Salads Plus ranges do not contain lettuce and/or tomato, is conveyed by the Advertisements.

Alternatively, we have been asked by the Advertiser to consider whether the Complaint is "trivial" and should not be considered by the Panel in accordance with clause 1.6 of the Guidelines. The Panel considers that this dispute is not trivial. Furthermore, it should be noted that the Advertiser's claim of triviality was made in its final reply submission dated 23 February 2005 and the Complainant did not have an opportunity to respond.

In determining whether the representations discussed in above paragraphs (b), (c) and (d) above are conveyed by the Advertisements, the Panel has followed the approach taken by Moore J of the Federal Court of Australia in *George Weston Foods Limited v Goodman Fielder Limited & Anor* [2000] FCA 1632, which requires us to consider "*the impression created ... by the advertisement viewed in its entirety*".<sup>1</sup>

There is a dispute as to the relevance of the Advertiser's knowledge of the Complainant's marketing plan of its Salads Plus and Deli Choices products. The Complainant alleges that the Advertiser purposefully aired the Advertisements during the launch of the Complainant's Deli Choices Rolls in South Australia and before its launch of that product range in other Australian States. The Advertiser denies this allegation stating that the Advertisements were written in early 2004 and commenced production well before the Advertiser had any knowledge of the Complainant's launch of its Deli Choices Rolls. The Panel does not consider that the intent or knowledge of the Advertiser as to the timing of the Complainant's product launch to be relevant to a consideration of whether the Advertisements are misleading.

## 7. Determination

### 7.1 *The scope of section 1.5 of the Code*

In the opinion of the Panel, section 1.5 of the Code is aimed at protecting against misleading claims relating to:

- "*the Australian origin or content of products*": section 1.5 relates to claims about the "Australian origin" or the "Australian content" of products and not the content of products generally; and
- "*products advertised*": in this case we view these products to be Subway's products and not those of the fictitious restaurant *Fries and Burgers*.

We think that both parties to the dispute have misunderstood the scope of section 1.5 and that the Complaint would have been more appropriately brought under sections 1.2 or 1.3.

Sections 1.2 and 1.3 of the Code provide:

"1.2 *Advertisements shall not be misleading or deceptive or be likely to mislead or deceive.*

1.3 *Advertisements shall not contain a misrepresentation, which is likely to cause damage to the business or goodwill of a competitor."*

Regardless of whether the Complainant claims breach of sections 1.2, 1.3 or 1.5 of the Code, it still has to show that the representations discussed in sub-paragraphs 6(b) and (c) above are misleading.

### 7.2 *Does "Fries and Burgers" represent a McDonald's outlet?*

In our opinion, the impression created by the Advertisements when viewed in their entirety, is that *Fries and Burgers* is a fictitious quick service restaurant in competition with Subway. We do not consider that the Advertisements represent or imply that *Fries and Burgers* is a McDonald's restaurant. The colours of

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<sup>1</sup> *George Weston Foods Limited v Goodman Fielder Limited & Anor* [2000] FCA 1632 at [39], per Moore J.

red and yellow are not exclusive to McDonald's and are not used prominently on McDonald's restaurant staff uniforms.

7.3 *Does "Fries and Burgers" represent a class of outlets that includes McDonald's?*

The Advertiser submits that *Fries and Burgers* is intended to represent any quick service restaurant in competition with Subway, "*ranging from the corner take away fish and chip/fries and burgers shop to the large chain competitors*". Assuming that this is what is represented, then the misleading representation required to be made out in order for the Advertisements to breach sections 1.5 or 1.2 or 1.3 of the Code, is that no quick service restaurant in competition with Subway sells products containing capsicum and/or cucumber, lettuce or tomato.

The Panel considers that this misrepresentation has not been made out. The Advertisements focus on a fictional outlet about which the representation is made. The Panel considers that what is intended to be advertised is the healthy quality of Subway's products by creating the impression that Subway's products are fresher than most quick service restaurant products. We do not accept that consumers would be misled as to consider the Advertisements as representing that the product ranges of all Subway's competitors, being quick service restaurants, in the Australian market do not contain capsicum and/or cucumber, or lettuce and/or tomato.

8. **Conclusion**

From the evidence before the Panel, we conclude that the Advertisements do not convey the misrepresentations alleged. It is the determination of the Panel that the Complaint be dismissed.

In accordance with the Guidelines, the ACB will notify the Complainant and the Advertiser of this determination.

Dated: 16 March 2005