

## ATTACHMENT A



10 June 2010

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Ms Laura Hartley  
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Dear Ms Hartley

### **Advertising Claims Board decision: Fonterra v Goodman Fielder, plant seed spread advertisement**

I refer to your letter of 2 June 2010, forwarding the decision of the Advertising Claims Board in the above matter.

I am writing to ask that the ACB reconsider its decision on the basis that the ACB incorrectly concluded it had jurisdiction to consider the matter and on the basis that the decision contains numerous errors of law. These errors lie at the heart of the determination: the advertisements were only found to contravene the Code of Ethics on the basis that the claims breached clauses in Standard 1.1A.2 of the Food Standards Code - it follows that if the Board does not have jurisdiction to determine whether a contravention has occurred or is incorrect in its interpretation of these clauses that no breach of the Code of Ethics is established.

#### **[1] Jurisdictional and governance matters**

[1.1] In making this decision, the ACB has set itself up as the arbiter of regulatory compliance. This is totally inappropriate and a very dangerous precedent for the ACB to be setting. There are government agencies responsible for the enforcement of the Food Standards Code and the ACB has no mandate to attempt to enforce its own interpretation as to questions of law. Where the only established contravention of the Code of Ethics are those that relate to regulatory compliance, the appropriate course of action would be to advise the complainant to take the matter directly to the government agencies responsible for enforcement of the law, rather than the ACB setting itself up without legal mandate as the arbiter of Australia's food laws. Once a final determination on the question of law has been made by the appropriate authority, then the ACB could consider whether a breach of the Code of Ethics on this ground has occurred, not before.

[1.2] Indeed, it is likely that the complainant in this case has already brought the matter to the attention of food regulators, having first raised their concerns with Goodman Fielder nearly 10 months ago. Surely if an applicant had real concerns that a competitor's conduct was illegal, it would and should refer the matter to the appropriate authorities, not to the ACB. Aside from being more familiar with the operation of food standards than the ACB could ever be, such agencies are aware of the wider policy and enforcement issues governing food laws, and are better placed than the ACB to deal with the issues raised. It is noteworthy that Goodman Fielder has NOT been contacted by the agencies with actual responsibility for the enforcement of the Food Standards Code notwithstanding the fact that the advertisements in question have been on air for in excess of 10 months.

[1.3] The ACB has, in paragraph 2.1 of its letter, concluded that it has jurisdiction to determine the matter as it is not required to deal with "*highly technical issues*". This could not be further from the truth, In order to determine whether the advertisements contravene the Food Standards Code requires a technical and qualified interpretation of that Code, an understanding of the differences in medical, nutritional and marketing statements by appropriately qualified legal and technical persons. The ACB has taken an approach of assessing the advertisements by reference to consumer perceptions and ancillary matters which is quite contrary to the proper approach to the interpretation of food regulation.

[1.4] The ACB is, like anyone, entitled to its opinion as to what a law means. However, it has no role in the interpretation of laws beyond that of any citizen. Goodman Fielder would have no issue with a decision expressed in terms of the Board's belief that certain claims in the advertisements may contravene the Food Standards Code and that the complainant has been advised to take the matter to the appropriate authorities, provided that opinion (and it can only be opinion) is qualified by a decision that the Board has no authority to make a final determination as to compliance and, for that reason, cannot uphold the complaint.

[1.5] For the sake of completeness, I have also set out below the reasons why the ACB has made clear errors of law in its interpretation of the Food Standards Code. This does not however detract from our view that the ACB has no standing to be reaching such determinative positions of law in the first place.

## **[2] Food Standards Code Std 1.1A.2 clause 3(b)**

[2.1] This clause is properly set out at paragraph 4.2 of the decision. However, the clause only prevents inclusion of the word "health", or similar, on labels or advertisements when used "*as part of or in conjunction with the name of the food*". "*Conjunction*" has no defined meaning in the Food Standards Code - its ordinary meaning according to the Macquarie Dictionary is "*the act of conjoining, combination*". The clause thus only prohibits words like "*healthy*" when used:-

- (a) as part of the name of the food (eg "Health Spread") or
- (b) conjoined or combined with the name of the food (eg "LOGICOL is a healthy plant spread ...").

[2.2] A useful guide for conjunction or combination is whether, grammatically, "*healthy*" as an adjective qualifies the name of the food as a noun, as in the above example".

[2.3] The key point therefore is that all other uses of the word 'healthy' in advertising or labelling are NOT prohibited. There are countless examples in the market (see Attachment

1 for just a small sample) of the use of the word "health" or "healthy" used in labelling or advertisements for food products that do not offend the prohibition. These examples include use by companies such as McDonalds, George Weston Foods, McCains, Nestle, Kellogg's, Sanitarium, Unilever, Parmalat, Bulla and Steggles amongst others. Is the ACB really contending that all these advertisers and manufacturers have misinterpreted the Food Code? Is the ACB contending by this decision that the various State and Commonwealth food authorities are so negligent and complacent in their duties that they would allow these numerous alleged contraventions to continue unopposed? Clearly it is the ACB which has applied an incorrect interpretation, not these other companies and not the regulators.

[2.4] At paragraphs 4.3 and 4.4 of the decision, the ACB claims that the phrase "*for a healthier option, switch to a margarine spread*" constitutes a breach of clause 3(b) of the Food Code. This is clearly not a case where "healthier" is used as part of, or in conjunction with, the name of food, nor does "healthier" as an adjective apply to the noun "spread". It applies to the noun "choice". This is no different from the McCains brand "Healthy Choice" which has been on the market for many many years - without any action by those responsible for the enforcement of the Food Standards Code. The Board's conclusion at paragraph 4.4 is therefore at odds with the ordinary meaning of clause 3(b) and the enforcement activities of government health agencies in all Australian jurisdictions.

[2.5] This error of interpretation is further compounded at paragraphs 4.5 and 4.6 of the decision. The Board clearly states that the word "healthier" in the Animated TVC is used in relation to a comparison, and not to the name of a food. Clause 3(b) does not prohibit such use. The decision evidences the Board's apparent belief that all uses of the word "health(ier)" when used in an advertisement for a food product are prohibited. This is clearly erroneous and not the way in which the relevant health agencies have interpreted or enforced this provision.

[2.6] In short, the decision fails to give proper effect to the terms of Standard 1.1A.2 clause 3(b), and in this error of law wrongly concludes that the advertisements contravene the Food Standards Code. It is also a clear example of why, as discussed above, it is inappropriate and dangerous for the ACB to have purported to have exercised jurisdiction over a matter which is outside the scope of its authority and expertise.

### **[3] Food Standards Code Std 1.1A.2 clause 3(c)**

[3.1] Clause 4.7 of the decision sets out this clause.

[3.2] The key point about this clause is that it prohibits "medical advice from any person". It does not prohibit "advice from any medical person". The ACB, however, appears to have erred in taking the latter view. At paragraph 4.8, for example, the mere fact that Dr Wilson provides advice is said to indicate that his advice must be medical advice. In fact, doctors, dentists, nutritionists and other health professionals often give advice of a lifestyle or nutrition nature, as distinct from advice of a medical nature. Examples of this include advice to consume less salt, reduce sugar in your diet, eat more fruit and vegetables, floss daily etc. Is the ACB suggesting that just because such advice is provided by a medical practitioner that it must be medical advice? Clearly this is not the case, when the exactly equivalent advice provided by a non medical practitioner would not be medical advice. Therefore to interpret the clause 3(c) accurately, one must look at the nature of the advice being provided, not the person providing it.

[3.3] "Medical" is not defined in the Food Standards Code. Its ordinary meaning according to the Macquarie Dictionary is "1. *having to do with the science or practice of medicine* 2. *curative, medicinal, therapeutic*". In other words, the advice must relate to the cure, treatment, alleviation or prevention of an illness, disease or injury.

[3.4] Even aside from the ACB's error of law in mistaking the messenger for the content, its interpretation of the claim in paragraph 4.9 discloses information that, at its strongest, can only be described as nutritional advice (it is no more than is contained in the National Health and Medical Research Council's Healthy Eating Guidelines). There is no evidence-based finding that the claim makes any suggestion that the food can cure, treat, alleviate or prevent any illness, disease or injury. This is expressly recognised in the decision at paragraph 4.10 which refers to the advertisements representing that ". . . *switching from butter to margarine will protect your children's cardiovascular health*". I have emphasised the word 'health' as this indicates that the ACB recognises that no representation is made about any illness, disease or injury. The ACB's reasoning therefore directly contradicts its own earlier conclusion that the advertisements amounted to medical advice.

[3.5] The advertisements, as is recognised in paragraph 4.9, do no more than recommend the substitution of certain food products for others on a nutritional basis. As noted above, recommendations of this nature are made regularly by food manufacturers, particularly in relation to particular consumer health concerns or trends, such as reduction in salt ('lite' products), reduction in sugar (sweeteners), increase in fibre (cereal products) and increase in real fruit or vegetables in our diets. Again, I question whether the ACB really intended to suggest that all such advertising amounted to medical advice merely because it recommended a change in a person's diet on nutritional and health grounds.

[3.6] Again, this basic error of law is compounded in paragraphs 4.10 and 4.11 of the decision. The decision refers to the use of the word "experts" and the NHF tick logo as its reasons for finding that the advertisement contravenes clause 3(c). The tick logo is used on the labelling of numerous products and clearly does not amount to medical advice, either directly or indirectly. What it is doing is recommending to consumers that they select the product with the heart foundation endorsement on health grounds. It is therefore totally inappropriate to reference the existence of the tick logo in Goodman Fielder's advertisements as part of the reasons for concluding that the advertisements provided advice of a medical nature. This is a clear error in mistaking the source of the advice for the nature of the advice: there is no analysis as to whether the claim is in fact of a medical nature.

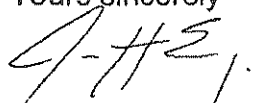
#### [4] Final Point

[4.1] As a final point, I would counsel the ACB against any further dissemination of the case report, especially to media proprietors, pending the resolution of these concerns. Goodman Fielder may have legal remedies against the ACB should it do so without Goodman Fielder's consent, and unlike the food regulatory agencies, the ACB enjoys no statutory protection for its decisions.

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Please contact me if you require any further information.

Yours sincerely



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**Cc Jonathon West**  
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Goodman Fielder Limited