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| Advertiser | Goodman Fielder Consumer Foods Pty Ltd |
| Complainant | Fonterra Brands (Australia) Pty Ltd |
| Type of Advertisement | Television |
| Nature of Complaint | Breach of clause 3 of Food Standard Code 1.1A.2 (Transitional Standard - Health Claims) and therefore the relevant Food Act of each State; and as a consequence Breach of section 1.1 of the Australian Association of National Advertisers Code of Ethics |
| Panel of Members | Paul Holm (Chairperson), Anzarut & Holm Lawyers Chris Kintis, Crisp Legal Andrew Sutherland, Eakin McCaffery Cox |
| Determination | COMPLAINT UPHELD, ADVERTISING REFERRED TO GOVERNMENT AGENCY |

Background

A complaint was lodged on 18 March 2010 (**the Complaint**) with the Advertising Claims Board (**the Claims Board**) by Fonterra Brands (Australia) Pty Ltd (**Fonterra**) against Goodman Fielder Consumer Foods Pty Ltd (**Goodman**) regarding two television advertisements (described as the '**Animated TVC**' and the '**Cardiologist TVC**'). The Claims Board convened a panel of legal practitioners (**the Panel**) to deal with the complaint in accordance with the Claims Board's procedural guidelines.

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

Complaint

The Complainant submitted that the Animated TVC and the 'Cardiologist TVC (together the **Advertisements**):

- (a) contravened clause 3 of Food Standard Code (FSC) 1.1A.2 (Transitional Standard - Health Claims) and therefore the relevant Food Act of each State; and
- (b) as a consequence contravened section 1.1 of the Australian Association of National Advertisers Code of Ethics (Code of Ethics).

The Complainant specifically complained that the Animated TVC is clearly an advertisement for food and that the Cardiologist TVC is not an educational advertisement or public service message but an advertisement for plant seed spreads and Meadow Lea.

The Complainant alleged that the Advertisements (whether taken separately or as one advertisement) include a word of similar import to “health” as part of or in conjunction with the name of a food, namely Meadow Lea plant seed spreads or, at least, plant seed spreads).

The Complainant also submitted that the advertisements contain advice of a medical nature because they convey the overall impression that:

- (c) saturated fats can adversely affect children’s health;
- (d) butter contains significant amounts of saturated fats and can thus adversely affect children’s health; and
- (e) a reduction in saturated fats, through the substitution of plant seed spreads for butter, will improve (or at least preserve) children’s health.

The Complainant finally alleged that the overall impression of the Advertisements, taken together as one advertisement, is that the consumption of butter is linked to a health condition, namely heart disease and/or other physiological conditions relating to blocked arteries.

Advertiser’s Response to Complaint

The substance of the Advertiser’s response was that:

- (a) the Cardiologist TVC was not a covered ‘advertising or marketing communication’ for the purposes of the Code of Ethics;
- (b) the Cardiologist TVC was also not an advertisement for ‘food’ for the purposes of FSC 1.1A.2;
- (c) while the Animated TVC was conceded to be an advertising or marketing communication for food for the purposes of the Code of Ethics and FSC 1.1A.2, it did not contravene clause 3 of FSC 1.1A.2.

The Advertiser also challenged whether the subject matter of the complaint fell within the jurisdiction of the Claims Board, as defined in its procedural guidelines.

Complainant’s response

The Complainant rejected the Advertiser’s arguments. The Complainant submitted that the Complaint did fall within the jurisdiction of the Claims Board. The Complainant submitted that the Complaint did not involve highly technical matters and did not require the Board to consider or formulate a view as to the technical basis or accuracy of the health claims being made. Further, the Complainant contended that the specific industry code that applied was not an issue because the Claims Board has a discretion under its procedural guidelines as to whether to hear a complaint where it is covered by a specific industry code.

Advertiser’s response

The Advertiser submitted that it would not provide a response to the Complainant’s response.

Determination of the Panel

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

The Panel made the following determination on 1 June 2010.

Determination of the Advertising Claims Board in the matter of

Fonterra Brands (Australia) Pty Ltd -v- Goodman Fielder Consumer Foods Pty Ltd

1. Introduction

1.1. A complaint was lodged on 18 March 2010 with the Advertising Claims Board (**Board**) by Fonterra Brands (Australia) Pty Ltd (**Fonterra**) against Goodman Fielder Consumer Foods Pty Ltd (**Goodman**). The complaint relates to two television advertisements placed by Goodman, which are described as the 'Animated TVC' and the 'Cardiologist TVC'. The substance of the complaint is that these advertisements:

- a) contravene clause 3 of Food Standard Code (FSC) 1.1A.2 (Transitional Standard - Health Claims) and therefore the relevant Food Act of each State; and
- b) as a consequence contravene section 1.1 of the Australian Association of National Advertisers Code of Ethics (Code of Ethics).

1.2. The relevant Food Acts of each State prohibit selling or advertising a food in a manner contrary to the FSC. For example section 21 of the *Food Act 2003 (NSW)* states:

'21 Compliance with Food Standards Code

- (1) A person must comply with any requirement imposed on the person by a provision of the Food Standards Code in relation to the conduct of a food business or to food intended for sale or food for sale.
- (2) A person must not sell any food that does not comply with a requirement of the Food Standards Code that relates to the food.
- (3) A person must not sell or advertise for sale any food that is packaged or labelled in a manner that contravenes a provision of the Food Standards Code.
- (4) A person must not sell or advertise for sale any food in a manner that contravenes a provision of the Food Standards Code.
- 5) This section does not require compliance with a provision of the Food Standards Code in relation to the conduct of a food business that is primary food production unless a food safety scheme provides that the provision applies to the food business or to a class of food businesses that includes the food business concerned.'

1.3. The Code of Ethics relevantly states;

'Advertising or Marketing Communications shall comply with Commonwealth law and the law of the relevant State or Territory.'

- 1.4. The substance of Goodman's response is that:
- a) the Cardiologist TVC is not a covered 'advertising or marketing communication' for the purposes of the Code of Ethics;
 - b) the Cardiologist TVC is also not an advertisement for 'food' for the purposes of FSC 1.1A.2;
 - c) while the Animated TVC is conceded to be advertising or marketing communication for food for the purposes of the Code of Ethics and FSC 1.1A.2, it does not contravene clause 3 of FSC 1.1A.2.
- 1.5. Goodman has also challenged whether the subject matter of this complaint falls within the jurisdiction of the Advertising Claims Board, as defined in its Procedural Guidelines.

2. Jurisdiction

- 2.1. Goodman contends that Fonterra's complaint falls within the Board's general exclusion of complaints that would require it to resolve 'highly technical issues' or are 'covered by a specific industry code'. On the first objection, we agree with Fonterra's response, namely, that whilst the science surrounding the competing merits of margarine spread and butter might well be highly technical, this complaint does not require us to assess the truth or accuracy of the claims made in the advertisement. As a result, we have disregarded as irrelevant to our determination, the material which Goodman submitted in substantiation of its claims that margarine spread is a healthier option than butter.
- 2.2. While the Procedural Guidelines state that the Board does not usually consider complaints involving issues covered by a 'specific industry code', this is discretionary and will depend on the particular circumstances. In the current instance we consider that the FSC is not an 'industry code' in the sense in which the Procedural Guidelines uses the term. Rather the FSC is quasi-legislative, being promulgated by a bi-national government agency (Food Standards Australia New Zealand) and given legal force via State, Territory, Commonwealth and New Zealand food legislation. We are also of the view that coverage by another AANA code, such as the 'Food & Beverages Advertising & Marketing Code', is not intended and does not exclude the coverage of the AANA's overarching Code of Ethics. We therefore consider that this complaint can properly be reviewed by the Board.

3. The Cardiologist TVC

- 3.1. Goodman contends that the Cardiologist TVC is not 'advertising or marketing communication' and is not 'an advertisement for food' because it 'is educational in content and purpose, providing important public health information'.

The Code of Ethics states:

‘Advertising or Marketing Communication means:

- a) matter which is published or broadcast using any Medium in all of Australia or in a substantial section of Australia for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct; or
 - b) any activity which is undertaken by or on behalf of an advertiser or marketer for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct, but does not include Excluded Advertising or Marketing Communications.’
- 3.2. The fact of a communication being ‘educational in content and purpose’, and/or ‘providing important public health information’, does not necessarily mean that the broadcast is not an advertisement. Rather, a communication is an advertisement if, relevantly, it ‘draws the attention of the public or a segment of it to a product ... in a manner calculated to promote or oppose directly or indirectly the product ...’
- 3.3. The Cardiologist TVC has Dr. Andrew Wilson highlighting the saturated fat content of butter and asking the viewer to ‘think how much of that is going through your child’s arteries’. He subsequently makes the statement ‘for a healthier option, switch to a margarine spread...’. The Cardiologist TVC therefore involves both an opposition of a product and a promotion of a product being, respectively, butter and margarine spread. In our view the Cardiologist TVC is therefore an ‘advertising and marketing communication’ for the purposes of the Code of Ethics.
- 3.4. As the FSC does not define the meaning of ‘food’ it should be ‘given the meaning it has in ordinary language’ (NSW Food Authority v Nutricia [2008] NSWSC 1382 per Simpson J at 21). In our view ‘margarine spread made with plant seeds is a ‘food’ as it would be understood in ordinary language. We therefore consider that the advice ‘switch to a margarine spread’ constitutes an advertisement for food for the purposes of the FSC.
- 3.5. Fonterra propounded a different reason for treating the Cardiologist TVC as an advertisement for food. In essence, Fonterra argued that the two advertisements were linked in a ‘top and tail’ technique, whereby both advertisements were shown in the

same advertising break, separated by only a short space of time, the Cardiologist TVC preceding the Animated TVC. That linkage, according to Fonterra, has the consequence that the two advertisements should in fact be treated as a single advertisement.

- 3.6. As we are of the view that each of the Cardiologist TVC and Animated TVC are separately subject to the requirements of the Code of Ethics and FSC 1.1A2, it is unnecessary for us to make a decision on this point. However we consider that the argument has merit in that the two TVC's were apparently both funded by Goodman and are clearly designed to be viewed together, with each reinforcing the message of the other. Against this is the fact that one TVC is a generic promotion of margarine spread, while the other expressly promotes Meadow Lea brand margarine and therefore they could be seen as sufficiently distinct to be separate advertisements.

4. Health Claims

Use of the word 'Health' in conjunction with the name of a food

- 4.1. 'Health claims' are not expressly defined in FSC 1.1.A2 and therefore we address this generic complaint by reference to the express prohibitions in each of clause 3(b), (c) and (d) of that Standard.
- 4.2. Fonterra's first complaint is of a breach of cl 3(b) of the FSC1.1A.2. Clause 3(b) states:
- (b) 'Any label on or attached to a package containing or an advertisement for a food shall not include the word 'health' or any word or words of similar import as a part of or in conjunction with the name of the food.'
- 4.3. The Cardiologist TVC includes the statement:
- 'For a healthier option, switch to a margarine spread.'
- 4.4. We consider that the use of the word 'healthier' in relation to a food (margarine spread) constitutes a breach of clause 3(b).
- 4.5. The Animated TVC includes the voice over:
- 'You see, there's a spread made with plant seeds that contains 65% less saturated fat than butter. So it's no wonder the experts agree it's the healthier alternative. Who makes this plant seeds spread? Meadow Lea'

4.6. The Animated TVC therefore uses the word ‘health’, or a variant of that word ‘healthier’, in relation to a comparison between Meadow Lea spread and butter. We therefore find that this also constitutes a breach of cl. 3(b) FSC.

Advice of a medical nature

4.7. Clause 3(c) of FSC1.1A2 states:

‘(c) Save where otherwise expressly prescribed by this Code, any label on or attached to a package containing or any advertisement for food shall not contain any word, statement, claim, express or implied, or design that directly or by implication could be interpreted as advice of a medical nature from any person.’

4.8. The Cardiologist TVC is presented by a cardiologist who is introduced by name as Dr Andrew Wilson and is seen wearing a stethoscope. We consider that this indicates that any advice he gives is likely to be ‘medical advice’, as it is from a qualified medical practitioner.

4.9. Dr Wilson’s message in the Cardiologist TVC can be summarised as:

- Saturated fat is bad for your child’s health;
- Butter contains 50% saturated animal fat;
- Margarine has 65% less saturated fat than butter;
- Switch to margarine ‘for a healthier option’.

4.10. The Cardiologist TVC concludes with the Heart Foundation logo. We consider that the Cardiologist TVC breaches clause 3(c), as it provides advice of a medical nature, being that the reduction in saturated fats achieved through switching from butter to margarine will protect your children's cardiovascular health.

4.11. The Animated TVC contains the statement; ‘so it’s no wonder experts agree it’s the healthier alternative’ during which the text on screen fades back to grass and is replaced with the heart foundation logo. In our view this reference to ‘experts’ implies that the advice is from medical experts and, in conjunction with the display of the heart foundation logo, makes the advice to switch from butter to Meadow Lea spread ‘advice of a medical nature’ and in breach of clause 3(c).

5. Reference to any disease or physiological condition

5.1. Clause 3(d) FSC 1.1.A.2 states:

- ‘(d) Save where otherwise expressly prescribed by this Code, the label on or attached to a package containing or any advertisement for food shall not contain the name of or a reference to any disease or physiological condition.’
- 5.2. Fonterra complains that, taken together, the advertisements give the impression of a linkage between the consumption of saturated fat on the one hand, and on the other, the existence of heart disease or other physiological conditions relating to blocked arteries.
- 5.3. The use of the Heart Foundation's tick constitutes the only direct reference to the heart, but the advertisements do contain multiple references to saturated fats flowing through arteries. However, we find that neither of these features of the advertisements, whether considered separately or cumulatively, makes a sufficiently specific reference to a disease or physiological condition so as to constitute a breach of cl 3(d).

6. Decision

6.1. We find as follows:

- the Cardiologist TVC contravenes clauses 3(b) and 3(c) FSC 1.1A.2 and therefore is in breach of section 1.1 of the Code of Ethics;
- the Animated TVC contravenes clauses 3(b) and 3(c) FSC 1.1A.2 and therefore is in breach of section 1.1 of the Code of Ethics.
- Neither the Cardiologist TVC nor Animated TVC is in breach of cl. 3(d) FSC 1.1A.2, or of the Code of Ethics.

7. Recommended Action

- 7.1. Fonterra seeks three orders consequent upon findings of breaches, namely, that these and similar advertisements should immediately stop, that they should be withdrawn from broadcasters and the like, and that Goodman should publish and broadcast corrective advertisements in a form to be approved by Fonterra.
- 7.2. The Board considers that the infringing advertisements should immediately cease and be withdrawn. We do not agree with Fonterra's proposal that Goodman be asked not to use "similar" advertisements – that is too vague and unnecessary in any event, because these reasons will give Goodman a clear indication of where their advertisements must draw the line in future.

- 7.3. We are against ordering corrective advertising in the current circumstances. In our view corrective advertising is appropriate where advertising is misleading or deceptive, but generally is not appropriate where the advertising contravenes more technical requirements of the FSC such as those contained in clause 3.

1 June 2010

Advertiser's Statement

On 2 June 2010, the Advertiser was provided with a copy of the Panel's determination. In accordance with the procedural guidelines and on the basis of the Panel's determination, the Advertiser was requested to provide an Advertiser's Statement indicating whether it would modify or discontinue the Advertisement.

On 10 June 2010, the Advertiser provided its response. The Advertiser's response is at **Attachment A**.