

**ADVERTISING CLAIMS BOARD
PANEL DETERMINATION**

Advertiser	Natvia Pty Ltd
Complainant	Sugar Australia Pty Limited
Type of Advertisement	Television 'Brand Power' advertisement Print advertisement
Nature of Complaint	Breach of Sections 1.2, 1.3 and 1.5 of the Australian Association of National Advertisers Code of Ethics
Product	Natvia sweetener
Panel Members	Jennifer Huby (Chair) – TressCox Lawyers Christopher Preston – Legal Finesse John Simpson – Clinch Long Letherbarrow Lawyers
Determination	Television 'Brand Power' advertisement – Complaint dismissed - Advertising Substantiated Print advertisement – Complaint upheld – Advertising modified or discontinued

1. Introduction

This determination of the Advertising Claims Board (**'Board'**) relates to a complaint by the Complainant in relation to the following advertisements of the Advertiser:

- (a) a television advertisement in the form of a 'Brand Power' advertorial which contains the statements: *'a new completely natural sweetener'* and *'natural guilt free sweetness'* (**'Television Advertisement'**); and
- (b) a print advertisement for the Product which appeared in *'The Age'*, *'The Sydney Morning Herald'*, and *'MX'* and contains the statements: *'100% natural'* and *'the 100% natural sweetener'* as well as the comparative statement: *'natural like sugar...only better'* (**'Print Advertisement'**).

The Panel Members referred to above have been appointed to determine the complaint on behalf of the Board.

2. The Complaint

The Complainant has claimed that the Print Advertisement and the Television Advertisement contain a number of misleading representations and may therefore be in breach of sections 1.2, 1.3 and 1.5 of the Australian Association of National Advertisers Code of Ethics (**'AANA Code of Ethics'**) which are set out below:

- '1.2 Advertising or Marketing Communications shall not be misleading or deceptive or be likely to mislead or deceive.*

- 1.3 *Advertising or Marketing Communications shall not contain a misrepresentation, which is likely to cause damage to the business or goodwill of a competitor.*
- 1.5 *Advertising or Marketing Communications shall not make claims about the Australian origin or content of products advertised in a manner which is misleading.'*

In considering the Complaint, the Board has considered:

- (a) the Print Advertisement and the Television Advertisement;
- (b) the Complainant's submission dated 15 March 2012;
- (c) the Advertiser's submission dated 24 April 2012;
- (d) the Complainant's submission dated 15 June 2012; and
- (e) the Advertiser's submission dated 26 June 2012.

3. Board jurisdiction on AANA Food & Beverage Code

For completeness, the Panel notes that the Complainant also claimed that the Print Advertisement and the Television Advertisement may be in breach of sections 2.1, 2.3, 2.4 and 2.6 of the Australian Association of National Advertisers Food & Beverages Advertising and Marketing Communications Code (*'AANA Food & Beverage Code'*). The Complainant was notified that the Board cannot assess the complaint with regard to the AANA Food & Beverage Code and this was accepted by the Complainant.

4. Submissions

4.1. Complainant's submissions

The Complainant's submissions include that:

- (a) Many consumers would believe after viewing the Television Advertisement that the Product:
 - (i) is sourced from ingredients that are '100% natural';
 - (ii) is not artificial in any way including the process used to manufacture the Product;
 - (iii) is a new completely natural sweetener and can be used as a replacement for sugar;

and the above representations may deceive the public.

- (b) The two ingredients of the Product are stevia glycosides and erythritol. Erythritol is a naturally occurring nectar found in fruit however is not extracted from fruit in commercial quantities but rather sourced from corn starch and other sources using industrial scale fermentation and purification processes. The addition of any chemicals or solvents in any process for the production of erythritol prevents the term '100% natural' being used to

describe erythritol or any product which has erythritol as an ingredient. Further, the erythritol in the Product is biosynthetically produced rather than being extracted directly from the fruits and plants in which they naturally occur. The chemical processes using additives, cultures and other products to convert sugar into erythritol are not natural processes as understood by the average consumer. As the erythritol used in the Product has been altered by chemicals it is not 100% natural and it is misleading to describe it as *'100% natural'*.

- (c) The statements *'100% natural'* and *'the 100% natural sweetener'* in the Print Advertisement imply that the Product is 100% natural both in its ingredients and the way the Product is produced.
- (d) The claim *'natural like sugar...only better'* in the Print Advertisement may mislead consumers to believe the Product is better than sugar in all respects, when the Complainant understands that the claim is supposed to relate to the Product's reduced calorie content.
- (e) The combination of the claims *'the 100% natural sweetener'* and *'natural like sugar...only better'* in the Print Advertisement may suggest to consumers that the Product is as natural as sugar which is not the case.
- (f) The Complainant is not concerned about the assertion that the Product is *'natural'* but by the phrase *'100% natural'*.

4.2. Advertiser's submissions

The Advertiser's submissions include that:

- (a) Both ingredients of the Product are naturally occurring and are natural, as stevia glycosides is a plant product and erythritol is a sugar alcohol occurring naturally in some fruits and fermented foods.
- (b) The ingredients of the Product and the production of the Product have not been altered by chemicals and comply with the Macquarie Dictionary definition of *'natural'*.
- (c) The phrase *'natural like sugar...only better'* in the Print Advertisement is explained by the Complainant as being due to the Product's decreased calorie content.

5. Matters to be taken into consideration

5.1. Overall impression

In determining whether the Print Advertisement and/or the Television Advertisement are misleading or deceptive (or likely to mislead or deceive) the Board notes that it is required to consider the likely overall impression created by the Print Advertisement and/or the Television Advertisement. As stated by Gibbs CJ in *Parkdale Custom Built Furniture Pty Ltd v Paxu Pty Ltd* (1982) ATPR 40-307:

'[t]he conduct of the defendant must be viewed as a whole. It would be wrong to select some words or act which, alone, would be likely to mislead if those words or acts, when viewed in their context were not capable of misleading. It is obvious that where the conduct complained of consists of words it would not be right to select some words only and to ignore others which provide the context which gave meaning to the particular words. The same is true of the facts.'

5.2. Community standards

In determining whether the Print Advertisement and/or the Television Advertisement are misleading or deceptive (or likely to mislead or deceive) it is necessary to consider the community standards which prevail at the time of the advertisement regarding 'natural' claims and whether the advertisement, judged according to those standards by a reasonable person of fair, average intelligence, would be misleading or deceptive.

There is some difficulty in identifying the meaning that the community would ascribe to the term 'natural'. In order to obtain an understanding of this the Board referred to the 2009 study of 'natural' claims for food products entitled *"Natural' claims on foods: review of regulations and a pilot study of the views of Australian consumers"* by Williams, Markoska, Chachay and McMahon. This study was referred to by the Advertiser in its submissions.

In the study Williams, Markoska, Chachay and McMahon state: *'From the responses it was clear that consumers believed that excessive processing or reformulation makes an ingredient unsuitable for inclusion in foods labelled as 'natural'. According to one participant, "natural means that nothing else has been added". Colours, flavours, additives, preservatives and anything that "is not found in nature and has to be manufactured" or "synthesised in a laboratory" were also regarded by consumers as unsuitable for inclusion in foods labelled as 'natural'. The theme of processing was closely linked to artificiality of an ingredient, as some methods of processing were considered to render an ingredient artificial and thereby unnatural, for example the use of chemical extraction processes for ingredients'* (at 15).

In summary, Williams, Markoska, Chachay and McMahon state: *'Creating clear guidelines on use of the term 'natural' will be difficult given the apparent lack of consumer consensus of its meaning for food products, particularly regarding the level of processing of ingredients'* (at 18).

The Board also considered the guidance provided by the ACCC in its publication *'Food and Beverage Industry: Food Descriptors Guide to the Trade Practices Act'* (**'ACCC Guide'**) which states: *'While technically accurate information is important, it may not always adequately guide or control the overall impression. The message needs to be seen from the viewpoint of the potential audience to determine what the impression might be. Consumers are not expected to have the same level of understanding as a food technologist'* (at 9).

The Board is to make this Determination based on prevailing community standards, being those at the relevant time in respect of the Print Advertisement and the Television Advertisement. In determining this, the Board contemplated that there is likely to be some cynicism amongst some consumers as to the real meaning of the term 'natural' when used in advertising, which is strengthened by the prevalence of the term 'natural' in the marketing and promotion of food products. Some consumers will be more discerning than others about claims made by advertisers

who are eager to promote their product. This view was reflected by Gyles J in *ACCC v Telstra Corp Ltd* ATPR 42-107 when he stated: '*Reading the numerous cases in this field makes it perfectly apparent that individual judges vary considerably in their assessments of the effect of advertising. Some take a robust view and credit consumers with a fair amount of cynicism about advertisements and a fair amount of ability to make their own judgements. Others are convinced of the power of advertisements and are protective of the consumer. Neither side is right or wrong – it is a matter of opinion*' (at 50).

5.3. Comparative advertising

The statement '*natural like sugar...only better*' in the Print Advertisement is a statement of comparison between the Product and sugar which, in the Board's view, is intended to represent that the Product is not only natural in the same way as sugar but, in addition, is better than sugar. Also, it is not clear or specific as to exactly how it is asserted to be 'better'.

The following principles apply to comparative advertisements:

- (a) There is a heavy burden on the advertiser to ensure that its comparisons are accurate, for inaccurate comparisons are inherently likely to mislead the public: *State Government Insurance Commission v J.M. Insurance Pty Ltd* (1984) ATPR 40-465 at 45362. Otherwise, '*it may mislead a consumer into thinking there is a basis for a choice where, in truth, there is not; or that a choice may be made on grounds which are not truly valid*' (*Duracell Australia Pty Ltd v Union Carbide Australia Ltd* (1988) ATPR 40-918 at 4986).
- (b) Errors in comparative advertising may have a greater potential to mislead consumers than statements made in ordinary advertisements which may be perceived as mere 'puffs': *Trade Practices Commission v Telstra Corporation Ltd* (1993) ATPR 41-256 at 41,454.
- (c) To publish an advertisement suggesting that one product will outperform another product, without there being any tests to demonstrate the truth of the claim, is itself to engage in misleading conduct: *Colgate-Palmolive Pt Ltd v Rexona Pty Ltd* (1981) ATPR 40-242 at 43,192.

6. Decision of the Board

6.1. Who is the target audience?

The Board is of the view that the class of consumers targeted by the Print Advertisement and the Television Advertisement is very broad, with some consumers likely to be cynical about '*natural*' claims and consumers in general holding a wide range of views on what the term '*natural*' means when used in respect of food products.

6.2. What does '*natural*' mean?

There is no regulatory or statutory definition of the term '*natural*'. The term is very widely used in the food industry.

In respect of 'natural' claims, the ACCC Guide provides some guidance and states that 'natural' claims: *'imply that the product is made up of natural ingredients, i.e. ingredients nature has produced, not man made or interfered with by man'* and *'suggest that a product is superior because it has certain 'natural' characteristics as opposed to being processed or artificial or otherwise removed from its natural form'* (at 17).

The ACCC Guide also makes reference to the Macquarie Dictionary definition of 'natural' which refers to something that existed in, or was formed by nature, i.e. not artificial, or something that is based on the state of things in nature, i.e. constituted by nature, or is true to nature, or closely imitating nature.

Therefore in the Board's view, the term 'natural' primarily refers to ingredients formed by nature and not man made. However it acknowledges that the term can also mean ingredients that 'imitate' nature.

The Board was provided with no evidence that the combination of stevia glycosides and erythritol comprised in the Product occur together in nature. Rather the Advertiser has asserted that the two ingredients occur separately in nature. Furthermore it seems that one of the ingredients is not itself sourced from nature for inclusion in the Product, but rather man made to imitate the natural process.

In relation to the Television Advertisement, the Board accepted that the target audience could understand the 'natural' claim to convey the representation that 'all ingredients included in this food are natural ingredients' (rather than the Product as a whole occurs naturally) because the advertisement itself described the Product as being a sweetener and as having been 'crafted' - both of which indicate that the Product is the result of a process of manufacture.

However, the Board had greater concerns in allowing the same representation in relation to the Print Advertisement, where the Product is not only claimed to be *'natural'*, but also to be *'natural like sugar'*. This is because sugar is a refined extract of chemical (sucrose) from a naturally occurring product (cane sugar) and therefore is not a combination of ingredients from different sources in the same way as the Product is.

6.3. The claim '100% natural' and 'natural'

The Board is of the view that a *'100% natural'* claim should not be considered differently to a *'natural'* claim on the basis of its understanding of community standards. While those with technical knowledge are aware of the shades of grey that exist around the 'natural' status of a food ingredient used in modern manufacture, most consumers are not and would expect that a product should either be 'natural', or not.

It is accepted by the Advertiser and the Complainant that the ingredient stevia in the Product is 'natural'. It is extracted from a plant product.

Consideration of whether or not erythritol is 'natural' is complex. The website for the Product states that erythritol is a naturally occurring nectar found in fruits, like melons and grapes. While the Board accepts that this is the case, it has been given no evidence that this is the case with the Product. It appears that the erythritol used in the Product is not of the naturally occurring type

which is extracted from fruits. Rather, it is produced by way of biosynthesis to imitate a process that occurs in nature.

The Board considered whether a reasonable person would be misled if they knew how the erythritol ingredient for the Product is manufactured and industrially processed. The Board accepted that there is likely to be a broad spectrum of views amongst consumers as to whether the product of a biosynthetic process which imitated a naturally occurring process could still be considered to be 'natural', even if the end result is identical to a naturally occurring substance.

Some consumers would assume that a product claiming to be '*100% natural*' would use only naturally occurring ingredients that have nothing added to them and are '*not man made or interfered with by man*' (as per the ACCC Guide). However some other consumers would accept that an industrial process which mimics a naturally occurring process is '*natural*' as it so closely imitates that which occurs in nature.

The Board had some difficulty in reaching a conclusion on this point. On the one hand, the ingredient erythritol is a naturally occurring substance, and its production method, fermentation, does occur in nature. The mere fact that the ingredient has been produced using large scale manufacturing and food technology does not alter this character. On the other hand, there is a significant degree of artifice and manufacture in the process, and the ingredient is very much the result of manufacture rather than of, say, extraction. On balance and by way of a majority decision, after much discussion and consideration, the Board formed the view that it could not, with certainty, determine that the target audience would consider erythritol not to be 'natural'. Some would consider it 'natural', some would not.

As a result, the Board is not satisfied that the Television Advertisement is misleading or deceptive according to prevalent community standards, and similarly it is not satisfied that it is a misrepresentation on the part of the Advertiser in respect of the Product or its constituent ingredients to refer to the Product as being '*natural*' or '*100% natural*'.

6.4. Comparative advertising - '*natural like sugar...only better*'

As the claim '*natural like sugar...only better*' is a comparison claim it must be considered by the Board with closer scrutiny on the basis that an error in a comparison claim may have a greater potential to mislead consumers.

It is not clear on what basis the comparison claim that the Product is as '*natural*' as sugar, only better, has been made by the Advertiser.

Sugar is a refined extract of chemical (sucrose) from a naturally occurring product (cane sugar). The Product (as a whole, being a combination of stevia and erythritol together) is not extracted from a naturally occurring fruit or plant; it does not occur in nature in any form; it is man made. Of the two ingredients comprising the Product, one is extracted from a naturally occurring plant, but the other is man made to mimic a naturally occurring process. It follows that the Product cannot accurately be claimed to be '*natural like sugar*' as it is not '*natural*' in the same way that sugar is '*natural*'.

In relation to the claim that the Product is 'better' than sugar, while the correspondence suggests the comparison is made because the Product is lower in calories than sugar, this is not clear and there are other interpretations as to what that statement means.

The Board considers that, having regard to the guiding principles set out in 5.3 above, the comparative claim '*natural like sugar... only better*' is misleading and deceptive (or likely to mislead or deceive) as consumers may be misled into thinking that the Product is (and both of its ingredients together are) derived from a naturally occurring fruit or plant in the same manner that sugar is derived from a naturally occurring plant. This is misleading as the Product is a blend of two ingredients the combination of which is synthesised and not found in nature and, whilst one of the ingredients is derived from nature, the other is biosynthesised to imitate nature. Furthermore it is not clear that the claim that the Product is better than sugar relates to it having fewer calories than sugar and that claim is likely to give the impression that the Product is a better product in a more general sense.

7. Determination

The Board is of the view that:

- (a) The Print Advertisement which contains the comparison claim '*natural like sugar...only better*' breaches sections 1.2, 1.3 and 1.5 of the AANA Code of Ethics.
- (b) The Television Advertisement does not breach sections 1.2, 1.3 or 1.5 of the AANA Code of Ethics.

17 July 2012

Advertiser Statement

On 18 July 2012, the Advertiser was provided with a copy of the Panel's determination. In accordance with the Board's Procedural Guidelines for Participants and on the basis of the Panel's determination, the Advertiser was requested to provide an Advertiser Statement indicating whether it would modify or discontinue the Print Advertisement.

On 24 July 2012, the Advertiser provided its response that it intends to modify or discontinue the Print Advertisement.