

Advertising Claims Board Panel Determination

Advertiser	Australian Pork Limited
Complainant	Meat & Livestock Australia Limited
Type of Advertisement	Television
Nature of Complaint	Breach of sections 1.2 and 1.3 of the Australian Association of National Advertisers Code of Ethics
Panel Members	Charles Alexander (Chair), Minter Ellison Lyndon Sayer-Jones, Lyndon Sayer-Jones & Associates Chris Kintis, Argyle Lawyers
Determination	COMPLAINT UPHELD in so far as it alleged a breach of section 1.2 of the Code of Ethics. COMPLAINT DISMISSED in so far as it alleged a breach of section 1.3 of the Code of Ethics. ADVERTISING MODIFIED OR DISCONTINUED
Date of Determination	24 January 2013

This is a determination of the Advertising Claims Board (**Board**) in relation to a complaint lodged on 17 October 2012 by Meat & Livestock Australia Limited (**Complainant**) against Australian Pork Limited (**Advertiser**) regarding a television advertisement promoting the purchase and consumption of pork (**TVC**).

The Complainant provides marketing and research and development services for Australian cattle, sheep and goat producers. The Advertiser provides similar functions for the Australian pork industry.

THE TVC

The TVC which is the subject of the complaint has been shown on selected free-to-air channels since September 2012 and on subscription television channels since 7 October 2012.

The TVC begins by showing a beef steak next to a pork steak and a woman saying '*Two juicy steaks, the big difference is, one has half the fat of the other. Well, unless I do this.*' The woman then cuts the beef steak in half and removes one half from view. (**First Part of the TVC**)

The TVC then depicts a visual of the same pork steak in a meal on a plate while the same woman says (in a voiceover): '*Australian pork, half the fat of red meat and a valuable source of iron.*' The following wording appears superimposed on the picture of the meal whilst the

voiceover is playing: *'Based on 200g raw trimmed lean meat (pork v 50:50 beef and lamb)'* (Super). (Second Part of the TVC)

Consumer survey in respect of the TVC

In response to the Advertiser's reply to the complaint, the Complainant refers to the results of a consumer survey conducted by Millward Brown on behalf of the Complainant. The Panel has only been provided with a one page summary of the results of this survey.

Consumers were asked *'what impressions did the advertisement give you about pork?'* 24% of responses mentioned a comparison between pork and another meat product. The meat product mentioned in the comparison was either red meat (54% of the 24%) or beef (46% of the 24%).

The complaint

The Complainant submits that the TVC contains a number of misleading representations and is in breach of sections 1.2 and 1.3 of the Australian Association of National Advertisers Code of Ethics (**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.'

The members of the Advertising Claims Board comprising Charles Alexander (Chair), Minter Ellison, Lyndon Sayer-Jones, Lyndon Sayer-Jones & Associates and Chris Kintis, Argyle Lawyers have carefully considered:

1. the TVC;
2. the Complainant's submission of 17 October 2012;
3. the Advertiser's response of 4 December 2012;
4. the Complainant's response of 17 December 2012; and
5. the Advertiser's response of 10 January 2013.

Submissions

It is implicit in both the Complainant's and the Advertiser's submissions that the TVC conveys at least two representations. The first representation is that the level of fat in the pork steak shown in the TVC is half the level of fat in the beef steak shown in the TVC (**Specific Message**). The Complainant does not appear to dispute that the Specific Message is true inasmuch as it applies to the "lean" cuts comparison referred to in the TVC's disclaimer.

The real dispute lies in the characterisation of the other representations and the adequacy of the Disclaimer in the TVC (**General Messages**). The General Messages alleged by each party and their submissions in relation thereto are discussed below.

Complainant's submissions

The Complainant submits that:

1. the General Messages conveyed by the TVC are that:
 - (a) a cut of pork has half the fat of a cut of red meat (of equivalent weight), regardless of:
 - (i) the type of red meat (beef or lamb);
 - (ii) the type of cut; and
 - (iii) how and when it is trimmed; and
 - (b) on average pork has half the fat of red meat, regardless of:
 - (i) the type of red meat; and
 - (ii) how and when it is trimmed;
2. the General Messages are untrue and misleading;
3. the General Messages flow from the TVC as a whole as the First Part of the TVC (and the associated Specific Message) will influence the message that an average consumer will take from the Second Part of the TVC;
4. the Super shown in the TVC does not prevent the representations from misleading consumers as:
 - (a) it is not linked closely to the voiceover or image that form part of the Second Part of the TVC;
 - (b) even if consumers read it as clarifying the message conveyed by the Second Part of the TVC it remains silent on many matters including:
 - (i) whether the comparison is between equivalent cuts or between any cut;
 - (ii) whether the comparison is between an average of all equivalent cuts or merely any equivalent cut of pork and cuts of a 50/50 mix of lamb and beef (**Red Meat Mix**);
 - (iii) whether beef and lamb have the same fat levels and whether these differ for different cuts; and
 - (iv) the meaning of 'trimmed lean meat' (such as when the meat is trimmed, eg by the butcher or the consumer);
 - (c) the voiceover does not signal that the viewer needs to read the Super;
 - (d) the size and time on screen of the Super fall below what is necessary given that it aims to qualify and diminish (as opposed to reinforce) what would otherwise

be conveyed by the TVC. In addition, the viewer must expand the shorthand used in the Super and understand the meaning of the Super's qualifications in 2 or 3 seconds whilst also listening to the voiceover and viewing the pork dinner image; and

- (e) it is difficult to read as it is in white letters against the white background of a plate;
5. even if the Super is able to clarify the message conveyed by the Second Part of the TVC so that the message is that raw trimmed lean pork contains half the fat of an equivalent Red Meat Mix, that basic message conveyed to the viewer is unsubstantiated and misleading; and
 6. the Super does not make clear that the message conveyed in the TVC is based on comparing fully trimmed lean Red Meat Mix with separable lean pork (as opposed to fully trimmed lean pork) and would in any event be misleading as it is a comparison of 'apples and oranges'.

Advertiser's submissions

The Advertiser has advised that it based the Second Part of the TVC on a comparison of the average fat content of trimmed lean pork cuts and the average fat content of trimmed lean Red Meat Mix cuts.

The Advertiser submits that:

1. the only General Message communicated by the TVC is that the average fat content of trimmed lean pork cuts is half the average fat content of trimmed lean Red Meat Mix cuts;
2. a reasonable consumer would understand that the Second Part of the TVC is different and distinct from the First Part of the TVC and would not infer that the specific comparison of the steaks will also apply to all cuts generally. In support of this argument, the Advertiser submits that:
 - (a) while both messages convey that pork is low in fat, both messages are clearly kept separate. The Second Part of the TVC is clearly presented in a separate and distinct manner from the First Part of the TVC via a change in visual and audio cues;
 - (b) there is no suggestion in the TVC that the specific comparison is applicable in a general sense to all cuts of red meat, it is clearly a comparison of two specific products; and
 - (c) consumers understand that different species of meat have different levels of fat and this does not require further clarification;
3. the TVC does not convey the messages outlined in item 1 of the Complainant's submissions above. In support of this submission the Advertiser argues that:

- (a) although an argument could be made that such messages could be taken from the Second Part of the TVC if it was not qualified by the Super, the effect of the Second Part of the TVC cannot be assessed without regard to the Super. For example, although the voiceover does not specifically say 'trimmed lean', the Super does;
 - (b) consumers understand that:
 - (i) 'red meat' includes beef and lamb and is not specific to either of these meats. In this regard, the Complainant has previously used 'lean red meat' to refer to a 'mix of 50:50 raw lean beef and lamb'; and
 - (ii) different cuts have different levels of leanness; and
 - (c) it is clear that the TVC is referring only to trimmed lean meats as set out in the Super and trimmed lean meats are visually represented throughout the TVC;
4. the Super adequately qualifies the claim in a prominent and clear manner as:
- (a) it is shown on screen for the duration of the voiceover to ensure that the viewer connects the two;
 - (b) it is very clear and large. The Advertiser notes that the initial Super (the size and duration of which was increased by the Advertiser in response to a letter from the Complainant expressing its concerns) was approved by Free TV Australia's Commercial Advice Division as complying with their requirements;
 - (c) although the text is white, the plate against which it appears is darker by virtue of shadows;
 - (d) it clearly qualifies the basis of the claim as comparing 200g of raw, trimmed lean meats;
 - (e) consumers are able to see a correlation between a voiceover they hear with a disclaimer they see and can easily comprehend both at the same time;
 - (f) the use of shorthand is immaterial as consumers would understand the abbreviations used;
 - (g) consumers already rate beef as lower in fat than lamb, so this does not need further explanation; and
 - (h) meat trimming can be done at retail (not just butchers) or in-home;
5. in regards to item 5 of the Complainant's submissions above, the claim itself does not have to be substantiated in the TVC, it simply has to be true and both the Specific Message and the General Message contended by the Advertiser are true; and
6. the assertion that the Second Part of the TVC is based on trimmed beef and lamb as compared to 'separable lean pork' is incorrect.

The conflicting nutritional data

Both parties submitted evidence concerning the calculation and comparison of fat levels in pork and lamb and/or beef. The calculations differed as the Complainant sought to rely on NUTTAB 2010 data whilst the Advertiser sought to rely on data it has prepared itself which has been peer reviewed and published. The Advertiser maintained that the NUTTAB 2010 data reflects outdated information regarding nutritional composition of pork cuts.

DETERMINATION

The Board considers that the TVC is misleading or deceptive or likely to mislead or deceive in breach of section 1.2 of the Code of Ethics.

The Board does not have enough information to make a positive finding that the misrepresentation contained in the Second Part of the TVC is likely to cause damage to the business of beef producers contrary to section 1.3 of the Code of Ethics.

The Board's reasons are set out below.

Section 1.2

1. The Board considers that the relevant consumers are purchasers of meat product which includes a wide variety of consumers who are ordinary or reasonable members of the meat consuming public and who will have varying levels of gullibility, intelligence and education.
2. The Board agrees that the Specific Message made in the TVC is likely to be correct. As stated above, this does not appear to be disputed by the Complainant.
3. The real issue is the character of the General Message/s. The Advertiser claims that the General Message is a very limited message which can be ascertained by listening to the voiceover and reading the Super. The Advertiser says it does not refer to any pork or red meat but to trimmed lean meat. The Advertiser also says that its claim is based on a 50/50 combination of raw beef and lamb, which can be categorised as 'red meat'. In other words, the General Message is far more nuanced and sophisticated than the message for which the Advertiser contends.
4. The Advertiser's interpretation is dependent upon an acceptance that consumers will read the Super and not only listen to the voiceover, and then understand the Super. If a consumer took time to carefully view (probably more than once) and read and consider the precise terms of the Super, it is possible that an intelligent and diligent consumer would take away the message for which the Advertiser contends. However in the view of the Board a significant number of the relevant class of consumer would not read the Super or, if they did, go through the detailed analytical thought process required.
5. The First Part of the TVC is very powerful. It does not claim less fat in the pork steak, it claims **half** the fat of the beef steak and graphically underlines this by removing half the beef steak from view. The Board believes that this Specific Message in itself may lead to a more general inference being drawn by a consumer about the comparative fat content of all pork and, at least, beef products and quite possibly both beef and lamb products. This general inference is reinforced by the general and also powerful

message contained in the voiceover which makes the unequivocal and general claim: 'Australian pork, half the fat of red meat...!'

6. The Board does not consider that the Super is sufficient to create the far more complex General Message for which the Advertiser contends. All of the members of the Board, on viewing the TVC, came away with the same impression, and it was only with some difficulty that they could ascertain the message which the Advertiser contends was conveyed. The Board therefore considers that the TVC contains the General Messages which the Complainant contends were conveyed.
7. No-one has contended that the General Message advocated by the Complainant is true. There will be some cuts of red meat which do not contain twice the fat of some cuts of pork. The TVC, therefore, is misleading and deceptive or likely to mislead or deceive.
8. In the light of this finding, the Board did not consider it necessary to extensively review the material relating to fat content in meat, other than to note it is clear that all cuts of red meat do not have twice the fat content of cuts of pork.
9. Neither did the Board have regard to the Millward Brown survey. The Board was only provided with a summary of the results of this survey and in the absence of detailed knowledge of the survey and how it was conducted limited weight could be placed on it.

Section 1.3

10. While the Board considers that the TVC certainly 'may' cause damage to the business of beef producers, particularly as the intention was clearly to encourage consumers to buy pork as opposed to red meat, there was no evidence that it was '**likely**' to cause that damage. In its submission the Complainant asserted that such damage would be caused because:
 - (a) it was calculated to damage beef sales;
 - (b) beef sales are in the millions of dollars each year; and
 - (c) 'huge numbers of viewers and consumers choose between the products regularly'.

There was unfortunately no evidence which supported those assertions. The test of the likelihood of something occurring can only be met if there is some evidence to support it. Having said this the Board wishes to make it clear that this is not a finding that damage to the business of beef producers and possibly significant damage, would not result from the broadcasting of the TVC. The Board Members simply do not know if this is likely.

Advertiser Statement

On 25 January 2013, 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 advertisement.

On 1 February 2013, the Advertiser provided its Advertiser Statement. The Advertiser's response is as follows:

“Australian Pork Ltd. (APL) respects the decision of the Advertising Claims Board, delivered 25th January, 2013.

We accept that in the TVC there are difficulties with communicating the explanation of lean pork's superiority over red meat where a specific example is used. While we do not agree that it was misleading, we agree to modify the advertisement moving forward so that the messages conveyed within it are simpler.

APL remains a diligent advertiser that pre-tests claims with legal specialists and often pre-tests finished advertisements with consumers. We will review our pre-testing process and apply relevant parts to any modification.

As a consequence of our need for re-testing, APL has not finalised what modifications will be made in order to address the concerns of the Board with regards to the advertisement; however, APL will modify the advertisement and has taken steps to withdraw the advertisement at the earliest available opportunity, pending such modification.”