



Ad Standards Industry Jury  
PO Box 5110, Braddon ACT 2612  
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AdStandards.com.au

Advertising Standards Bureau Limited  
ACN 084 452 666

# Case Report

1	Case Reference	18 ASIJ 1
2	Advertiser	Heilala Vanilla Limited
3	Complainant	Queen Fine Foods Pty Ltd
4	Product	“Natural Vanilla with Vanilla Extract” and “Natural Vanilla Bean Paste” products
5	Type of Advertisement/Media	Print, website, social media
6	Industry Jury Panel Members	Odette Gourley, Corrs Chambers Westgarth (Chair) Christine Ecob, Johnson Winter & Slattery Raph Goldenberg, CIE Legal
7	Date of Determination	2 November 2018
8	DETERMINATION	Advertising modified or discontinued Complaint upheld in relation to breach of section 1.2 of the Code as identified in the Determination below

## 1. Introduction

- 1.1 A complaint was lodged on 10 August 2018 (**the Complaint**) with Ad Standards by Queen Fine Foods Pty Ltd (**Complainant**) against Heilala Vanilla Limited (**Advertiser**) regarding the Advertiser’s advertising for the products specified above (**Products**). The Products are purchased by consumers to provide vanilla flavour in prepared food and when baking cakes, biscuits, custards and other dishes. A panel of legal practitioners (**the Industry Jury**) was convened to consider the Complaint in accordance with the Industry Jury’s procedural guidelines (**Guidelines**).
- 1.2 The Complainant and the Advertiser were given an opportunity to make submissions in accordance with the Guidelines. These submissions and the Industry Jury’s determination are detailed below.

## 2. Description of advertising or marketing communication

- 2.1 The Complainant complains about a range of advertising, appearing on the Advertiser’s website and in sponsored social media, in relation to the Advertiser’s Products (**the Advertising Material**). For the purposes of determination of the Complaint, it is convenient to consider representative advertisements which are set out in an Annexure to this Report.



### 3. Issues raised by Complainant

3.1 The Complaint raises issues under Sections 1.1, 1.2 and 1.3 of the Australian Association of National Advertisers Code of Ethics (**Code**), which provide as follows:

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

1.2 *Advertising or Marketing Communications shall not be misleading or deceptive or be likely to mislead or deceive; and*

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.*

3.2 The Complainant submitted that the Advertising Material is misleading or deceptive because it conveys messages to consumers that the vanilla flavour of each of the Products referred to in the Advertising Material is:

- (a) wholly or substantially natural;
- (b) is wholly or substantially derived from “natural vanilla”; and
- (c) is wholly or substantially derived from vanilla beans,

when the vanilla flavour of each of the Products is, according to the Complainant, not derived from vanilla beans but rather is comprised substantially of synthetic vanillin derived from non-vanilla products.

3.3 The Complainant also submits that, even if the flavour of the Products were to be substantially derived from non-vanilla products that were natural rather than synthetic in origin, it is misleading or deceptive to describe the Products as “natural vanilla”.

3.4 The Complainant provides technical test data relating to the Advertiser’s Products, the results of a survey of the understanding of consumers in relation to the labelling of the Products, and detailed submissions as to the applicable legal principles and the meanings conveyed to consumers by the Advertising Material.

### 4. Advertiser’s response

4.1 The Advertiser raises issues about products of the Complainant and objects to their labelling. The Advertiser explains that the Products, in its more affordable non-premium range, include a commercially supplied food additive characterised by the Advertiser’s Supplier as ‘natural vanilla’ flavour; and points out that the Complainant, in referring to synthetic vanillin, has left out of account ‘natural vanillin’ that is manufactured from



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natural aroma chemicals from non-synthetic sources, and is more expensive than the synthetic product but substantially cheaper than the vanilla bean derived flavour. The Advertiser responds to the technical testing and consumer survey evidence provided by the Complainant, including providing on a confidential basis various technical documents about the Products. The Advertiser makes submissions about the relevant legal principles and the application of those principles to the label descriptions of the Products which include the words “Natural Vanilla”, and to the Advertising Material.

## **5. Complainant reply**

- 5.1 The Complainant responds to matters raised by the Advertiser concerning the products of the Complainant and refutes the justification put forward by the Advertiser as to its use of “Natural Vanilla” in the Advertiser’s label descriptions of the Products and in the Advertising Material.

## **6. Advertiser reply**

- 6.1 The Advertiser repeats its allegations in relation to the Complainant’s products; and again makes submissions in relation to the representations conveyed and other matters.

## **7. DETERMINATION**

### **Findings in relation to the Advertiser’s Products featuring in the Advertising Material**

- 7.1 As noted above, the Complaint relates to Advertising Material for the Advertiser’s non-premium Products that provide vanilla flavour in prepared food including baked cakes etc.
- 7.2 Because the Products are referred to in the Advertising Material, either by the label description or through an image which includes the label description, the label descriptions are an important aspect of the Complaint.
- 7.3 We set out below the label descriptions and our findings in relation to the Products. References are to the party’s submissions: CC (Complainant in chief dated 10 August 2018), AR (Advertiser response to Complainant in chief dated 13 September 2018), CR (Complainant reply dated 28 September 2018) and AR2 (Advertiser response to reply dated 10 October 2018).
- 7.4 For completeness, as noted above, the Advertiser sought to complain about aspects of advertising and labelling of the Complainant’s products that compete with the Advertiser’s Products but there is no formal complaint before the Industry Jury in relation to that advertising and we therefore do not address the complaint in this Report.
- 7.5 Information in relation to the composition of the Advertiser’s Products was not clearly set out in its submissions, partly for confidentiality reasons. The Advertiser has, however, in



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its submissions and in website information, which it invited the Jury to examine, acknowledged the following matters in relation to its Products:

- (a) the non-premium Products of the Advertiser the subject of the Advertising Material in issue in the Complaint are more affordable products than the Advertiser's premium products such as Pure Vanilla Extract and Pure Vanilla Bean Paste (AR[18]);
- (b) the Advertiser's premium extract product is prepared by cold extraction from vanilla beans and no sugar, chemicals, synthetic or imitation flavours are added. It is available for purchase by consumers on the Advertiser's website for AUD \$33.93 for a 100 ml bottle (AR Annexure A and the Advertiser's website)
- (c) the Advertiser's premium paste product is prepared by combining pure vanilla extract with vanilla seeds, and is available for purchase on the Advertiser's website for AUD \$36.25 for a 100 ml bottle or AUD \$25.17 for a 65 g bottle (AR Annexure B and the Advertiser's website)
- (d) each of the Advertiser's non-premium Products contains Vanilla flavour (AR[12(a), [15] to [17], [19 to 20] and AR Annexure C);
- (e) the flavour is a high quality commercially prepared food ingredient manufactured from extracted aroma chemicals to emulate the flavour compounds found in a vanilla bean (AR[12(a), [19], [20]);
- (f) the flavour is blended with the Advertiser's Pure Vanilla Extract AR[19]) resulting in a complex and robust taste (AR[19], [20], [34]);
- (g) the Advertiser's non-premium extract Product is not wholly or substantially derived from vanilla beans (AR[12(c)(i)]);
- (h) the Advertiser's non-premium extract Product is a mixture of vanilla bean extract, vanilla flavour and additional materials, and available for purchase by consumers from the Advertiser's website for AUD \$14.95 for 125 ml (AR[19], [32] and AR Annexure C/the Advertiser's website);
- (i) the Advertiser's non-premium paste Product is derived only in part from vanilla beans (AR12(c) with the Advertiser's website); and
- (j) the Advertiser's non-premium paste Product is a mixture of its non-premium extract product (see 7.5(g) and 7.5(h) above) and a small quantity of ground vanilla; and is available for purchase by consumers from the Advertiser's website for AUD \$13.95 for 65 g (AR[19], [32] and AR Annexure C/the Advertiser's website).

7.6 In addition to the above, an important question is whether the commercially supplied



flavour ingredient added by the Advertiser to its non-premium Products is derived from vanilla beans to any significant extent. In that regard:

- (a) at [34] of AR, the Advertiser agrees that “.the ‘Natural Vanilla’ flavour supplied by the Supplier..is not derived from vanilla beans.”;
- (b) at [33] of AR, in relation to the Complainant’s testing, the Advertiser states that “the ‘Natural Vanillin’ is not expected to match that of the vanillin from vanillin [sic] beans as the vanillin source in this case is enzyme-generated natural vanillin from a plant source *as well as* vanillin extracted from vanilla beans.”;
- (c) at [15] of AR, the Advertiser states:

*Paragraph 3.3 of the Complaint refers to natural vanillin derived from vanilla beans and synthetic vanillin derived from petrochemicals. The Complainant fails to mention that there is also available a ‘natural vanillin’ that is enzymatically derived from more than two different...sources. This product is about 10 to 20 times more expensive than the synthetic product, but substantially cheaper than the vanilla bean derived product.”*

Thus, we infer, the “natural vanillin” in the commercially supplied flavour ingredient added by the Advertiser is “not the vanilla bean derived product”; and

- (d) in referring to its “Pure” premium products, the Advertiser’s website makes a virtue of the absence of added flavour ingredients which it characterises as “imitation” flavour.

7.7 Having regard to the above, we find that the commercially supplied flavour ingredient added by the Advertiser to its non-premium Products is not derived from vanilla beans or, to the extent that it is derived from vanilla beans, that extent is not significant.

7.8 There is also a dispute between the parties as to the process of manufacture of the Vanilla flavour contained in the Advertiser’s products and the extent to which the flavour is sourced from synthetic materials. It is not necessary to resolve that dispute to determine the Complaint. Accordingly, in arriving at its determination, the Industry Jury has not had regard to the technical testing material, confidential (or otherwise) provided by either party nor to submissions referenced to such material.

7.9 Given the above, we find that:

- (a) each of the Advertiser’s non-premium Products is not wholly or substantially derived from, and does not contain a substantial proportion of, vanilla beans; and
- (b) the vanilla flavour of each of the Advertiser’s non-premium Products is substantially



contributed to by an added flavour ingredient not derived from vanilla beans to any significant extent.

### Messages conveyed by the Advertising Material

- 7.10 The Industry Jury considers that at least the following representations are conveyed to consumers by the Advertising Material:
- (a) each of the Advertiser's non-premium Products is substantially derived from, or contains a substantial proportion of, vanilla beans;
  - (b) the Advertiser's non-premium extract Product provides vanilla flavour substantially derived from vanilla beans; and
  - (c) the Advertiser's non-premium paste Product provides vanilla flavour substantially derived from vanilla beans.
- 7.11 The Industry Jury's reasons for its views as to the representations conveyed by the Advertising Material, as set out in paragraph 7.10 above, are summarised in the following paragraphs.
- 7.12 The Products are used in the preparation of food for humans to consume. Consumers are interested in what is in their food and the extent to which it is artificial and processed. Consumers are familiar with vanilla as a flavour of food. Consumers interested in baking and the preparation of food are aware that vanilla beans are a source of vanilla flavour. Vanilla beans in a dried form are readily available for purchase by consumers. Consumers would have no difficulty in describing vanilla beans as "natural" or unprocessed.
- 7.13 The use of the word "natural" for a grocery food preparation product is therefore likely to convey a message that the product is prepared in some way from vanilla beans. In the case of the label description "NATURAL VANILLA WITH VANILLA EXTRACT", the Advertiser submits that the phrase should be read as a whole and that it is then clear from the context that "NATURAL VANILLA" is only a description of flavour not composition.
- 7.14 We do not agree with the Advertiser. The label description is strongly suggestive of product identification or a composition description, rather than a mere statement of flavour. Also, if one tries to analyse the phrase, the word "with" suggests the product is composed of two parts, one of which is "NATURAL VANILLA" and the other VANILLA EXTRACT". The latter sounds like it is more processed because the word "EXTRACT" is used. The former is "NATURAL". The consumer would readily conclude the former is less processed and thus substantially derived from or containing vanilla bean.
- 7.15 In any event, consumers are unlikely to undertake much analysis but simply take the reference to "NATURAL VANILLA" as a reference to the product containing vanilla bean or



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being derived in a substantial way from vanilla bean.

- 7.16 As to the bean paste product, the Advertiser suggests that it is irrelevant whether the product is wholly or substantially derived from vanilla beans and that what matters is that it is derived in some part from vanilla beans. We do not agree with the Advertiser. We think consumers would readily take the composite phrase “NATURAL VANILLA BEAN PASTE” to mean that all or most of the product is a paste of vanilla beans.
- 7.17 The Advertiser refers to ingredients lists which also appear in the Advertising Material. Some consumers may examine these closely but most will not. The ingredients are in fine print in online materials or on a product purchased in the supermarket or other grocery store at a relatively low price for everyday use in the home. It would not be easy, except for the technically qualified or the most experienced consumer, to understand clearly what is conveyed by the various phrases used.
- 7.18 Similarly, the Industry Jury does not consider the requirements of the Food Standards regulations in Australia or in relation to the commercially supplied flavour additive to be relevant to the question of the messages conveyed to consumers by the Advertising Material.
- 7.19 The Advertising Material includes the descriptions of the Advertiser’s range of non-premium products in an earlier and an updated form. As can be seen, the descriptions include the prominent title “NATURALS RANGE” and references to the added flavour as “NATURAL” and “100% NATURALLY SOURCED”. The updated description uses the word “EMULATE” and “FLAVOUR COMPOUNDS” which may be some indicator to those who are more astute and well informed that the added flavour is a highly processed product. As an aside, the Industry Jury notes that the Advertiser uses the simpler and more easily understood word “IMITATION” in relation to such flavours when promoting its Premium range which does not contain added flavour.
- 7.20 While the Industry Jury considers that updating of the earlier description was clearly warranted, it considers the updated description to be insufficient to avoid the messages in issue. The Industry Jury is of the view that the content will continue to contribute, for those consumers who visit the online material, to messages being conveyed that the products in the range are substantially derived from vanilla beans.
- 7.21 The Advertiser refers to the continued supply by it of its premium range of “PURE” products. Before it introduced its more affordable non-premium range, in promoting those products the Advertiser characterised products with added flavour as “imitation”. Where the Advertiser now chooses to add a commercially supplied flavour to a more affordable range of products, as the Advertiser is entitled to do, it is unconvincing for the Advertiser to suggest, and we do not agree with the Advertiser, that:
- consumers understand that a reference to “NATURAL VANILLA FLAVOUR” is a





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reference to an added flavour (or sometimes simply an indication of the taste to be imparted to food from the product); and

- it is enough to justify calling the flavour “NATURAL” if it is derived only to an insignificant extent from vanilla beans.

7.22 In reaching its views as to the representations conveyed by the Advertising Material for the reasons set out above, the Industry Jury has applied the well understood principles in the decided cases of the Federal Court of Australia concerning the misleading and deceptive conduct provisions of the *Competition and Consumer Act*, and its predecessor legislation, in relation to the advertising and marketing of consumer products including grocery products such as the Products of the Advertiser in issue here. The parties refer to the principles which are not in dispute. None of the decided cases is so closely analogous to the case before the Industry Jury to be determinative. We decide the case on its own facts. We accept the Advertiser’s submission that the consumer survey provides no assistance as insufficient information is provided in relation to the survey questions, and we have not relied on it.

### **Are the Advertising Material messages substantiated?**

7.23 Given the findings made by the Industry Jury (see paragraphs 7.7 to 7.9 above, and the Industry Jury’s views as to the representations conveyed by the Advertising Material (see paragraph 7.10 above), it follows that the Industry Jury considers the representations not to be substantiated by the Advertiser. Put simply, the Advertising Material’s uses of the phrase “Natural Vanilla” in the label descriptions and other references to “Natural” and “Naturals” are not justified given the limited, if any, extent to which the Advertiser’s Products and the components of them, are derived from vanilla beans.

7.24 In its submissions, the Advertiser has indicated that it is relaunching the Products, and others in its non-premium range, with new branding. The Advertiser indicates that the labels for its “Natural Vanilla with Vanilla Extract” Product will be amended to “Vanilla Extract with added Natural Flavour” and the label “Natural Vanilla Bean Paste” will be amended to “Vanilla Bean Paste with added Natural Flavour”.

7.25 The exact status of the Products, and any Products with revised branding, and the Advertising Material the subject of the Complaint is not clear. As to the revised branding, the Advertiser indicates the new label descriptions to be used, as stated above, but does not provide artwork for new labels except on a confidential basis which the Advertiser declines to provide to the Complainant.

7.26 In these circumstances, it is not open to the Industry Jury to address the updated label descriptions and updated labels, as requested by the Advertiser.

7.27 Accordingly, the Industry Jury determines that the Advertising Material is not substantiated





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and therefore misleading in breach of at least Section 1.2 of the Code, and upholds the Complaint. Given this determination, it is not necessary to address the other provisions of the Code.

## **8. Advertiser Statement**

8.1 On 5 November 2018, the Advertiser was provided with a copy of the Industry Jury's determination. In accordance with the Guidelines and on the basis of the Industry Jury's determination, the Advertiser was requested to provide an Advertiser Statement indicating whether it would modify or discontinue the Advertisement.

8.2 On 9 November 2018 the Advertiser provided the following statement:

*"Heilala has already modified the labelling on the products in question. Products bearing the new labelling are already in the market in Australia, and are being rolled out into stores in the normal course of trade. The relevant items on Heilala's website have been removed, and will be substituted by material which does not make the claims found to be in breach in the determination".*



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## Annexure to Case Report – Representative Advertising Material the subject of Complaint 18 ASIJ 1

- (a) The description of the non-premium vanilla extract Product on the Advertiser website/social media as appears below and accompanied by a depiction of the Product with the label description “NATURAL VANILLA WITH VANILLA EXTRACT”;



NATURAL VANILLA WITH VANILLA EXTRACT  
125ML  
\$14.95

QUANTITY:

ADD TO CART

DETAILS SHIPPING

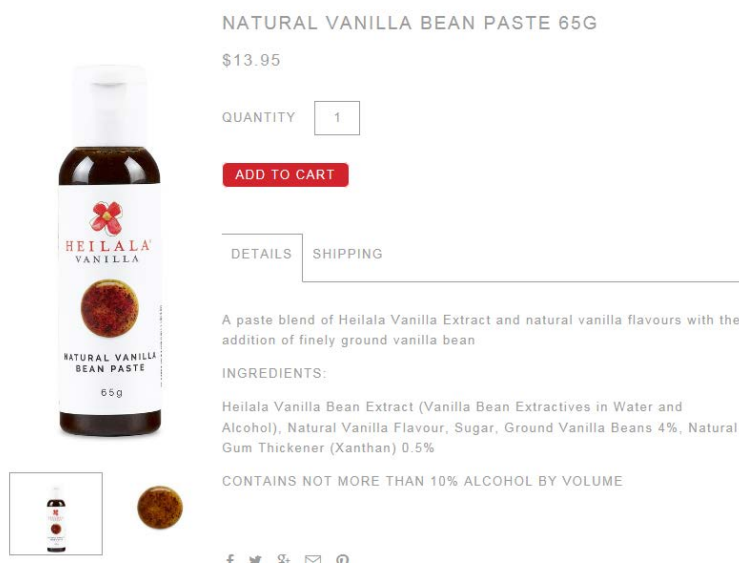
A liquid blend of Heilala Vanilla Extract and natural vanilla flavours

INGREDIENTS:  
Heilala Vanilla Bean Extract (Vanilla Bean Extractives in Water and Alcohol), Natural Vanilla Flavour, Sugar

CONTAINS NOT MORE THAN 10% ALCOHOL BY VOLUME

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- (b) The description of the non-premium vanilla paste Product on the Advertiser website/social media as appears below and accompanied by a depiction of the Product with the label description “NATURAL VANILLA BEAN PASTE”;



NATURAL VANILLA BEAN PASTE 65G  
\$13.95

QUANTITY:

ADD TO CART

DETAILS SHIPPING

A paste blend of Heilala Vanilla Extract and natural vanilla flavours with the addition of finely ground vanilla bean

INGREDIENTS:  
Heilala Vanilla Bean Extract (Vanilla Bean Extractives in Water and Alcohol), Natural Vanilla Flavour, Sugar, Ground Vanilla Beans 4%, Natural Gum Thickener (Xanthan) 0.5%

CONTAINS NOT MORE THAN 10% ALCOHOL BY VOLUME

f t g e p



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- (c) The description of the non-premium Products range, as appears below:

## naturals range

HOME / HEILALA VANILLA / NATURALS RANGE

In an effort to create a line that all bakers could afford, we worked with an international flavor house to develop the highest-quality natural vanilla flavour to emulate the 200+ flavor compounds found in our vanilla beans. The 100% naturally sourced vanilla flavour is blended with pure Heilala Vanilla extract, resulting in a uniquely complex, rich and robust taste.

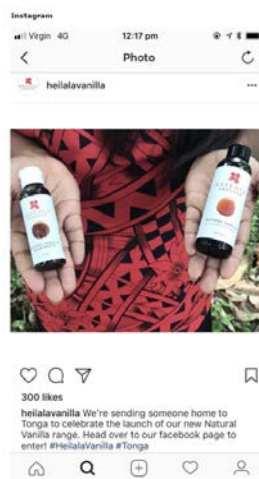
- (d) The now superseded description of the non-premium Products range, as appears below:

## naturals range

HOME / HEILALA VANILLA / NATURALS RANGE

Heilala Vanilla is the base ingredient of our Naturals range. Developed in partnership with an international flavour house, our natural vanilla flavour is of the highest quality, 100% naturally sourced and created to emulate the flavour compounds found in a Heilala Vanilla Bean. When our Natural vanilla flavour is blended with Heilala Vanilla Extract, a complex and robust vanilla flavour profile is achieved.

- (e) The Instagram posted image below:



Source: <https://www.instagram.com/heilalavanilla/?m=1> (Accessed 26 June 2019)