

1. Matter reference	JAL/PAU/99	
2. Advertiser	Pauls Ltd	
3. Complainant	Jalna Dairy Foods Pty Ltd	
4. Product	Food	
5. Type of advertisement	Print	
6. Nature of complaint	Section 1.2	
7. Date of determination	22 September 1999	
8. Board members	Odette Gourley (Chair)	<i>Minter Ellison</i>
	Ross McLean	<i>Baker & McKenzie</i>
	Conway Restom	<i>Michell Sillar</i>
9. DETERMINATION	

DESCRIPTION OF THE ADVERTISEMENT

The print advertisement consists of a photograph of two 'Vaalia' yoghurt products in a setting of fresh fruit. Superimposed text reads *"Vaalia is the only dairy range of yoghurts and yoghurt drinks to combine the triple action health benefits of Acidophilus, Bifidus and the strongest of all "good bacteria", Lactobacillus GG. Lactobacillus GG or, more simply, LGG, has been proven to boost the performance of the A and B cultures. Together these cultures can enhance your body's natural defences against harmful bacteria and promote healthy digestion. Vaalia drinks and yoghurts are not only good for you, they're exceptionally delicious too and come in a fruity range of exclusive flavours. Do your inner health a world of good. Hail Vaalia, the only dairy range with LGG. THREE DYNAMIC CULTURES. THREE TIMES THE HEALTH BENEFITS."*

THE COMPLAINT

Comments that the complainant made regarding this advertisement included the following:

"Specifically, it makes three misleading claims that combine to create a deceptive advertisement:

- 1. It claims Lactobacillus GG to be the 'strongest of all good bacteria' ... this is an unsubstantiated superlative.*
- 2. It claims that 'this culture has been proven to boost the performance of the A and B cultures' without sourcing the actual proof.*
- 3. The headline 'Three Times The Health Benefits' is clearly deceptive and begs the question: three times the health benefit of what?"*

THE ADVERTISER'S RESPONSE

Comments that the advertiser made in response to the complaint included the following:

"Lactobacillus GG was discovered in 1985 and has since become the most researched probiotic ('good' or 'healthy', literally 'pro-life') culture in the world, with the greatest number of scientific papers published proving clinical benefits ... 'A Nordic research project is currently underway to establish criteria for selecting and evaluating new probiotic strains. Lactobacillus GG is used as a gold standard for comparison in these tests and the results will form new selection criteria for the future.' ... The statement that Lactobacillus GG is the strongest of all 'good bacteria' represents in everyday language the scientific fact that Lactobacillus GG is a 'good' bacteria (which seems to be unarguable) and that it has the strongest documented case for clinical effectiveness and safety of all probiotic bacteria."

"The paper by Yoshimi Benno and co-workers in 'Nutrition Today' Supplement to Volume 31 Number 6 November/December 1996, pages 9s - 11s presents results showing that Lactobacillus GG boosts the proportion of Bifidobacteria (B culture) and Lactobacilli (of which A culture is one) in the intestine."

"It is well established that Lactobacillus GG, Lactobacillus acidophilus and Bifidobacteria have health benefits ... The phrase 'three times the health benefits' states in everyday language that Vaalia provides benefits from three probiotic bacteria, not just one, as many products do."

ADVERTISING CLAIMS BOARD DETERMINATION

Introduction

This is a determination of the Advertising Claims Board in relation to an advertising dispute between Jalna Dairy Foods Pty Limited (**the Complainant**) and Pauls Limited (**The Advertiser**) concerning a magazine advertisement for the Advertiser's Vaalia brand yoghurt and yoghurt drink products. The Claims Board is constituted by a panel comprising Odette Gourley (Chair) of the firm Minter Ellison, Conway Restom of Michell Sillar and Ross McLean of Baker & McKenzie. Each of us is a lawyer who has certified that he or she has experience and expertise in advertising and/or trade practices law.

Preliminary Observations

1. These preliminary observations do not form part of the determination. However, since this is the first determination of the Advertising Claims Board, to assist advertisers and advertising agencies, we make some comments on the approach we have taken in reaching a determination on the complaint before us.
2. Operation of the Claims Board is an activity of the Advertising Standards Bureau Limited, a company established by the Australian Association of National Advertisers ('AANA') and funded through the vehicle of Advertising Standards

Council Limited. Through the Claims Board and the Advertising Standards Board, the Bureau administers the AANA voluntary Advertiser Code of Ethics.

3. The Standards Board deals with complaints concerning matters of taste and decency, etc. in advertising (see section 2 of the Code). The Claims Board does not deal with such complaints. Its role is to resolve disagreements between competitors in relation to complaints of misrepresentation in advertising, as a voluntary alternative to litigation.
4. The Bureau publishes for the information of potential participants guidelines on the procedures followed by the Claims Board.
5. Section 1 of the Code of Ethics provides as follows:
 - 1.1 *Advertisements shall comply with Commonwealth law and the law of the relevant State or Territory.*
 - 1.2 *Advertisements shall not be misleading or deceptive or be likely to mislead or deceive.*
 - 1.3 *Advertisements shall not contain a misrepresentation which is likely to cause damage to the business or goodwill of a competitor.*
 - 1.4 *Advertisements shall not exploit community concerns in relation to protecting the environment by presenting or portraying distinctions in products or services advertised in a misleading way or in a way which implies a benefit to the environment which the products or services do not have.*
 - 1.5 *Advertisements shall not make claims about the Australian origin or content of products advertised in a manner which is misleading.*
6. The notion of 'misleading' and 'misrepresentation' is a key element of each of clauses 1.2 to 1.5. Clause 1.2 deals with misleading advertising generally. Clause 1.3 deals with misleading advertising likely to cause damage to the business or goodwill of a competitor. Clause 1.4 focuses on advertising that is misleading in relation to protecting the environment and clause 1.5 deals with advertising that is misleading in relation to the Australian origin of products. We think nothing turns on minor differences in language, for example, in that clause 1.3 refers to advertisements that 'contain a misrepresentation' and clause 1.4 refers to 'in a misleading way'.
7. Although the Code is a voluntary code of ethics and, so, could establish standards in relation to advertising that are higher than required by the law, we take the view that the Code does not so establish. We take the view that an advertisement does not breach any of clauses 1.2 to 1.5 of the Code unless its publication by an advertiser would amount to a breach of at least section 52 of the *Trade Practices Act* and equivalent provisions of *Fair Trading* laws which prohibit misleading or deceptive conduct in trade or commerce. Thus, we treat clause 1.2 as approximating section 52 of the *Trade Practices* (or equivalents) and clauses 1.3, 1.4 and 1.5 as specific applications of section 52 or, to put it

another way, as examples of advertising that is unacceptable because it is misleading in a particular way.

8. Clause 1.1 is broader, of course, because it refers to a range of laws. Since, however, the gist of the present complaint is that the advertisement is misleading, there is no need to anticipate the other ways in which advertisements might breach clause 1.1 of the Code by not complying with laws.
9. Thus, the minimum 'standard' we apply is that established by decisions of the Federal Court of Australia and other courts as to conduct prohibited by section 52 of the *Trade Practices Act* and the equivalent provisions of *Fair Trading* laws, in the context of advertising.
10. This approach should assist advertisers and agencies by looking to a relatively certain and predictable standard as clarified and explained in many decisions of the courts about section 52 and its equivalent provisions.
11. We take a 'legal' approach to the standard we have to apply. When it comes to matters of proof, however, we avoid an overly legal approach.
12. The procedural guidelines note that it is the responsibility of the complainant to establish and substantiate its claim (clause 4.6). The guidelines also note, however, that the advertiser should provide substantiation of the claims at issue (clause 2.3). Further, the manner in which the Claims Board case reports are to be published are classified, in part, according to the actions by the advertiser in substantiating the disputed material (see clause 3.3).
13. We take a common sense approach to matters of proof. There should be no strict legalistic rules in relation to onus of proof on complainant or advertiser. On the other hand, complaints which reach a reasonable threshold in demonstrating a breach of the Code or frivolous complaints will be encouraged. Also, the Claims Board will take account, not just of what is said by complainant or advertiser by way of substantiation, but what is not said. Otherwise, the Claims Board could too easily direct itself into seeking out facts which is not its role. The Claims Board does have an ability to invite the submission of further material by the parties but we envisage that this would be undertaken relatively rarely.
14. Clearly, complainants would be well advised to provide as much information as possible demonstrating that a disputed advertising claim is in fact misleading. However, a complaint will not necessarily fail in the absence of such material. Likewise, advertisers would be well advised to address the issues raised by the complainant but, if they fail to do so, a complaint will not automatically be upheld.
15. The task for the Claims Board is to determine whether there is a breach of Part 1 of the Code. Rules about proof on a balance of probabilities or beyond reasonable doubt are out of place.
16. What is required is that the Claims Board be able to reach a reasonable level of satisfaction that the advertisement is misleading. If the Board is not reasonably

satisfied that the advertisement is misleading then the Board's determination will be that there is no breach of the Code.

17. These comments do not address all of the issues that might arise in relation to the role and approach of the Claims Board. These will emerge as the Board makes determinations, complaint by complaint.

The Determination

1. A copy of the advertisement, a magazine print advertisement, is attached. The Complainant says that the advertisement breaches clause 1.2 of the Code because it makes three misleading claims that 'combine to create a deceptive advertisement'.
2. The Complainant says that the reference to Lactobacillus GG as the 'strongest of all "good bacteria"...' is misleading because it is an 'unsubstantiated superlative'. The Advertiser justifies the claim on the basis that it 'represents in everyday language' that Lactobacillus GG is a 'good' bacteria and that it has the 'strongest documented case for clinical effectiveness and safety of all probiotic bacteria'.
3. The Complainant's second issue is that the advertisement states that Lactobacillus GG has been 'proven' to boost the performance of certain cultures when no data is referenced. The Advertiser responds with a reference and notes that there is no requirement in advertising for products of this kind that data to support a claim be referenced.
4. The third area of complaint relates to the use of the phrase 'three times the health benefits' which is said to suggest qualities beyond that involved because of the presence of three 'good bacteria'. The Advertiser responds that the phrase merely states in everyday language that the product provides benefits from three bacteria, not just one.
5. The Claims Board has given careful consideration to each area of complaint, including careful review of the material received from Complainant and Advertiser. In this case, the Claims Board has been able to reach a determination without seeking further assistance. Each area of complaint has ultimately depended on reaching a view as to the messages conveyed to consumers by the advertisement.
6. As to the first area of complaint, to describe Lactobacillus GG as the 'strongest of all "good" bacteria' suggests that the bacteria has an action or benefits more powerful than other 'good bacteria'. We think consumers would take a meaning of this kind from the advertisement. We do not agree with the Advertiser that the claim would be taken by consumers as indicating that it has the 'strongest documented case' for effectiveness and safety. The Advertiser has sought to support that meaning but, since we take a different view of the meaning of the claim, we do not need to determine whether the Advertiser has demonstrated the 'strongest documented case'.
7. The Advertiser has not sought to demonstrate that a meaning concerned with superior action or benefit is true. The data referred to does not appear to include

data comparing the attributes or benefits of Lactobacillus GG and those of other 'good bacteria' when some such data would be necessary to justify the claim as we determine consumers would understand it. The reference in the literature, to which the Advertiser referred in its response to the complaint, to Lactobacillus GG as the 'gold standard' for efficacy testing of bacteria falls short of establishing that it is 'strongest' in the relevant sense.

8. In the circumstances, we determine that unless there is data substantiating superior action or benefits of Lactobacillus GG over other 'good bacteria', it would be a breach of the Code to continue the advertisement without modification.
9. In relation to the second area of complaint, we determine that the Advertiser has substantiated the claim. We agree with the Advertiser that there is no requirement that the supporting data be referenced in the advertisement. The Complainant seems to accept that the evidence referred to by the Advertiser supports the 'proven to boost performance' claim.
10. In relation to the third area of complaint, it is necessary to determine the meaning consumers would take from the phrase 'three times the health benefits' in the context of the advertisement as a whole. Would consumers take the claim, as the Advertiser suggests, as merely referring to the opportunity to benefit from three bacteria rather than a smaller number? Or would consumers take out something more - a meaning that the product has significantly superior health benefits because of the presence of three bacteria over products with less than three?
11. Given the prominence of the phrase in the advertisement and the supporting copy including reference to 'combine the triple action health benefits...', we think consumers would be led by the phrase to believe that the product has significantly superior health benefits over products containing less than three bacteria. The Advertiser does not seriously endeavour to demonstrate the truth of such a meaning and argues that the phrase merely refers to the presence of three bacteria. The Advertiser does, in passing, refer to a synergy between Lactobacillus GG, Lactobacillus acidophilus and Bifidobacteria but insufficient information is provided to enable us to determine that this demonstrates significantly superior health benefits over products containing less than three bacteria. Presumably, if such data were available, the Advertiser would have provided it.
12. In the result, the advertising has been partly substantiated but requires substantial modification if it is to be continued without breach of the Code.
13. In accordance with the procedural guidelines, the Claims Board will proceed to notify the Advertiser and request the Advertiser to provide an Advertiser Statement as to whether it agrees to modify or discontinue the advertising.

ADVERTISER'S STATEMENT