



Ad Standards Industry Jury
PO Box 5110, Braddon ACT 2612
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Ad Standards Limited
ACN 084 452 666

Case Report

1	Case Reference	19 ASIJ 1
2	Advertiser	Sandem Pty Ltd t/a Jenquine
3	Complainant	Calinnova Ltd t/a EquiFeast
4	Product	DR JENNIFER STEWART'S BONE FORMULA FORTE
5	Type of Advertisement/Media	Website, social media
6	Industry Jury Panel Members	Laura Hartley, Addisons (Chair) Catherine Chant, Halfords IP Georgina Hey, Norton Rose Fulbright
7	Date of Determination	8 October 2019
8	DETERMINATION	Advertising modified or discontinued Complaints upheld in relation to breaches of sections 1.1 and 1.2 of the Code as identified in the Determination below.

1. Introduction

- 1.1 A complaint was lodged on 1 May 2019 (**the Complaint**) with Ad Standards by Calinnova Ltd t/a EquiFeast (**Complainant**) against Sandem Pty Ltd t/a Jenquine (**Advertiser**) regarding the Advertiser's advertising for the product known as "Dr Jennifer Stewart's Bone Formula Forte" (**Product**). The Product is a horse supplement containing calcium and other minerals. 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 on social media platforms, including Facebook and YouTube, in relation to the Product (**the Advertising Material**). For the purposes of determination of the Complaint, the Industry Jury has had particular regard to the following materials:



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- (a) pages on the Advertiser's website, in particular the product page and FAQs page (**Website Advertising**) – extracts of which are set out in Annexure A;
- (b) the brochure for the Product (**Product Brochure Advertising**) – set out in Annexure B; and
- (c) a video titled 'ECN SIE2 Bone Formula Forte' advertising the Product and posted by the Advertiser on YouTube on 28 May 2018 (**YouTube Advertising**) – a transcription of which is set out in Annexure C.

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 provides:

- 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 essence of the Complaint is that the Advertising Material contains representations which are misleading or deceptive or likely to mislead or deceive. The Complainant offers a number of reasons in its submissions in support of its position. In general, we found the Complainant's submissions quite technical and the analysis difficult to readily understand, and observed also a degree of overlap between some of the arguments raised. Nevertheless, we sought further detail from both Complainant and Advertiser and have distilled three key issues which are at the heart of the Complaint, being that the Advertising Material contains representations which can be grouped as follows:

- (a) representations that the Product contains a substantial amount of chelated calcium relative to non-chelated calcium (**Content Representations**);
- (b) representations that the Product contains a sufficient level of chelated calcium to meet the nutritional needs of horses with, or at risk of, varying levels of calcium deficiency due to oxalate grazing (**Efficacy Representations**); and



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- (c) representations that the Product contains calcium which is chelated to the amino acid methionine, organic, and pharmaceutical grade in quality (**Methionine Representations**),

(together, **Representations**) in circumstances where the Advertiser has no reasonable basis for making the Representations.

- 3.3 The Complainant also submits that, in order to correct the misleading impression created by the Content Representations and to assist consumers in making an informed comparison between the Product and other products on the market (in particular, the Complainant's products), the Advertiser must quantify the proportion of chelated calcium in the Product.
- 3.4 The Complainant has provided technical test data relating to the Product and various discussion materials in support of its arguments.
- 3.5 Notably, in its written submissions, the Complainant sought to argue that the Advertiser was making the relevant Representations in breach of the Code in respect of both the Product and another product 'Dr Jennifer Stewart's Calsorb Forte', being a product substantially identical to the Product. However, as the Complainant has only provided us with testing results in respect of the Product, we have limited our determination to Representations by the Advertiser in relation to the Product only.

4. Advertiser's response

- 4.1 The Advertiser denies that it has made the Content Representations or the Efficacy Representations in any of its Advertising Material. The Advertiser does not dispute that it has made the Methionine Representations but relies on written correspondence with its supplier to provide support for making such Representations.
- 4.2 The Advertiser states that it is under no obligation to quantify the ingredients contained in its Product by calling out the specific proportion of chelated calcium.
- 4.3 In addition, the Advertiser challenges the credibility of the Complainant and questions its motives for filing the Complaint. These latter points raised by the Advertiser were considered by the Industry Jury to be largely irrelevant to the resolution of the dispute.



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5. DETERMINATION

Preliminary observations

Role of Industry Jury

- 5.1 The role of the Industry Jury is to resolve disputes between competitors in relation to complaints around misleading claims and misrepresentations in advertising, as a voluntary alternative to litigation. In resolving such disputes, the Industry Jury applies the standard for truth in advertising established by decisions of the Federal Court and appellate courts in relation to conduct prohibited by section 18 of the *Australian Consumer Law*.
- 5.2 The Industry Jury comprises a panel of lawyers certified as having experience or expertise in advertising and/or consumer law.
- 5.3 Bearing in mind the role and composition of the Industry Jury, it is important to note that the Industry Jury is not an appropriate forum for the determination of disputes which are of a purely scientific or technical nature. Despite the highly technical nature of some of the Complainant's arguments, we were able to nevertheless determine this Complaint.

Standard of proof

- 5.4 As first noted by the Industry Jury (then, the Advertising Claims Board) in the matter of JAL/PAU/99 (22 September 1999), the Industry Jury adopts a common sense approach to matters of proof rather than taking an overly technical approach. What is required in order to establish a breach of the Code is simply that the Industry Jury is able to reach a reasonable level of satisfaction that the advertisement complained of is misleading or deceptive or likely to mislead or deceive.
- 5.5 In terms of which party bears the onus of proof, the Complainant noted multiple times in its submissions that the Advertiser has the onus of proof. However, we note that both the Complainant and the Advertiser have a duty under the Procedural Guidelines to provide substantiation for their respective positions. That is, the Complainant is responsible for establishing and substantiating its claim (cl 5.6), in the sense that complaints must reach a reasonable threshold in demonstrating a breach of the Code. This is in order to discourage frivolous complaints from being made to the Industry Jury. On the other hand, the Advertiser is expected to provide substantiation of the Representations at issue (cl 3.1). It is a fundamental requirement of laws around truth in advertising, which have been adopted in the Code, that advertisers should be able to substantiate their advertising and marketing claims and representations made in that advertising and marketing.



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Materials referred to in this determination

- 5.6 In determining the Complaint, the Industry Jury has considered all the material provided by the Advertiser and Complainant and sought further information from both the Advertiser and the Complainant to determine this matter.
- 5.7 In our analysis below, we reference the following submissions by the parties:
- (a) initial letter by the Complainant to Ad Standards dated 1 May 2019 (**C1**);
 - (b) letter of response by the Advertiser to Ad Standards dated 8 July 2019 (**A1**);
 - (c) letter of response by the Complainant to Ad Standards dated 18 July 2019 (**C2**);
 - (d) second letter of response by the Advertiser to Ad Standards dated 31 July 2019 (**A2**);
 - (e) additional materials provided by the Complainant to Ad Standards in response to a request from the Industry Jury dated 25 August 2019 (**C3**); and
 - (f) additional materials provided by the Advertiser to Ad Standards in response to a request from the Industry Jury dated 26 August 2019 (**A3**).
- 5.8 We do not purport to make any comments in respect of the standards of compliance around the labels or packaging of the Products. This is because labels and packaging materials for products are excluded from consideration under the Code.

Summary of Industry Jury determination

- 5.9 The Industry Jury finds that the Advertiser has breached Sections 1.1 and 1.2 of the Code by making representations about its Products in its Advertising Material which create an overall impression that is misleading or deceptive or likely to mislead or deceive. In particular, we note that the Advertiser has made Content Representations, Efficacy Representations and Methionine Representations through its Advertising Material, including via the Website Advertising, Product Brochure Advertising and YouTube Advertising, in circumstances where it does not have reasonable grounds for making such Representations.
- 5.10 The Industry Jury does not consider that it has been provided with sufficient evidence to determine whether a breach of Section 1.3 of the Code has occurred. We note that the Complainant has referred anecdotally to the loss of potential sales in respect of its own products as a result of the Advertiser's marketing practices, e.g. "[consumers and vets who use the Product] believe the results are those of a true Chelated Calcium Supplement)" and



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are then “discouraged from trying our products – especially because of our significantly higher pricing which is caused by the high cost of chelated calcium” (C1). However, the Complainant has not provided us with any sales data over a reasonable period of time, demonstrating a loss of sales which can be linked to the marketing practices of the Advertiser in order to support these assertions.

5.11 We have set out our detailed analysis below.

Analysis

Principles around misleading or deceptive conduct

- 5.12 As noted above, the standard applied by the Industry Jury in determining whether an advertising or marketing communication has breached the Code is that set by the Federal Court and appellate courts when determining whether there has been a breach of section 18 of the *Australian Consumer Law*.
- 5.13 For the purposes of determining this particular Complaint, we have had particular regard to the following principles:
- (a) whether particular conduct is misleading or deceptive is a question of fact to be determined in the context of the evidence as to the alleged conduct and the relevant surrounding facts and circumstances – in particular, there must be a sufficient causal link between the conduct and error on the part of the persons exposed to it: *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640;
 - (b) in determining whether conduct is misleading or deceptive or likely to mislead or deceive, the conduct must be considered by reference to the class of persons likely to be affected by the conduct: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191;
 - (c) the test is whether a not insignificant number of persons in the relevant class would likely be misled: *Hansen Beverage Co v Bickfords (Aust) Pty Ltd* (2008) 171 FCR 579;
 - (d) the relevant class of people may range from the gullible to the astute, and the Court must consider whether the ordinary or reasonable members of that class would be misled or deceived: *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435; and
 - (e) the dominant message of the advertising is of crucial importance: *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640.



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5.14 We have applied these principles below, looking at each of the Representations in context.

Content Representations

Background

- 5.15 The Complainant alleges that the Advertiser has made the Content Representations in its Advertising Material, being representations to the effect that the Product contains a substantial amount of chelated calcium relative to non-chelated calcium (C1). The Complainant asserts that the Content Representations are misleading or deceptive because the Complainant commissioned third party testing analysis which indicates that only a very small percentage (1.65%) of the total calcium in the Product is chelated calcium (C1).
- 5.16 The Complainant argues further that, in order to avoid giving the overall impression that the Product contains a significant amount of chelated calcium when it does not, the Advertiser should be required to disclose the actual amount of chelated calcium in its Product (C1).
- 5.17 In support of its allegations, the Complainant refers specifically to the following:
- (a) based on the Complainant's limited discussions with veterinarians in the market (being a key target market for the Product), many such veterinarians believe that the Product is a "true chelated calcium supplement" and that the Product is comparable in nature to the Complainant's own 100% chelated calcium product;
 - (b) the Complainant has commissioned a third party testing laboratory to test the amount of chelated calcium in the Product, the Complainant's own product, and a number of other third party products which are of a similar nature. This testing revealed that the amount of chelated calcium in the Product and the third party products is very low relative to other ingredients – as distinct from the Complainant's own product, which contained a significantly higher amount of chelated calcium relative to other ingredients (C1).
- 5.18 In response, the Advertiser denies that it has made any representations regarding the significance of the chelated calcium content in respect of the Product (A1). The Advertiser maintains that its advertisements clearly and accurately set out the Product composition, and rejects the Complainant's assertion that it has any obligation to disclose the actual amount of chelated calcium in its Product (A1). Further, the Advertiser has referred to the fact that most of its customers are veterinarians (and lay people acting on veterinary advice) and that veterinarians are *"well informed professionals who are properly qualified and experienced to determine whether [the Products] are properly advertised, labelled and packaged"* (A2).



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Has the Advertiser made Content Representations in the Advertising Material?

- 5.19 The first stage of our analysis around the Content Representations is to consider whether the Advertiser has made any Content Representations in its Advertising Material.
- 5.20 In order to determine this, we have had regard to the multiple references to chelated calcium in the Advertising Material and in particular, the following statements, taking into account their form, content and the context in which they appear:
- (a) the statement *"We've formulated Bone Formula Forte with high levels of chelated calcium"* by Dr Jennifer Stewart in a YouTube video posted by the Advertiser (YouTube Advertising, Annexure C);
 - (b) the description of the Product on the product page of the Advertiser's website which includes the line *"Only chelated calcium is protected from oxalates and phytates in the food"* which appears immediately above the statement *"Calcium 302g"* with no disclaimers to indicate that the *"302g"* reference includes both chelated and non-chelated calcium (Website Advertising, Annexure A);
 - (c) various statements throughout the Advertiser's website and in the Product brochure calling out the benefits of chelated calcium, as distinct from non-chelated calcium, and highlighting its use in the Product, e.g. *"Chelation protects calcium from oxalate attack, is over 95% absorbed into the blood stream and, in the presence of oxalates, is more bioavailable than inorganic forms (lime and dicalcium phosphate). Dr Jennifer Stewart's Bone Formula Forte and Calsorb Forte contain chelated calcium PLUS essential bone trace minerals"* (Website Advertising, Annexure A and Product Brochure Advertising, Annexure B); and
 - (d) similarly to the above, the emphasis in the Product brochure on the advantages of chelated calcium over non-chelated calcium, e.g. ***"WHY USE CHELATED CALCIUM?"***, ***"WHY NOT JUST FEED MORE ORDINARY CALCIUM (LIME, DCP ETC)?"*** and the table in the Product brochure which sets out the Nutrient Intake as a % of minimum RDI and sets out calcium as providing 200% of that minimum RDI, without stating what percentage comes from chelated calcium despite the significant emphasis on the benefits of chelated calcium as opposed to non-chelated calcium in the rest of the brochure (Product Brochure Advertising, Annexure B).
- 5.21 We also note that, in the YouTube video, the Advertiser expressly states that the Product contains *"high levels"* of chelated calcium. This is a positive and unqualified representation regarding the composition of the Product. Further, in each of its marketing communications, the Advertiser's Representations around calcium content in the Product refer exclusively to



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chelated calcium and its advantages over non-chelated calcium, e.g. *“Chelation protects calcium from oxalate attack, is over 95% absorbed into the blood stream and, in the presence of oxalates, is more bioavailable than inorganic forms”*, *“WHY USE CHELATED CALCIUM?”*, *“WHY NOT JUST FEED MORE ORDINARY CALCIUM”*. Having regard to these references, we consider it likely that a not insignificant number of reasonable consumers in the relevant target market would expect the Product to contain a substantial amount of chelated calcium relative to non-chelated calcium.

- 5.22 On the other hand, we note that there is a section on the FAQs page of the Advertiser’s website titled ***“Why can’t the entire calcium content of a supplement be chelated?”*** with the response *“Horses don’t need that much chelated calcium and it would be wasteful and expensive... The really important thing to keep in mind is that we are not endeavouring to perfectly balance the mineral content of the entire diet – we are just attending to the oxalate problem and supplying trace elements”*. There is a further section on the FAQs page titled ***“How much bone formula forte is chelated?”*** to which the response is simply *“Commercial in-confidence proprietary information”* (Website Advertising, Annexure A).
- 5.23 Apart from the sections in the FAQs referred to above, there are no other references in the Advertising Material which disclose that the Product contains a significant amount of non-chelated calcium as well as chelated calcium.
- 5.24 On balance, we have come to the conclusion that the Content Representations have been made. We have come to this view notwithstanding:
- (a) the Complainant’s findings through its third party testing that the majority of relevant products on the market, including the Product, contain only very low levels of chelated calcium – this may suggest that a not insignificant number of reasonable consumers in the target market might understand that only a very low level of chelated calcium is typically contained in such products; and
 - (b) the Advertiser’s arguments that the majority of persons in the relevant target market for the Product are veterinarians who would be expected to have a reasonable degree of experience and expertise around such products, such that they would examine advertising and marketing Representations with a greater degree of scrutiny than the average consumer.
- 5.25 We agree that the above factors are relevant to bear in mind when determining what the overall impression created by a representation is likely to be to a reasonable consumer in the relevant target market. However, they do not exempt the Advertiser from having to take reasonable steps in its advertising and marketing to assist such consumers in understanding what the true nature and composition of the Product is.



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- 5.26 In the circumstances, we do not consider that reasonable steps have been taken by the Advertiser to overcome the dominant message in the Advertising Material i.e. that there is a significant amount of chelated calcium in the Product. As noted above, there are no references in the Advertising Material other than two sections on the FAQs page (which is included in the Website Advertising only) that would indicate to a reasonable consumer in the relevant target market that the Product contains any form of calcium other than chelated calcium. Further, the Advertiser has focused almost exclusively on the benefits of chelated calcium in its advertising content for the Product. On balance, the overall impression of the relevant communications is that the Product contains a substantial amount of chelated calcium relative to all other ingredients including non-chelated calcium.
- 5.27 We do not agree with the Complainant's assertion that the Advertiser has an obligation to set out the precise amount of chelated calcium in its Product. However, the overall impression of any representations made in advertising or marketing must not be misleading or deceptive. Therefore, unless the Content Representations can be substantiated, the Advertiser must create a more balanced impression in its marketing such as by placing more emphasis on the presence and benefits of other ingredients in the Product rather than focusing exclusively or primarily on the chelated calcium benefit and content.
- 5.28 Accordingly, we find that the Advertiser has made Content Representations in its Advertising Material.

Are the Content Representations misleading or deceptive in breach of the Code?

- 5.29 The next stage of our analysis is to consider whether the Content Representations are misleading or deceptive in breach of the Code.
- 5.30 The Complainant has provided third party testing analysis which indicates that only a relatively small percentage of the Product comprises chelated calcium and that the majority of the Product is made up of a non-chelated form of calcium, being calcium carbonate. We note that there is a significant disparity between the proportion of chelated calcium in the Product compared to non-chelated calcium and that, as a matter of fact, the Product contains only a relatively low percentage of chelated calcium overall.
- 5.31 Further, we have had regard to the fact that the Advertiser has not made any attempt to argue or demonstrate that the Product contains a substantial amount of chelated calcium as distinct from non-chelated calcium. Rather, the basis for the Advertiser's objections is that it has not made the Content Representations at all.
- 5.32 However, for the reasons set out above, we find that the Advertiser has in fact made the Content Representations. Further, we note that on the evidence presented by the parties,



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the Advertiser does not appear to have reasonable grounds for making the relevant representations. We refer in particular to the reasoning of the Federal Court in *ACCC v Nudie Foods Australia Pty Ltd* [2008] FCA 943, and the risks around over-emphasising the presence of a key ingredient in a product where only a very small proportion of that ingredient is in fact used in the product.

- 5.33 We therefore find that the Advertiser has breached the Code by making misleading or deceptive Representations around the composition of the Product.

Efficacy Representations

Background

- 5.34 The Complainant alleges that the Advertiser has made the Efficacy Representations, being representations to the effect that the Product contains a sufficient level of chelated calcium to meet the nutritional needs of horses with, or at risk of, varying levels of calcium deficiency due to oxalate grazing (C1). The Complainant alleges that this is misleading or deceptive because such Representations are incapable of substantiation on the basis that there is no available scientific evidence around the impact of chelated calcium supplements on horse health, whether in oxalate environments or otherwise (C1, C3).
- 5.35 In response, the Advertiser denies that it has made *“any Representations in any of its literature, conferences, seminars or social media that the levels of organic chelated calcium present in [the Product] are sufficient to address the problems of calcium-deficient feeds and diets of horses”* (A3). Further, the Advertiser advises that there are numerous factors which will affect the amount of calcium an individual horse requires so that in fact *“it is not possible to specify the amount of organic (chelated) and inorganic calcium required to address dietary deficiencies”* (A3). The Advertiser maintains that it has only presented a recommended intake *“as a range and a general feeding guide”* (A3).

Has the Advertiser made Efficacy Representations in the Advertising Material?

- 5.36 We refer to the following statements in the Advertising Material, taking into account their form, content and the context in which they appear:
- (a) the claim *“Formulated for the prevention, management and treatment of calcium and mineral deficiencies in horses’ diets”* which appears in large font in a prominent position on the front of the product brochure and the claim *“To address the problems of calcium-deficient feeds and diets, Dr Jennifer Stewart’s Bone Formula® Forte and Calsorb® Forte are formulated with organic chelated calcium which is protected from oxalate binding”* which appears in two places on the second page of



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the product brochure, including in large font at the top centre of the page as a response to the question **“WHY USE CHELATED CALCIUM?”** (Product Brochure Advertising, Annexure B);

- (b) the following statements by Dr Jennifer Stewart in the YouTube video posted by the Advertiser (YouTube Advertising, Annexure C):
- (i) *“[I’m] here to talk about a product we have formulated specifically for horses that are grazing oxalate pastures. One of the big problems for the horses on these pastures is osteoporosis... Now there are lots of ways that we can supplement the diets for these horses, but because it involves oxalates, it’s a very, very particular problem and it requires a particular solution. We’ve formulated Bone Formula Forte with high levels of chelated calcium. And chelated calcium is absorbed and meets daily requirements regardless of the oxalate levels in the pasture.”*
 - (ii) *“With Bone Formula Forte, we’ve used a chelated form of calcium so the horse’s calcium requirements will be met, no matter what the level of oxalate is in the pastures.”*
 - (iii) *“We developed Bone Formula Forte based on clinical trials... Bone Formula Forte has been tested in clinical trials for over 2 to 3 years. Some of the trials ran for longer because of the severity of the clinical signs. We did the trials using horses that had signs of osteoporosis. Not just bighead – some of them just had dental problems, spontaneous fractures, shifting intermittent lameness. So the product was trialled and developed based on the clinical results as well as the scientific data.”*
- (c) the description of the Product on the product page of the Advertiser’s website which refers exclusively to health risks associated with calcium deficiency that may arise through certain diets including oxalate-dominated feeds (*“Bighead and osteoporosis are a constant risk from high phosphorus, oxalates and phytates in feeds”*) and asserts that *“Only chelated calcium is protected from oxalates and phytates in the feed”*, with a prominent reference to the total calcium content (chelated and non-chelated) in the Product *“Calcium 302g”* (Website Advertising, Annexure A); and
- (d) the following question and answer on the FAQs page of the Advertiser’s website, which represents impliedly that the chelated calcium in the Product is equivalent to that contained in 1/2kg lime, **“WHY NOT JUST FEED MORE ORDINARY CALCIUM (DCP, LIME etc.)? Depending on oxalate and phytate levels in pasture and feeds and the extent of osteoporosis in each horse, you may have to feed up to 1/2kg of lime a**



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day to meet the calcium requirements - and there is a limit to how much calcium the body can absorb" (Website Advertising, Annexure A).

- 5.37 Having regard to the above, the Industry Jury is of the view that the Advertiser has made Efficacy Representations in its Advertising Material in respect of the Product.
- 5.38 In particular, we note the use of the expression "formulated specifically" and analogous phrases in relation to the Product, which is a clear representation that the Product has a specialised or targeted function in relation to the treatment of the diseases referred to in the Advertising Material. We note also the extensive discussion around diseases associated with calcium deficiency arising from oxalate grazing in the context of marketing the Product combined with the use of phrases such as "*The solution is mineral chelation*", which implies that, due to its chelated calcium content, the Product will be effective in treating such diseases.
- 5.39 We refer also to the manner in which the Advertising Material has been presented, with significant emphasis on the credentials and scientific expertise of the face of the brand, being Dr Jennifer Stewart, and the references to the use of clinical trials in developing the Product. These representations further reinforce the Efficacy Representations made by the Advertiser by holding out the Advertiser as a "specialist in the field" and so encouraging consumers to accept the veracity of the representations made.

Are the Efficacy Representations misleading or deceptive in breach of the Code?

- 5.40 As noted above, the role of the Industry Jury is to make determinations around whether advertising and marketing content is misleading or deceptive in breach of the Code, including by reference to any applicable laws such as the Australian Consumer Law. We do not purport to make technical or scientific rulings in respect of the actual quality or efficacy of the products which are the subject of such advertising or marketing communications.
- 5.41 With this in mind, we have considered the evidence presented by the parties with a view to determining whether there is reasonable basis for making Efficacy Representations in respect of Product of the type made by the Advertiser.
- 5.42 In our view, there is no reasonable basis for making any such Efficacy Representations in respect of the Product. Both the Complainant and the Advertiser have confirmed that there is insufficient scientific evidence currently available to indicate how much chelated calcium is required to address dietary deficiencies in an individual horse, whether in oxalate grazing environments or otherwise.



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- 5.43 The Advertiser has sought to argue that the Representations made refer to *“a range and a general feeding guide”* only, rather than being a positive statement in relation to the efficacy of the Products. However, for the reasons set out above, we consider that the Advertiser has gone beyond setting out a range and general feeding guide and has in fact made Efficacy Representations in relation to the Product.
- 5.44 Accordingly, we find that the Advertiser has breached the Code by making misleading or deceptive Representations around the efficacy of the Product.

Methionine Representations

Background

- 5.45 The Complainant alleges that the Advertiser has made the Methionine Representations, being representations that the Product contains calcium which is chelated to the amino acid methionine, organic, and pharmaceutical grade in quality (C1). The Complainant asserts that these representations are misleading or deceptive because testing analysis indicates that the Product in fact contains calcium MHA (Methionine Hydroxy Analogue), a materially different ingredient to methionine in that it is an amino acid substitute, which is synthetic in nature – as opposed to a genuine amino acid, which is natural. Further, the Complainant asserts that the ingredient used by the Advertiser is not in fact available in pharmaceutical grade.
- 5.46 As noted above, the fact that the Advertiser has made the Methionine Representations is not disputed by the Advertiser. By way of example of statements made that constitute the Methionine Representations, we refer to the following:
- (a) the claim *“Methionine 145g”* which appears in the “guaranteed analysis” for the Product on the product page of the Advertiser’s website (Website Advertising, Annexure A);
 - (b) the claim *“Dr Jennifer Stewart’s Bone Formula® Forte and Calsorb® Forte are formulated with organic chelated calcium which is protected from oxalate binding”* which appears in the Product brochure (Product Brochure Advertising, Annexure B); and
 - (c) the claim *“The chelated calcium in Dr Jennifer Stewart’s Bone Formula® Forte and Calsorb® Forte is manufactured under the pharmaceutical industry’s most stringent quality controls so you can be sure they’re free of contaminants or impurities that impede accurate prediction of bioavailability”* which appears also in the Product brochure (Product Brochure Advertising, Annexure B).



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- 5.47 However, the Advertiser denies that the Methionine Representations are misleading or deceptive and relies on written confirmation from the supplier of the ingredient, Novus Nutrition Pty Limited, in support of its position (A1). We have been provided with a copy of the correspondence between the Advertiser and its supplier on a confidential basis (A3).

Are the Methionine Representations misleading or deceptive in breach of the Code?

- 5.48 Overall, we consider that the Advertiser has not provided adequate evidence to support the Methionine Representations made in its Advertising Material.
- 5.49 First, in terms of the scope of the substantiation provided by the Advertiser, we note that these confirmations do not address each aspect of the Methionine Representations made by the Advertiser. We do not set these issues out here as the material supplied by the Advertiser in this regard is confidential to the Advertiser.
- 5.50 Next, in terms of the nature of the substantiation provided, it is important to bear in mind that in circumstances where a person is making claims about the qualities and nature of a product and/or its ingredients in trade or commerce, it is not always enough to rely entirely on confirmations from the relevant supplier to support those claims. We would expect the Advertiser to have had recourse to additional supporting materials, such as, reports or testing analysis, in order to verify the Methionine Representations. There is a material risk of consumers being misled where reasonable precautions such as those described above are not taken. This is a particular risk in relation to premium representations, which cannot be independently tested and examined by reasonable consumers. This is so even in circumstances such as these, where the majority of persons in the relevant target market for the Product may be veterinarians who would be expected to have a reasonable degree of sophistication and understanding regarding the matters involved.
- 5.51 The representations made by the Advertiser are made on an entirely unqualified basis. For instance, we refer to the statements “Methionine 145g”, “organic chelated calcium” and “manufactured under the pharmaceutical industry’s most stringent quality controls”. There is nothing on the face of the representations that might cause a reasonable consumer to question the prima facie meaning of those representations, even if such a consumer was reasonably familiar with scientific matters. However, for the reasons set out above, we consider that the materials adduced by the Advertiser in order to substantiate those representations are not sufficient in their scope, content and nature to provide a reasonable basis for the Methionine Representations.
- 5.52 Accordingly, we find that the Advertiser has breached the Code by making misleading or deceptive Methionine Representations around the nature and quality of the ingredients used in the Product.



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6. Advertiser Statement

6.1 On 19 September 2019, 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.

6.2 On 26 September 2019, the Advertiser provided the following statement:

In relation to the upheld complaints (without accepting the accuracy of the Industry Jury's determination in relation to those complaints and without any admission that it has contravened any relevant legislation or the Code), Jenquine has modified its Advertising Material.

Jenquine has also taken the opportunity to review all of its Advertising Material to better assist customers make informed decisions.

Jenquine is passionate about equine nutrition and is committed to producing the best nutritional feeds based on scientific research, analysis and feedback from industry experts. Jenquine's vision is to provide a world best-practice in equine nutrition and clinical nutritional services.



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Annexure A – Website Advertising

1. Product page

References to the benefits of chelated calcium and its presence in the Product appear on the Product Page of the Advertiser's website at <http://www.jenquine.com/products> (accessed on 9 September 2019).



DR JENNIFER STEWART'S BONE FORMULA® FORTE

FORTIFIED CALCIUM SUPPLEMENT FOR HORSES ON HARD FEED

Bighead and osteoporosis are a constant risk from high phosphorus, oxalates and phytates in feeds such as cereal and grassy hays, grains, bran and sub-tropical grass (including buffel, panic, kikuyu and setaria) found throughout Australia. Signs include shifting intermittent lameness, reluctance to move forward freely, joint pain, 'creaky' joints, stiffness, dental problems and an increased risk of fractures, tendon and ligament injuries.

Maintaining mineral intake throughout a horse's life helps protect against dietary imbalances and musculoskeletal weakness. Only chelated calcium is protected from oxalates and phytates in the feed.

GUARANTEED ANALYSIS (per kg): Calcium 302g, Manganese 8880mg, Copper 2010mg, Iodine 34mg, Zinc 810mg, Selenium 15.4mg, Methionine 145g, Salt (NaCl) 151g

This product does NOT contain restricted animal material. APVMA#: Exempt

[Download Brochure PDF](#)



Bighead and osteoporosis occurs in horses on pasture or stabled, and at any age.

It can happen on grain, bran and pasture diets — especially buffel, pangola, setaria, kikuyu, green panic and signal grass. These grasses contain oxalates that bind to the calcium in the grass, hard feed and supplements — making the diet calcium deficient and unbalancing the calcium:phosphorus ratio.

The importance of calcium

Calcium is essential for life itself (regulating heartbeat, nerve function, muscle contraction and blood clotting) and blood levels are tightly regulated by parathyroid hormone (PTH). PTH is released when diets are low in calcium — causing calcium to move out of the bones and into the blood, and leading to demineralisation of bones and osteoporosis. Mild cases are difficult to detect, manifesting as vague shifting lameness, shortened stride, soreness at ligament and tendon insertions, joint pain and swelling. In more severe forms, ligament and tendon injuries increase and there may be a watery nasal discharge, poor coat, difficulty chewing, dental pain and swelling of the jaws, maxilla, mandible and nasal bones.

Management and prevention

The dietary calcium deficiency must be corrected. Chelation protects calcium from oxalate attack, is over 95% absorbed into the blood stream and in the presence of oxalates, is more bioavailable than inorganic forms (lime and dicalcium phosphate). **Dr Jennifer Stewart's Bone Formula® Forte** and **Calsorb® Forte** contain chelated calcium PLUS essential bone trace minerals that are deficient in Australian soils, pastures, hays and grains.



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The need to provide mineral supplements for horses is well recognised. The challenge is to provide minerals which are both highly absorbable and bioavailable. The solution is mineral chelation.

Introducing chelated calcium from Dr Jennifer Stewart

In many grasses, calcium is bound to oxalates. Calcium-oxalate is insoluble in the gut and the calcium is unavailable. Other minerals are also bound to oxalates but are soluble in the gut – releasing the oxalates, which then bind to calcium in hard feed and supplements – making them unavailable. The calcium in the grass, hard feed and supplements cannot be absorbed and pass out in the manure.

To address the problems of calcium-deficient feeds and diets, **Dr Jennifer Stewart's Bone Formula® Forte and Calsorb® Forte** are formulated with organic chelated calcium which is protected from oxalate binding.

2. FAQs page

References to chelated calcium appear also on the FAQs page of the Advertiser's website at <http://www.jenquine.com/faq> (accessed on 10 September 2019).

WHY USE CHELATED CALCIUM?

To address the problems of calcium-deficient feeds and diets, Dr Jennifer Stewart's Bone Formula® Forte and Calsorb® Forte are formulated with organic chelated calcium which is protected from phytate and oxalate binding.

The benefits include:

- chelation protects calcium from interactions with other minerals, phytates and oxalates
- chelation presents calcium to the absorption sites in the intestine
- chelated calcium is embedded and protected in a ring-like structure
- in the presence of oxalates and phytates, organic chelated calcium is more bioavailable than inorganic forms

The chelated calcium in Dr Jennifer Stewart's Bone Formula® Forte and Calsorb® Forte is manufactured under the pharmaceutical industry's most stringent quality controls so you can be sure they're free of contaminants or impurities that impede accurate prediction of bioavailability.

WHY NOT JUST FEED MORE ORDINARY CALCIUM (DCP, LIME etc)?

Depending on oxalate and phytate levels in pasture and feeds and the extent of osteoporosis in each horse, you may have to feed up to 1/2kg of lime a day to meet the calcium requirements – and there is a limit to how much calcium the body can absorb.

Plus, this amount of lime will reduce absorption of other minerals. Considering the dangers of osteoporosis, the use of scientifically sound formulations that are bioavailable, is essential. Horses with correct calcium and phosphorus intakes exhibit better growth, joint cartilage health, bone mineral density, tendon strength and soundness.

This principle holds true for adult horses and is essential for young horses, brood mares and working horses – who need a steady, reliable source of minerals for tissue maintenance and resilient immunity.



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HOW IS BONE FORMULA FORTE DOUBLE STRENGTH WHEN THE GRAMS PER KILO ARE NOT DOUBLE?

The double strength refers to the chelated calcium which is 2-3 times stronger in the new BONE FORMULA *FORTE*. The reason for doubling the strength is that case studies and clinical trials (including x-rays and blood tests) showed that the degree of osteoporosis in horses on oxalate pastures can range from mild to severe.

Bone biopsy is the only way to find out how demineralised the skeleton is, and to measure remineralisation. However, our x-ray studies and research by other scientists and vets have shown that remineralisation can take up to 12 months. We can't do these studies on every horse but based on the history, length of time on oxalate pastures and clinical signs, we know that some horses need extra help to shorten the time taken to restore bone calcium levels. With the new double-strength formula, these horses can easily get the extra calcium without having to be fed huge amounts (300g a day). The double strength also means that other horses get the same calcium but in smaller dose.

When we did our research on parathyroid hormone (PTH) in horses on setaria and kikuyu, we found that PTH levels dropped back to normal within a couple of weeks of being on Bone Formula. This showed us that:

1. the horses were absorbing the BONE FORMULA calcium into the blood
2. the horses were no longer moving calcium out of their skeleton to replenish blood levels

That's great news! But it takes a lot longer than a couple of weeks to replace all the calcium that was already taken out of the bones when the horse couldn't get enough calcium from the grass. So although PTH levels tell us the horse is no longer taking calcium OUT of the skeleton, they can't tell us whether they are moving calcium back INTO the skeleton.

The double-strength formulation assists horses reverse the osteoporosis faster.

We have also provided a range of feeding rates. This is to enable owners to feed according to their horse's individual situation. For example, some ponies weigh 150kg and some 400kg. The smaller ponies would be fed the lower amount. Young horses and ponies and pregnant mares need more calcium than other horses – so they should be fed the higher end of the range. There are also differences in the types and amounts of oxalate pastures that horses graze – and some are hand-fed and others are not. And there are differences in how long horses have been on oxalate-pastures and how much oxalate is in the grass (this varies with season, rainfall, fertiliser etc. and even between paddocks). Again, by providing a range of dose rates, you can adjust the amount fed according to your situation. If you have been using the original Bone Formula with success, for example feeding 50g per day, you should have the same effect feeding 25g of the new Bone Formula *FORTE*.

CHELATED IS LOWER IN ELEMENTAL VALUE, SO HOW CAN WE FEED LESS THAN WE DID BEFORE?

Because there is more chelated calcium in the new formula. With 3x the amount a lower feeding rate is fine.



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Annexure B – Product Brochure Advertising

Bighead and osteoporosis occurs in horses on pasture or stabled, and at any age.

It can happen on grain, bran and pasture diets — especially buffel, pangola, setaria, kikuyu, green panic and signal grass. These grasses contain oxalates that bind to the calcium in the grass, hard feed and supplements — making the diet calcium deficient and unbalancing the calcium:phosphorus ratio.

Calcium is essential for life itself (regulating heartbeat, nerve function, muscle contraction and blood clotting) and blood levels are tightly regulated by parathyroid hormone (PTH). PTH is released when diets are low in calcium — causing calcium to move out of the bones and into the blood, and leading to demineralisation of bones and osteoporosis.

CLINICAL SIGNS

Mild cases are difficult to detect, manifesting as vague shifting lameness, shortened stride, soreness at ligament and tendon insertions, joint pain and swelling. In more severe forms, ligament and tendon injuries increase and there may be a watery nasal discharge, poor coat, difficulty chewing, dental pain and swelling of the jaws, maxilla, mandible and nasal bones.

MANAGEMENT AND PREVENTION

The dietary calcium deficiency must be corrected. Chelation protects calcium from oxalate attack, is over 95% absorbed into the blood stream and, in the presence of oxalates, is more bioavailable than inorganic forms (lime and dicalcium phosphate). Dr Jennifer Stewart's Bone Formula[®] Forte and Calsorb[®] Forte contain chelated calcium PLUS essential bone trace minerals that are deficient in Australian soils, pastures, hays and grains.

Formulated for the prevention, management and treatment of calcium and mineral deficiencies in horses' diets.



WITH
CHELATED
CALCIUM
Protected from
oxalates

DR JENNIFER STEWART'S
CALSORB[®]
18kg BLOCKS **FORTE**
For horses on pasture

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BRINGING SCIENCE TO YOUR FEED BIN

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Phone: 02 4365 0806
Email: info@jenquine.com
www.jenquine.com

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BRINGING SCIENCE TO YOUR FEED BIN

DR JENNIFER STEWART'S
**BONE
FORMULA[®]**
5kg & 10kg POWDER **FORTE**
For horses on hard feed

WITH
CHELATED
CALCIUM
Protected from
oxalates



Recommended by Veterinarians
www.jenquine.com



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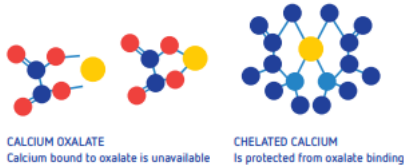
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The need to provide mineral supplements for horses is well recognised. The challenge is to provide minerals which are both highly absorbable and bioavailable. The solution is mineral chelation.

INTRODUCING CHELATED CALCIUM FROM DR JENNIFER STEWART

In many grasses, calcium is bound to oxalates. Calcium-oxalate is insoluble in the gut and the calcium is unavailable. Other minerals are also bound to oxalates but are soluble in the gut — releasing the oxalates, which then bind to calcium in hard feed and supplements — making them unavailable. The calcium in the grass, hard feed and supplements cannot be absorbed and pass out in the manure.

To address the problems of calcium-deficient feeds and diets, **Dr Jennifer Stewart's Bone Formula® Forte** and **Calsorb® Forte** are formulated with organic chelated calcium which is protected from oxalate binding.



“I have known Dr Stewart for two decades. I have the highest level of respect for her knowledge, integrity and desire to help horses. Her products are of the highest quality.”
Dr Oliver Liyou BVSc (Hons1) MACVSc (Eq Dent)

WHY USE CHELATED CALCIUM?

To address the problems of calcium-deficient feeds and diets, **Dr Jennifer Stewart's Bone Formula® Forte** and **Calsorb® Forte** are formulated with organic chelated calcium which is protected from oxalate binding.

The benefits include:

- Chelation protects calcium from oxalates and mineral interactions;
- Chelation presents calcium to the absorption sites in the intestine;
- Chelated calcium is embedded and protected in a ring-like structure;
- In the presence of oxalates, organic chelated calcium is more bioavailable than inorganic forms.

The chelated calcium in **Dr Jennifer Stewart's Bone Formula® Forte** and **Calsorb® Forte** is manufactured under the pharmaceutical industry's most stringent quality controls so you can be sure they're free of contaminants or impurities that impede accurate prediction of bioavailability.

WHY NOT JUST FEED MORE ORDINARY CALCIUM (LIME, DCP ETC)?

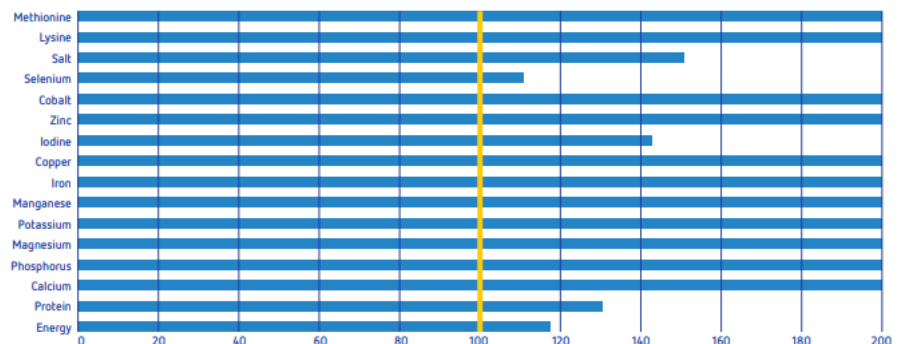
Depending on oxalate levels and the amount of osteoporosis, you may have to feed up to ½kg of lime a day — and there is a limit to how much calcium the body can absorb.

Plus, this amount of lime will reduce absorption of other minerals. Considering the dangers of osteoporosis, the use of scientifically sound formulations that are bioavailable, is essential. Horses with correct calcium and phosphorus intakes exhibit better growth, joint cartilage health, bone mineral density, tendon strength and soundness.

This principle holds true for adult horses and is essential for young horses, brood mares and working horses — who need a steady, reliable source of minerals for tissue maintenance and resilient immunity.

NUTRIENT INTAKE AS % MINIMUM RDI*

*400kg horse in medium work on pasture + 2kg lucerne + 2kg grassy hay diet + 50g of Dr Jennifer Stewart's Bone Formula® Forte Or 100g of Calsorb® Forte





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Annexure C – YouTube Advertising

References to chelated calcium appear also in a video titled 'ECN SIE2 Bone Formula Forte' posted by the Advertiser on YouTube at <https://www.youtube.com/watch?v=b3XUKVIUsuY> (28 May 2018). We have set out below a transcript of the video.

Dr Jennifer Stewart – Here to talk about a product we have formulated specifically for horses that are grazing oxalate pastures.

One of the big problems for the horses on these pastures is osteoporosis. It's also known as bighead, bran disease, millers disease and the correct veterinary term is nutritional secondary hyperparathyroidism. The problem for these horses is that the osteoporosis affects every bone in the body. And not just the bones, it affects the sites of tendon and ligament insertions and so it can cause anything from dental problems, chewing problems, lamenesses, fractures, anything that involves the musculoskeletal weakness.

Now there are lots of ways that we can supplement the diets for these horses, but because it involves oxalates it's a very, very particular problem and it requires a particular solution. We've formulated Bone Formula Forte with high levels of chelated calcium. And chelated calcium is absorbed and meets daily requirements regardless of the oxalate levels in the pasture.

The problem with inorganic forms of calcium, like mono calcium phosphate, di-calcium phosphate, dolomite or calcium carbonate, is that as the level of the oxalates in the pasture changes so does the requirement for the calcium.

The particular problem faced by horses that are on calcium deficient diets because of oxalates, is that they develop a generalised osteoporosis. We don't know how severe that osteoporosis is. The only way to tell is from a bone biopsy. X-rays can give you a little bit of a handle on it if the horse is very osteoporotic but the bone mineral content needs to reduce by about 80% before it will show up on x-rays.

So we don't know how widespread the osteoporosis is. Certainly if they've got bighead we know that it's very extensive, but if they are just getting sub clinical shifting lamenesses and things it can be difficult to determine. The other thing is, a consequence of that, is that we don't know how long it's going to take to remineralise the skeleton. Now if we try and do the remineralisation with inorganic forms of calcium any oxalates in the pasture will take up those calcium in that supplement, so that it can't be used by the horse. And that's why some manufacturers say to take horses off the pasture for an hour or two before and after giving



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them a supplement, because the oxalate in the grass will take up any calcium that's in the feed, or in any other supplements.

So that's a big problem and so with Bone Formula Forte we've used a chelated form of calcium so the horses calcium requirements will be met, no matter what the level of oxalate is in the pastures. The pasture levels of oxalate change with fertilisers, time of year, weather, climate, soil type etc. so if you're using an inorganic form of calcium you must adjust the amount depending on the amount of oxalate in pasture.

The other problem is if we are trying to remineralise the skeleton we need to ensure that the horse is getting sufficient chelated calcium for that to happen and the sooner it happens the better, the less likely-hood of risks of musculoskeletal problems. If we're using inorganic forms there is a limit to the amount the intestine can absorb in one day. And so feeding them once or twice a week a big amount of lime is not going to be very efficient way of trying to remineralise the bone. With chelated calcium it's up taken immediately and there's not the limit that there is if you're using inorganic forms of calcium.

The other thing about Bone Formula Forte is it's got higher levels of the mineral that are known to be efficient in Australian soils and pastures. And don't forget that any pasture or hay cut from deficient soils will have those same mineral deficiencies.

Why is there no phosphorus in Bone Formula Forte?

Horses diets are very rich in phosphorous. Phosphorous is high in native pasture, white chaff, oaten chaff, oaten hay, wheaten hay, all the grains and in the grain byproducts and mill byproducts like bran and pollard, phosphorous is very high.

The other thing is that we're attracted to sugar, fat and salt. Horses are actually attracted to sugar, salt and phosphorous. They actively seek out phosphorous. Now if we're trying to remineralise the skeleton in a very efficient size dose then we don't need to provide additional phosphorous.

We developed Bone Formula Forte based on clinical trials. We start off with science, molecular weights, biochemistry, chemical equations, and the steroid chemistry of plants so that we can try and get a handle and quantify the problem. And that's great and it's really important that that pure research is done, however it's also important that it's then tested in clinical trials. Bone Formula Forte has been tested in clinical trials for over 2 to 3 years. Some of the trials ran for longer because of the severity of the clinical signs. We did the trials using horses that had signs of osteoporosis. Not just bighead, some of them just had dental problems, spontaneous fractures, shifting intermittent lamenesses. So the product was trialed and developed based on the clinical results as well as the scientific data.