



## Case Report

<b>1</b>	<b>Case Number</b>	<b>0456/12</b>
<b>2</b>	<b>Advertiser</b>	<b>Bayer Australia Ltd</b>
<b>3</b>	<b>Product</b>	<b>Health Products</b>
<b>4</b>	<b>Type of Advertisement / media</b>	<b>TV</b>
<b>5</b>	<b>Date of Determination</b>	<b>28/11/2012</b>
<b>6</b>	<b>DETERMINATION</b>	<b>Dismissed</b>

### ISSUES RAISED

2.1 - Discrimination or Vilification Disability

### DESCRIPTION OF THE ADVERTISEMENT

In-utero image of fetus at 8-10 weeks. Cuts to kitchen with young professional couple getting ready to leave for work. As part of her daily routine the woman takes an Elevit tablet. As they leave the woman's midriff becomes visible and the image goes back to developing fetus in the womb. The voiceover says that Elevit contains folic acid which is clinically proven to reduce the risk of neural tube defects.

### THE COMPLAINT

A sample of comments which the complainant/s made regarding this advertisement included the following:

*As a person with the condition Spinabifida and Hydrocephalus (the former often accompanied by the later), I am offended that my condition (and thousands of others) was described as a "defect", when it so easily could have been described as a "condition" instead. Describing something as a "defect" infers that it is somehow less than perfect. Nobody is "perfect", and the actual cause of the condition is not known. Nobody is "normal", and nobody is "perfect". "Normal" is society's perception of what "should" be, in comparison to what often is the case. It also sends the wrong message to mothers who can potentially just "pop a pill" and have their potential child's "defect" just disappear.*

*I am not a person with a "defect", I am a person with a "condition" which is beyond my control, and in no way my fault. Suggesting that a person possesses a "defect" suggests that*

*they are in some way responsible for it. I strongly object to this wording. I would be much more likely to tolerate watching the ad if the wording was changed to "neurological condition" rather than "defect".*

## **THE ADVERTISER'S RESPONSE**

Comments which the advertiser made in response to the complainant/s regarding this advertisement include the following:

*I am writing in response to your letter dated 19th November 2012 regarding a television advertisement for Elevit with Iodine (the Elevit advertisement).*

*We note that the complaint(s) was initiated online and submitted to the Advertising Standards Bureau.*

### *Background*

*The complainant suffers from spina bifida and hydrocephalus and was offended that spina bifida was associated with the word "defect" in the Elevit advertisement. The complainant stated that she was offended that her condition was described as a "defect" and went on to state that "describing something as a "defect" infers that it is somehow less than perfect. Nobody is "perfect", and the actual cause of the condition is not known. Nobody is "normal", and nobody is "perfect". "Normal" is society's perception of what "should" be, in comparison to what often is the case."*

*The complainant further stated that "I am not a person with a "defect", I am a person with a "condition" which is beyond my control, and in no way my fault. Suggesting that a person possesses a "defect" suggests that they are in some way responsible for it. I strongly object to this wording."*

*The complainant stated that changing the word "defect" to "condition" or to "neurological condition" would be less offensive.*

### *Compliance with Standards*

*From the complaint, it appears that the most relevant section of the Australian Association of National Advertisers Code of Ethics 2012 (AANA Code) is section 2.1, which provides that: "Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual preference, religion, disability, mental illness or political belief."*

*In addition to section 2.1, Bayer notes that section 2.5 of the AANA Code provides that: "Advertising or Marketing communications shall only use language which is appropriate in the circumstances (including appropriate for the relevant audience and medium). Strong or obscene language shall be avoided."*

*However, having regard to the Australian Association of National Advertisers 2012 Code of Ethics Practice Note (Practice Note), the reference to "language" in section 2.5 of the AANA Code relates to the use of offensive language, such as swear words, rather than "language" in the context of the particular wording used in an advertisement. Accordingly, in Bayer's opinion, section 2.5 of the AANA Code does not apply to the complaint because "offensive language" within the meaning of section 2.5 has not been used.*

*Aside from section 2.1, in Bayer's view, no other sections of the AANA Code are relevant to this complaint.*

*The Practice Note also states that the provisions in section 2 of the AANA Code are subject to the Prevailing Community Standards. This requires the Advertising Standards Board (Board) to have regard to community standards at the time the advertisement was published. Bayer*

*notes that there is no single test for Prevailing Community Standards and the standards will differ in relation to the different restrictions in relation to health and safety, nudity, language, violence and portrayal of people.*

*Bayer's response to the complaint*

*Bayer acknowledges the concerns of the complainant but considers that the use of the word "defect" is correct in describing the incomplete closure of the embryonic neural tube that is characteristic of neural tube defects such as spina bifida. The "condition" is what causes the defect, and is unknown. In this regard, the "condition" and the "defect" caused by the condition are not the same.*

*Bayer rejects that use of the word "defect" in relation to a person suggests that the person is responsible for that defect. It is well understood, for example, that neural tube defects such as spina bifida are congenital, and no reasonable person could therefore conclude that a person with spina bifida is somehow responsible for it.*

*As to the complainant's reference to what is "normal", the dictionary meaning of the word "normal" is "conforming to the standard or the common type". In this regard, the incomplete development or closure of the spinal cord or its coverings would not be considered "normal" according to the standard (complete development and closure of the spinal cord or its coverings). However, there is no suggestion, and it cannot be inferred from the advertisement, that a person with spina bifida or hydrocephalus is not normal in every other respect.*

*Based on the above, Bayer submits that the Elevit advertisement conforms to Prevailing Community Standards and is not in breach of the AANA Code for the following reasons:*

*1. The word "defect" is used in the context of describing a "neural tube defect" and is the widely recognized and accepted terminology*

*The Elevit advertisement uses the word "defect" in the following context:*

- On-screen text : "Contains folic acid clinically proven to reduce the risk of neural tube defects like spina bifida".*
- Voice over : "Contains folic acid clinically proven to reduce the risk of neural tube defects."*

*Bayer notes that what constitutes the Prevailing Community Standards is determined primarily by the Board, whose members are representative of the community, on a case-by-case basis.*

*In Bayer's view, the term "neural tube defect" is aligned to the commonly accepted medical terminology given to this condition. This medical terminology is widely used by the key regulatory body in Australia, the Therapeutic Goods Association (TGA), and is present on the label of many products that contain folic acid. The terminology is also widely used by State-based support associations such as SBH Queensland (<http://spinabifida.org/>) and the Spina Bifida Foundation of Victoria (<http://www.sbfv.org.au/>). To substitute the word "defect" with "condition" would be inconsistent with the medically accepted terminology which refers to a "condition" as causing a "defect", and this is well understood by consumers. In that regard, the use of the term "neural tube condition" would only serve to cause confusion to consumers.*

*Based on the above, Bayer submits that a reasonable person viewing the Elevit advertisement would be familiar with the medical term "neural tube defect" and would not form the same conclusions as the complainant. In this regard, Bayer submits that the Elevit advertisement conforms to Prevailing Community Standards and does not breach section 2.1 or any other section of the AANA Code.*

*2. Compliance with Regulatory Requirements*

*Bayer has taken all necessary steps to comply with the regulatory requirements for advertising of Elevit with Iodine by:*

- obtaining advertising approval from the delegated external advertising services body, the*

*Australian Self Medication Industry, as required by the Advertising Standards Bureau (approval number 21123-0912); and*

*• obtaining approval from the TGA so that claim can be made in relation to the reduction of neural tube defects, such as spina bifida. Accordingly, Bayer believes that the Elevit advertisement complies with Section 2 of the AANA Code. The use of the word “defect” is appropriately within the context of medically recognized terminology.*

*We trust that the concerns of the Board have been sufficiently addressed, but should you require any further information, please do not hesitate to contact us. Otherwise we look forward to your favourable response.*

## **THE DETERMINATION**

The Advertising Standards Board (“Board”) considered whether this advertisement breaches Section 2 of the Advertiser Code of Ethics (the “Code”).

The Board noted the complainant’s concerns that the advertisement implies that a person with Spina Bifida is not perfect and that this is offensive.

The Board viewed the advertisement and noted the advertiser’s response.

The Board considered whether the advertisement complied with Section 2.1 of the Code which requires that 'advertisements shall not portray or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual preference, religion, disability, mental illness or political belief.'

The Board noted that the advertisement features in-utero images of a fetus whilst a voice over says that folic acid has been clinically proven to reduce the risk of neural tube defects.

The Board noted that the complainant stated that the descriptor “condition” would be more appropriate than “defect”. The Board noted that the advertiser had responded to say that the term “neural tube defect” is commonly accepted medical terminology which is used by Spina Bifida organisations including the Spina Bifida Foundation of Victoria and that the word “condition” would be incorrect in the context of the advertisement as it is the condition, Spina Bifida, which causes the neural tube defect: Spina Bifida itself is not the defect, the incomplete neural tube is. Based on this the Board considered that the advertisement is not suggesting that people with Spina Bifida are in themselves a defect and therefore not perfect.

The Board acknowledged the complainant’s concerns regarding the use of the word “defect” and agreed that it is important that disabilities are described in an appropriate manner. The Board considered however that in this instance the advertisement contains an important public health message regarding the effects of folic acid on the development of a fetus and that this message is presented in a manner which is consistent with current medical terminology.

Based on the above the Board determined that, in this instance, that the advertisement did not depict any material that discriminated against or vilified any person or section of society. The Board determined that the advertisement did not breach Section 2.1 of the Code.

Finding that the advertisement did not breach the Code on other grounds, the Board

dismissed the complaint.