

ASMI Complaints Panel Determination

Meeting held on July 14, 2009

Wyeth Consumer Healthcare Pty Limited (“Wyeth”) v. Reckitt Benckiser (Australia) Pty Limited (“RB”) – Nurofen Zavance “Twice as Fast”

Procedural background

1. This complaint was formally initiated by letter dated May 25, 2009. The formal response was made by letter dated June 9, 2009, with a minor correction next day.
2. Contrary to the ASMI Code of Practice (“the Code”), clause 8.4.2.7, prior informal correspondence between the parties was included, much of which was repetitive and some of which (the Internet advertising claim) was no longer in issue by the time of the formal complaint. The Panel has considered that correspondence on this occasion but wishes ASMI members to understand that the purpose of that clause and of clauses 8.4.2.4 and 8.4.2.5 is to confine the materials sent to ASMI to a stand-alone complaint and a stand-alone response (except to the extent necessary to show failure to provide substantiation upon request, in breach of clause 5.1.4) so as to avoid placing before the Panel repetitious and no longer relevant material.
3. Also contrary to the Code, clause 8.4.2.4, the covering letter by which the formal complaint was forwarded to ASMI contained additional submissions on the part of the Complainant. ASMI correctly referred this matter to the Panel Chair for consideration under clause 8.4.2.10. The Panel Chair found there to be no exceptional circumstances and directed that the covering letter not be included in the papers put before the Panel.
4. Pursuant to clause 8.4.2.10 the Panel invited the parties to attend part of the Panel meeting by telephone conference call solely to answer questions from the Panel. Two questions were provided to the parties in advance. It was made clear to the parties that the Panel had not formed a view at that stage. This was the first time this procedure was used. Although some useful information was thus obtained, debate took place directly between the parties, prompting termination of the conference call.

The Complaint

5. Wyeth complains about an advertising campaign introducing a new product, Nurofen Zavance (an analgesic containing the active ingredient sodium ibuprofen) in which the claim is made “TWICE AS FAST” (“the claim”), followed by the qualification, corresponding to the TGA-approved packaging claim: “*Absorbed up to twice as fast as standard Nurofen” (“the disclaimer”). The claim (which is followed by an asterisk) and the disclaimer appear in various forms of print advertising, including point of sale (“POS”) material and billboards and in a television commercial, all of which depict racing cars, with the car representing Nurofen Zavance leading another car, which Wyeth says is likely to be understood to represent other painkillers in general or, from its livery (teal blue with a yellow stripe), to represent the particular rival Wyeth ibuprofen product Advil Liquid Capsules.

6. Wyeth says the advertising campaign breaches clause 4.3.1 of the Code, which requires compliance with the Therapeutic Goods Advertising Code (“TGAC”). Wyeth specifies the following TGAC provisions (with Wyeth emphasis added):

- Clause 1(1): *The Object of the Therapeutic Goods Advertising Code 2007 (the Code) is to ensure that the marketing and advertising of therapeutic goods to consumers is conducted in a manner that promotes the quality use of therapeutic goods, is socially responsible **and does not mislead or deceive the consumer.***
- Clause 4(1): *An advertisement for therapeutic goods must:*
 - (a) *comply with the statute and common law of the Commonwealth, States and Territories; and*
 - (b) *contain **correct and balanced** statements only and **claims which the sponsor has already verified.***
- Clause 4(2): *An advertisement for therapeutic goods must not:*
 - (a) *be likely to **arouse unwarranted and unrealistic expectations of product effectiveness;***
 - (c) *mislead, or be likely to **mislead**, directly or by implication or through emphasis, comparisons, contrasts or omissions.*
- Clause 5: *Comparative advertisements must be **balanced and must not be misleading or likely to be misleading**, either about the therapeutic goods advertised or the therapeutic goods, or classes of therapeutic goods, with which it is compared. Points of comparison should be factual and reflect the body of scientific evidence.*

7. Wyeth says the advertisements also breach clause 5.1.3 of the Code, which provides:

Information and medical claims about non-prescription consumer healthcare products must be current, accurate, balanced, and must not mislead either directly, by implication, or by omission. Points of comparison should be based on facts which have been previously substantiated and reflect the body of scientific evidence or experience at the time the advertisement is published.

8. The explanatory notes to the Code, regarding comparative advertising, provide:

Techniques which may be considered inappropriate and contrary to the provisions of this Code are:

- *Where it is unclear with what the advertised non-prescription consumer healthcare products is [sic] being compared or upon what basis.*
- or*
- *Claims of superior or superlative status which are not expressed in terms which accurately reflect the extent or the nature of the evidence available to substantiate them.*

9. Wyeth says the claim is in breach of all these provisions because:
- (a) it omits each of the limiting factors from the TGA-approved claim “*absorbed up to twice as fast as standard Nurofen*”;
 - (b) it is a superior and different claim to “up to twice as fast”. Nurofen Zavance is not absorbed “twice as fast” as standard Nurofen (or any other product), but only “up to twice as fast”;
 - (c) by omitting the reference to absorption, it may be taken to be referring to efficacy not absorption - ie that Nurofen Zavance works twice as fast, which is not true; and
 - (d) by not directly referring to the comparator product (standard Nurofen), consumers may think that the comparison is with other competitors generally.
10. In other words, Wyeth says, because the claim omits all of the limiting features of the approved claim, consumers may be left with the impression that Nurofen Zavance works twice as fast as its competitors. The claim is thus inaccurate, unbalanced and misleading by implication and by omission, in breach of clause 5.1.3 of the Code. It is unclear with what the advertised non-prescription consumer healthcare product is being compared and upon what basis. The claim of superior status is not expressed in terms which accurately reflect the extent or the nature of the evidence available to substantiate it.
11. Further, Wyeth says there is evidence to suggest that RB has deliberately used colours in the television commercial to imply that the comparator product to which Nurofen Zavance is superior is Advil Liquid Capsules. To the extent that this can be gleaned from images used in the advertising itself, the campaign is also misleading to the extent that it may suggest, falsely, that Nurofen Zavance works twice as fast as Advil Liquid Capsules.
12. Wyeth says the disclaimer is not prominent enough to draw consumers’ attention to the facts of the TGA-approved claim, “*Absorbed up to twice as fast as standard Nurofen*”. By increasing the prominence of only part of the TGA-approved claim, namely “TWICE AS FAST” and separating from it all of the limiting features of the claim (that is, that the claim relates only to absorption, is only “up to twice as fast” and relates only to standard Nurofen), consumers are left with a misleading overall impression that Nurofen Zavance is twice as fast as its competitors.

The Response

13. RB denies all Wyeth’s allegations and says the advertising campaign complies with the provisions of the Code and the TGAC raised by Wyeth. Those of the advertisements which required approval were approved by ASMI.
14. RB says the words “TWICE AS FAST” are prominently marked with an asterisk and prominently qualified by the disclaimer. The totality of the representation clearly conveyed by the advertising is:

“Nurofen Zavance is up to twice as fast, in terms of absorption, as standard Nurofen” (“the Representation”).

15. RB says this is correct and strictly in accordance with the approved claim. Consumers are used to the qualification of advertising representations by the use of an asterisk. Given the use of prominent asterisks in the advertising in question, consumers are most likely:

- to understand the asterisk after the words “TWICE AS FAST” to designate a disclaimer of those words;
- to look for the corresponding asterisk with the qualification of the words (which is proximate to the words “TWICE AS FAST” in each advertisement); and
- on seeing the disclaimer, understand that the advertisement makes the Representation.

16. RB says it did not choose colours for the television commercial to suggest a comparison with Advil. The commercial was adapted in Australia from one shown in the UK, where Wyeth’s corresponding product to Advil, Anadin, has different colours from Advil. In any event, Wyeth has not shown that it has a reputation in the colours used in the commercial so as exclusively to identify Advil Liquid Capsules in the mind of the public.

Panel consideration

17. In addressing the question whether these advertisements are in breach of the ASMI Code, the TGAC or the law, (such as s.52 of the *Trade Practices Act*, which prohibits conduct by a corporation that is misleading or deceptive or is likely to mislead or deceive), the Panel needs to determine how each advertisement, taken as a whole and in the context in which it is presented, including the circumstance that each is a part of a campaign, would be likely to be understood by the class of consumers likely to be affected by it (ie. people seeking painkillers), including the astute and the gullible, the intelligent and the not so intelligent, the well educated and the poorly educated, acting reasonably¹. The intention of the advertiser is irrelevant², save that if it were to be found that there was an intention to mislead, the conclusion might be drawn more readily that this had been achieved³. The Panel makes no finding of intention to mislead on the part of RB.

18. An asterisk leading to a qualification of a representation may be effective to neutralise an otherwise misleading or deceptive advertisement⁴. Whether this is so is a matter for determination in the specific circumstances of any particular case. The qualifying

¹ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44 and *Taco Co of Australia v Taco Bell Pty Ltd* [1982] FCA 136.

² *Hornsby Building Information Centre Pty Ltd v. Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 223.

³ *Twentieth Century Fox Film Corp. v. South Australian Brewing Co Ltd* (1996) 66 FCR 451.

⁴ *George Weston Foods Ltd v Goodman Fielder Ltd* (2000) 49 IPR 553 (‘Wonder White Case’).

material must be sufficiently prominent to prevent the primary statement being misleading and deceptive or likely to mislead or deceive⁵.

19. In considering how consumers would understand these particular advertisements the Panel notes that, according to Mr. Mark Cooper, marketing director Healthcare at RB:

“We know from our research that one of the critical things people look for in a painkiller is speed of relief” (Annexure B4 to the Formal Complaint).

The print advertisements

20. The print advertisements before the Panel, said to be examples of the advertising campaign, comprise a Poster, a Display Bin, a Chest Carton, a BP Service Station Poster, a POS Display Unit, a Hanging Display Unit and Billboards.
21. All except the Billboards and (depending on whether Nurofen Zavance is sold at BP service stations, as to which there is no evidence before the Panel) the BP Service Station Poster are displayed at the point of sale, where the consumer seeking a painkiller will be offered a choice between several brands likely to be on display, including other brands of ibuprofen and brands of paracetamol.
22. Given the emphasis and prominence given to the claim in all of the print advertisements, the Panel finds that, unless effectively qualified by the disclaimer, the claim is likely to convey to a significant proportion of consumers seeking painkillers, acting reasonably, the unsubstantiated and misleading representation that Nurofen Zavance works twice as fast as other painkillers.
23. On the Poster and the Hanging Display Unit the disclaimer appears in capital letters. It is separated from the claim by the depiction of the racing cars. It appears above the mandatory statements, which are in fine print.
24. On the Display Bin the racing cars appear immediately after and on the same level as the claim, followed by the mandatory statements, followed by the disclaimer, which is in fine print. In passing, the Panel notes that Annexures B1, B2 and B3 to the formal complaint comprise photographs of Nurofen Zavance display bins containing standard Nurofen, in which some of the product has been placed in such a way as to obscure the disclaimer. There is no evidence that this was done by RB personnel and the Panel does not hold RB responsible for this.
25. On the Chest Carton and the Billboards the racing cars appear immediately after and on the same level as the claim, followed by the disclaimer in capital letters, followed by the mandatory statements in fine print.

⁵ *Australian Competition and Consumer Commission v Signature Security Group Pty Limited* [2003] FCA 3 at [26] - [27].

26. On the BP Service Station Poster the racing cars appear immediately after and on the same level as the claim, with the disclaimer immediately below the racing cars, in capital letters, followed a little way below by the mandatory statements in fine print. Opposite the disclaimer is a pack shot showing the TGA-approved statement in which the words of the claim (without an asterisk) appear in larger font and in a different colour than the other words.

27. On the POS Display Unit the disclaimer appears immediately after the claim, in capital letters. This advertisement also contains the statements:

“NEW Nurofen Zavance provides FAST targeted relief from [various types of pain]...It is absorbed up to TWICE AS FAST as standard Nurofen – providing relief where it is needed. Nurofen Zavance. FAST targeted relief from pain.”

28. These statements juxtapose the concepts of fast relief and fast absorption in a way which, in the absence of an effective disclaimer, is likely to reinforce the misrepresentation that Nurofen Zavance works twice as fast as other painkillers.

29. Thus the critical issue is whether the disclaimer is effective. It contains three important qualifications. The first is “absorbed”. The Panel understands that the rate at which an active ingredient is absorbed into the bloodstream bears no direct linear relationship to the rate at which it achieves its intended therapeutic effect. It is possible that this may not be readily understood by many consumers, who may equate absorption with speed of relief since, as RB’s research has shown, that is one of the critical things people look for in a painkiller. Accordingly, it is possible that the claim would be taken as a representation of speed of relief even if this qualification were to come to the consumer’s attention. As appears below, it is unnecessary for the Panel to determine this question for the purposes of the present complaint.

30. The second qualification is “up to” [twice as fast]. This is a contradiction of the claim. The Panel considers that consumers expect asterisked qualifications to explain, not to contradict claims. Therefore the question arises whether this qualification may be ineffectual to correct the claim even if it comes to the consumer’s attention. Again, as appears below, it is unnecessary for the Panel to determine this question for present purposes.

31. The third qualification is “as standard Nurofen”. This is the only qualification which contains the kind of explanation consumers expect when presented with a “hanging comparative” such as “TWICE AS FAST”, which begs the question “twice as fast as what?” Accordingly, the Panel considers this qualification likely to be effectual to explain this aspect of the claim if it were to come to the consumer’s attention.

32. The matters raised in the last three paragraphs do not require determination in this complaint because the Panel is of the unanimous view that, in the circumstances in which consumers would come to consider the print advertisements, whether at point of sale, on the freeway or in a BP service station, and having regard to the fact that one of the critical things people look for in a painkiller is speed of relief, in none of the print advertisements is the disclaimer sufficiently prominent to qualify effectively the claim in any of the three ways required to avoid the claim being understood as an

unsubstantiated and misleading representation that Nurofen Zavance works twice as fast as other painkillers.

33. Accordingly the Panel finds all of the print advertisements to be in breach of the provisions of the ASMI Code and the TGAC specified by Wyeth, other than clause 1.1 of the TGAC, which is a mere objective, not a prohibition capable of breach.
34. A further feature of the print advertisements is that they all depict the losing racing car in teal blue with a yellow stripe down the roof and the bonnet. The formal complaint included a pack of Advil Liquid Capsules and the formal response included a copy of an Advil television commercial depicting an Advil Liquid Capsules pack. It is clear to the Panel that the colours of the losing car in the print advertisements are the colours of Advil Liquid Capsules, even down to the yellow being presented as a stripe on the car, as on the pack.
35. RB submits that Wyeth has not established a reputation in those colours such as exclusively to identify its products in the mind of the public. That test may be appropriate where a claim is made for passing off but it is not the test of whether conduct is misleading or deceptive or likely to mislead or deceive in contravention of s.52 of the *Trade Practices Act*. The appropriate test under section 52 was set out in a case involving the colour purple in relation to chocolate by the Full Federal Court as follows⁶:

“The question is not whether an applicant has shown a sufficient reputation in a particular get-up or name. The question is whether the use of the particular get-up or name by an alleged wrongdoer in relation to his product is likely to mislead or deceive persons familiar with the claimant’s product to believe that the two products are associated, having regard to the state of the knowledge of consumers in Australia of the claimant’s product.”

36. Since the leading car is clearly identified as representing Nurofen Zavance and the trailing car bears the Advil colours, those consumers familiar with the Advil product (for example through taking Advil Liquid Capsules or seeing the Advil television commercial or seeing packs of Advil Liquid Capsules displayed in close proximity to the Nurofen Zavance POS material) are likely to believe that the losing car represents the Advil product. To those consumers, the claim makes the unsubstantiated and misleading representation that Nurofen Zavance works twice as fast as Advil Liquid Capsules. For this reason also the Panel finds all the print advertisements to be in breach of those clauses of the ASMI Code and the TGAC identified by Wyeth other than clause 1.1 of the TGAC.

The television commercial

37. The 30-second television commercial depicts a race between a car identified as representing Nurofen Zavance and a car labelled “Global Racing”. Initially the Nurofen Zavance car trails the Global Racing car and “more speed” is called for from a crew member in the pits. She is struck by sudden headache but takes Nurofen Zavance and is able to respond by “activating Zavance” (pressing a “fast forward”

⁶ *Cadbury Schweppes Pty Ltd (ACN 004 551 473) v Darrell Lea Chocolate Shops Pty Ltd (ACN 000 498 386)* [2007] FCAFC 70 at [99].

symbol), whereupon the Nurofen Zavance car overtakes the Global Racing car, doing twice its speed (as shown on the rival speedometers) and by the end of the advertisement is in the lead.

38. The voiceover says:

“When pain strikes, use Nurofen Zavance. It’s absorbed up to twice as fast as standard Nurofen, giving you fast, effective relief when you need it. Target pain fast with Nurofen Zavance.”

39. A series of written statements appears at the bottom of the screen while the race is proceeding and the voiceover is being spoken, accompanied by the sounds of revving racing car engines. First there is the statement in fine print “Always read the label. Use only as directed”. Then (while the words “It’s absorbed up to twice as fast as standard Nurofen” are spoken) the claim appears in bold green print, with an asterisk and, immediately below, the disclaimer in the same fine print. Then appear further warning statements in the same fine print, followed (while the rival speedometers are shown) by a repetition of the claim and the disclaimer, with their print size as before. At the end appear the words in large print “Fast targeted relief from pain” under a pack shot of the product.

40. This description of the television commercial was formulated by the Panel after many repeated viewings of it on a CD provided with the formal complaint. Television viewers do not have such an opportunity. The effect of the advertisement as a whole on viewers, acting reasonably, must be considered as a matter of impression:

“[The advertisements] will be seen by the casual but not overly attentive viewer viewing a free-to-air program with only marginal interest in the advertisements shown between the segments of the program. In that context it will be the first impressions conveyed to that viewer, rather than an analysis of the cleverly crafted constituent parts of the commercial, which will be determinative. The observations I have referred to above are of particular relevance to television advertising where the message is basically one of the impression conveyed⁷.”

41. The Panel notes that, as with the POS Display Unit, the television commercial juxtaposes the concepts of fast relief and fast absorption in a way which, in the absence of an effective disclaimer, is likely to reinforce the misrepresentation that Nurofen Zavance works twice as fast as other painkillers. The need for an effective disclaimer is even greater in the television commercial because the race is depicted through “live” action-packed sounds and images, whereas on the print material it is portrayed through a still image.

⁷ *Telstra Corporation v Optus Communications Pty Limited* (1997) ATPR 41-541 per Merkel J at 43,514.

42. The television commercial does have the advantage over the print advertisements of the voiceover in addition to the printed disclaimer. This advantage is offset by the simultaneous “action” images however, which are the dominant feature of the commercial.
43. Taking everything into account, the Panel is unanimously of the view that, in the context of a race between competitors as portrayed in the commercial, the disclaimer and the voiceover are insufficient to overcome the misleading representation made by the claim that Nurofen Zavance works twice as fast as other painkillers.
44. The impact of the fine print qualification and the voiceover are disproportionate to the impact of the images of speed of action and the TWICE AS FAST statements. The potential for the overall effect to be misleading and deceptive is immense⁸. In light of this finding, it is unnecessary, for present purposes, for the Panel to decide whether the misleading representation would be entirely overcome even if the qualifications in the disclaimer were fully conveyed to the viewer, particularly having regard to the possibility that consumers may not appreciate the distinction between absorption and efficacy.
45. One issue debated between the parties in their correspondence was whether the colours of the losing car in the television advertisement were intended to represent Advil Liquid Capsules. RB says the advertisement was made overseas and adapted from a version shown in the UK, where Advil’s corresponding product uses different colours. As mentioned at the beginning of this determination, the only relevance of intent in relation to a claim of misleading conduct is that, if intent to mislead be established, the conclusion might be more readily drawn that this had been achieved. The Panel does not find that RB intended, by using the footage from the UK advertisement, to represent that the losing car was Advil Liquid Capsules. However, in Australia the colours used, albeit slightly different from those of Advil Liquid Capsules, are likely to be taken as the Advil colours, particularly by people familiar with Advil Liquid Capsules who had seen the print advertisements.
46. The Panel notes that the colours of the losing racing car are shown only for a very short time and the images are dominated by other subjects. The words “Global Racing” also appear only very briefly. Despite their brief appearance the Panel considers that since those colours and those words were used, some viewers (including people who had seen some of the print advertisements and taken the losing car in those advertisements to represent Advil) would see them.
47. Accordingly the Panel finds that the television commercial is likely to be interpreted by those consumers who see the words “Global Racing” that Nurofen Zavance works twice as fast as all other painkillers and by those consumers familiar with Advil Liquid Capsules and who see the colours of the losing car (albeit that they are not identical to the Advil colours) as representing that Nurofen Zavance works twice as fast as Advil Liquid Capsules.

⁸ Adapting the language of Stone J. in *Medical Benefits Fund of Australia Limited v Cassidy; John Bevins Pty Limited v Cassidy* [2003] FCAFC 289 (16 December 2003) at [39].

Conclusion

48. The Panel has found that:

- (a) all of the advertisements are likely to convey to consumers seeking painkillers the unsubstantiated and misleading representation that Nurofen Zavance works twice as fast as other painkillers; and
- (b) all of the advertisements are also likely to represent to consumers familiar with Advil Liquid Capsules that Nurofen Zavance works twice as fast as Advil Liquid Capsules.

49. Accordingly the Panel finds all of the advertisements to be in breach of the following clauses of the TGAC and hence clause 4.3.1 of the Code:

- Clause 4(1)(a) in failing to comply with section 52 of the *Trade Practices Act (Commonwealth)*;
- Clause 4(1)(b) in failing to contain correct statements only and claims which the sponsor has already verified;
- Clause 4(2)(a) in being likely to arouse unwarranted and unrealistic expectations of product effectiveness;
- Clause 4(2)(c) in misleading, or be likely to mislead, directly or by implication or through emphasis, comparisons, contrasts or omissions; and
- Clause 5 in making a comparative advertisement that is misleading or likely to be misleading about the therapeutic goods advertised.

50. The Panel also finds all of the advertisements to be in breach of clause 5.1.3 of the Code in making inaccurate and misleading medical claims about a non-prescription consumer healthcare product and unsubstantiated points of comparison.

Classification of breaches

51. The Panel considers the breaches to be Moderate breaches, in that there are no safety implications but that the breaches will impact on the perceptions of consumers regarding the product and competitor products generally, as well as on the perceptions of some consumers regarding Advil Liquid Capsules.

Sanctions

52. The Panel has considered all the circumstances of the case. As to the factors set out in clause 9.1.3 of the Code, the Panel understands that publication has not ceased; no steps have been taken to withdraw the material published; no corrective statements have been made; RB has previously breached the Code but not in circumstances relevant to the determination of sanctions in this case; there are no safety implications and the perceptions of consumers have been or will be affected. As to whether the breaches were deliberate or inadvertent, the Panel is unable to tell but, as previously mentioned, makes no finding of intention to mislead on the part of RB.

53. Accordingly, the Panel requires RB:

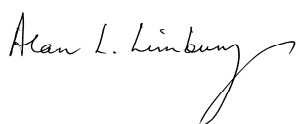
- (a) to give an undertaking in writing to the Executive Director of ASMI to cease publication forthwith in any media, until they can be supported by clinical evidence, of all of the print advertisements and the television advertisement the subject of this complaint and of any claim to the effect that:
 - Nurofen Zavance works twice as fast (or up to twice as fast) as other painkillers; and
 - Nurofen Zavance works twice as fast (or up to twice as fast) as Advil Liquid Capsules;
- (b) to use its best endeavours, within the next sales cycle and in any event within 10 weeks of the date of this Determination, to retrieve and destroy all print material containing any such claim;

54. Having regard to the cost of compliance with the requirements just set out, the Panel imposes no fine.

55. Attention is drawn to sections 9.2.6 and 10.1 of the Code.

Dated August 3, 2009.

For the ASMI Complaints Panel

A handwritten signature in black ink, appearing to read "Alan L. Limbury", with a stylized flourish at the end.

Alan L. Limbury
Chairman