ASMI COMPLAINTS PANEL FINAL DETERMINATION

Meeting held 13 May 2014

Sanofi-Aventis Healthcare Pty Ltd and Pfizer Australia Pty Ltd

Caltrate Vitamin D Television Advertisement

1. Sanofi-Aventis Healthcare Pty Ltd ("Sanofi") complains that a television advertisement for Caltrate Vitamin D, which Pfizer Australia Pty Ltd ("Pfizer") caused to be shown, breaches sections 5.1.3 and 5.2 of the ASMI Code of Practice.

2. The television advertisement includes a voiceover statement that "Caltrate Vitamin D gives you the highest daily dose of vitamin D" and a screen footnote stating "highest daily dose of vitamin D (1000 IU) allowed in OTC products".

3. Sanofi says in its Complaint that the statements would be taken by the average consumer to mean that Caltrate Vitamin D has "the highest amount of Vitamin D in comparison to other similar products on the market" when Ostelin Vitamin D has the same amount. Therefore the claim that Caltrate Vitamin D has "the highest daily dose of vitamin D" is misleading and an inappropriate comparison.

4. Pfizer in its Response says that the statements are accurate, balanced and not misleading in any way. They have been used in other TV advertisements for the Caltrate product since May 2013 without complaint. It says that the purpose of the statements is to convey to consumers that the product contains the highest level of Vitamin D permissible in a daily dose in OTC products. It also says that the TV advertisement received approval from ASMI on 17 January 2014 prior to its broadcasting.

Procedural matters

5. Contrary to section 9.4.2.7 of the Code, informal correspondence was submitted to ASMI as part of both the Complaint and Response. This was removed before the material was placed before the Panel.

Panel consideration

6. The Panel undertook its consideration in the context of the following principles laid down in a number of Federal Court of Australia decisions dealing with television advertisements:

   (a) Members of the public watch a commercial after and before viewing other things, rather than in isolation. They do not carefully view the commercial with a special interest in noting and memorizing its features. They view it against a background of distractions, such as domestic activity, or simply a preoccupation with other more interesting or pressing concerns. Usually they do not know in advance that the

commercial is about to commence: *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* [2002] FCAFC 223 per Merkel J at [47];

(b) A television commercial simultaneously stimulates the visual and auditory senses. There are subtleties of suggestion not available from a reading of the transcript: *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* [2002] FCAFC 223 per Merkel J at [49];

(c) The consumer is drawn to the medium of television to watch the program not the advertisement. The broadcast of an advertisement by television is an ephemeral communication to a consumer. It is a transient communication that leaves a dominant impression in the mind of a consumer. A consumer cannot turn to a fixed reference point to check or re-check messages conveyed by the advertisement. The consumer must deal with the cognitive cues triggered by the dominant impression the advertisement makes in the space of time the advertisement is screened: *Global One Mobile Entertainment Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 134 at [84] –[85];

(d) Whether the words convey the making of the representation is always a question of fact to be determined having regard to all of the contextual circumstances within which something was said or done. The question is, "whether the misconceptions, or deceptions, alleged to arise or to be likely to arise are properly to be attributed to the ordinary and reasonable members of the classes of prospective purchasers". The focus of the inquiry is whether a not insignificant number within the class or cohort have been misled or deceived or are likely to be misled or deceived by the conduct, whether in fact or as a matter of inference: *Global One Mobile* at [108].

(e) Where the viewer is inevitably drawn to the images on the screen and the language of the voice over, it is easy to miss or disregard the writing on the bottom of the screen. Unless the viewer's attention is adequately brought to it, it is highly unlikely that the viewer would read and absorb it: *Global One Mobile* at [88]; and

(f) In television advertising, the message is basically one of the impressions conveyed. Where a false dominant impression is conveyed, its message will not be ameliorated by the accuracy of the detailed message which is derived from a careful analysis of all of the constituent parts of the advertisement: *Stuart Alexander & Co. (Interstate) Pty Ltd v Blenders Pt. Ltd* (1981) 37 ALR 161 at 163.

The Highest Daily Dose statement

7. Applying those principles, the Panel considers that the dominant impression likely to be left upon the minds of a not insignificant number of ordinary and reasonable viewers by the television advertisement is that Caltrate Vitamin D contains the highest daily dose of Vitamin D compared to any other Vitamin D product on the market.

8. The words "Highest Daily Dose" appear on the screen in one frame accompanied by the voiceover which places emphasis on the word "Highest". The use of the superlative, "Highest", implies that all other Vitamin D products contain a lower amount of Vitamin D. The girl is featured moving in different yoga poses throughout the advertisement. The frame in which the written words "Highest Daily Dose" appear is dominated by those

written words and an image of the girl lifting her leg high in a yoga pose, an image which visually reinforces the impression a viewer gains from the use of the word "Highest". The voiceover statement accompanies that frame, with the word "Highest" in a heightened tone.

9. Viewers' attention will inevitably be drawn to the words "Highest Daily Dose", the image of the girl in the high leg pose, and to the heightened tone of the voiceover. These are the dominant features.

Footnote on screen

10. The footnote on the screen gives a different message, that the words "Highest Daily Dose" refer to the highest daily dose allowable in "OTC products". With the moving picture, the size of the font and the dominant features referred to above, viewers are very likely to miss or disregard the footnote on the bottom of the screen. It does not attract the eye.

11. Despite the insertion of the asterisks linking the written words "Highest Daily Dose" to the footnote, the viewers' attention is not adequately brought to the footnote. It is highly unlikely that viewers would observe the asterisks or that they would read and absorb the words in the footnote.

12. Even if a particular consumer did observe the footnote and noticed the word "OTC", the Panel considers that the term "OTC" is not a term that the average reasonable consumer would understand.

13. In summary, the footnote does not dispel the effect of the voiceover and the general nature of the advertisement on the screen, which conveys a clear message.

14. Since the representation that Caltrate Vitamin D contains the highest daily dose of Vitamin D compared to any other Vitamin D product on the market is not correct the Panel finds the television advertisement to be misleading and in breach of section 5.1.3 of the Code of Practice. In coming to this conclusion, the Panel takes into account the advertisement as a whole, noting the emphasis, both visually and audibly, on the word "Highest".

15. The Panel does not consider that there is a breach of s 5.2 of the Code of Practice. Although viewers of the advertisement who know about Ostelin may compare Caltrate Vitamin D with Ostelin, no direct comparison is made and we do not have sufficient evidence to find a breach of s 5.2

ASMI approval of advertisement

16. As noted above, the television advertisement was approved by ASMI prior to being broadcast. Under the *Therapeutic Goods Act 1989* and Regulations, the *Broadcasting Services Act 1992*, and s 5.3.1 of the Code of Practice, advertisements to consumers of therapeutic goods are required to be submitted for approval to ASMI. Such approval is intended to ensure, for example, that the advertisement complies with the minimum requirements set out in clause 6 of the TGAC. This provides some level of assurance but it is not a guarantee that the advertisement complies with all the provisions of the Code of Practice or the TGAC. The fact that there is a complaint process makes this abundantly

clear. The approval by ASMI is not relevant to the issue of whether there is a breach of the Code of Practice or the TGAC.

Category of breach

17. The Panel notes that s 9.4.2.4 of the Code of Practice requires the formal complaint to identify the category of breach. Section 10.1 of the Code of Practice provides for Minor, Moderate, Severe and Repeat breaches. Sanofi submits that the breach is Moderate, that is, one with no safety implications but one which will impact on the perceptions of the consumer or healthcare professionals regarding the product or competitor product. Pfizer did not address the issue of the category of breach in its Response.

18. The Panel finds the breach to be Moderate as it is likely to impact on the perceptions of the consumer regarding the amount of Vitamin D in Caltrate Vitamin D as compared to the amount in similar products.

Sanction

19. In determining whether or not to impose a sanction and, if so, what the sanction should be, the Panel is required by s 10.1.3 of the Code of Practice to consider all the circumstances of the case, including the features set out below. On the material before the Panel, the Panel has considered those features as follows:

    (a) *Whether publication has ceased*: The Panel does not know whether publication has ceased.

    (b) *Whether steps have been taken to withdraw the material published*: There is nothing before the Panel to indicate that any such steps have been taken.

    (c) *Whether the breach was deliberate or inadvertent*: The Panel considers that the wording and presentation of the advertisement was deliberately chosen but that there is no evidence that the breach was deliberate.

    (d) *Whether the Member that is the subject of the complaint has previously breached the Code*: The Panel is not aware of any previous breaches of the Code by Pfizer.

    (e) *Whether there were or are safety implications*: The Panel considers there are no safety implications.

    (f) *Whether the perceptions of healthcare professionals or consumers have been or will be affected*: The Panel considers that the perceptions of consumers are likely to have been and will be affected.

20. The Panel requires Pfizer to give an undertaking in writing to the Executive Director of ASMI to cease publication forthwith in any media, until it can be supported by clinical evidence, of any representation, express or implied, to the effect that Caltrate Vitamin D contains the highest daily dose of Vitamin D in comparison to any other Vitamin D product on the market.

Costs

21. Although Sanofi's complaint in respect of breach of s 5.2 of the Code of Conduct has been dismissed, it was minor by comparison with complaint in respect of s 5.1.3 which has been upheld and is insufficient to justify any determination by the Panel to alter the usual operation of section 9.4.2.2 of the Code. Therefore, Pfizer is required to reimburse ASMI its out-of-pocket expenses associated with the determination of the complaint.

22. Attention is drawn to sections 10.2.6 and 11.1 of the Code.

Dated: 2 June 2014

For the ASMI Complaints Panel

Angela Bowne SC
Chair

Note: although this is called a Final Determination, each party has a right of appeal to the Arbiter. If no appeal is lodged this determination will be published on the ASMI website once the time for lodging an appeal has expired. If there is an appeal, the Arbiter's determination will be published on the ASMI website together with this determination. Until publication on the website, parties and their representatives should maintain the privacy of these proceedings.