

COMPLAINTS RESOLUTION PANEL DETERMINATION

Complaint 13-1101 (Swisse Ultivite) Meeting held February 21, 2002

The complaint

1. A complaint was made that an advertisement for Swisse Ultivite published in NW Magazine on November 19, 2001 contravened sections 4.4.1(b), 4.1.1(b), 4.1.2(a) and 4.1.2(g) of the Therapeutic Goods Advertising Code. It was claimed the words "one of the most highly recommended" and "advice pertaining to good health" imply endorsement by a healthcare professional, contrary to section 4.4.1(b). [The panel takes this to be a mistaken reference to the current section 4.4.1(c), following amendment of the Code in July 2001]. It was claimed the expression "you'll feel better on Swisse" arouses unwarranted and unlikely expectations, particularly in the context of "Tired? Stressed?" and "Wanna feel great all day?", contrary to sections 4.1.1(b), 4.1.2(a) and 4.1.2(g).
2. The sponsor, Swisse Natural Health Care Pty Ltd, denied implying endorsement by a healthcare professional. It conceded that the words "you'll feel better on Swisse" had not been used as a tag line, as required by the conditions of the approval obtained for the advertisement. It did not argue that those words did not raise unwarranted expectations in the context of the advertisement.

Panel consideration

3. In determining whether an advertisement conveys an implied representation, the Panel follows the approach of the courts in determining whether an advertisement makes misleading or deceptive claims:

"First, it is necessary to identify the relevant section (or sections) of the public (which may be the public at large) by reference to whom the question of whether conduct is, or is likely to be, misleading or deceptive falls to be tested.

Second, once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, "including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations": Taco Co of Australia Inc v. Taco Bell Pty Ltd (1982) 42 ALR 177 (omitting citations).

4. This approach is subject to the further qualification:

"Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section [ie section 52 of the Trade Practices Act] must in my opinion be regarded as contemplating the effect of the conduct on reasonable members of the class": Parkdale v. Puxu (1982) 149 CLR 191, per Gibbs CJ.

5. The words "*one of the most highly recommended*" appear in the sentence "*Millions of tablets are taken by Australians every month, and the Swisse brand is one of the most highly recommended*". The words "*advice pertaining to good health*" appear in the sentence "*Swisse is available only from pharmacies and health stores Australia wide – where you get the products and advice pertaining to good health*". In the context of the complete sentences in which the words appear, and in the context of the advertisement as a whole, the Panel does not find the complaint of professional endorsement justified.
6. The words "*You'll feel better on Swisse*" appear in bold type immediately beneath the bolder words "*tired? stressed?*", which themselves appear beneath a photograph of people who appear to be energetic and relaxed, under the headline "*Wanna feel great all day?*". In this context, the Panel finds the words "*You'll feel better on Swisse*" to be likely to give rise to unwarranted and unrealistic expectations of product effectiveness, contrary to section 4.1.2(a). This aspect of the complaint is justified.

Matter not specified in the complaint

7. The Panel is satisfied that the advertisement to which the complaint relates contains matter that is not mentioned in the complaint, which may contravene s42C(3) of the Act. The panel has decided to deal with the matter under subregulation 42ZCAH(1). Accordingly, the panel hereby notifies the sponsor of this decision.
8. Pursuant to subregulation 42ZCAH(3)(a), the matter not mentioned in the complaint and the possible contravention of the s42C(3) of the Act is:

Publication in mainstream media of an approved advertisement that differs from the advertisement that was approved, in that the words "*You'll feel better on Swisse*" were not approved to appear immediately after the words "*Tired? Stressed?*" but were instead approved to appear at the end of the advertisement under the Swisse logo after the words "*Celebrate Life Everyday!*" as a tag line only in tagline size, not as an inverted heading or advertising claim.

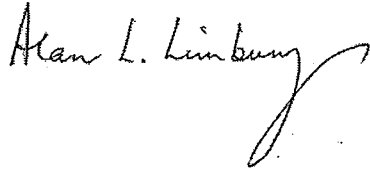
9. In considering this matter, the Panel is minded to have regard to the fact that the requirements of the approval were communicated to the sponsor in June, 2001; that the advertisement was published in November, 2001 and that in July 2001 the Panel stated in its determination 22-0301, involving the same product:

"Having regard to the many occasions on which Swisse has been found by the Panel to have failed to obtain approval of advertisements for therapeutic goods, the Panel commends the adoption by Swisse of its "ISO 9001 Benchmark Advertising Policy" in an endeavour to ensure that its advertisements comply with the Regulatory requirements. The Panel notes however that the Policy makes no mention of the requirements for Swisse itself to obtain approval of its advertisements before publication; to ensure the approval number appears in the advertisement and to ensure that the form of advertisement as published is the same as the form approved. This is not a responsibility that can be delegated by Swisse to the publisher." [emphasis added].

10. Pursuant to subregulation 42ZCAH(3)(b), the sponsor is invited to send written submissions to the panel, together with any supporting documents, by March 12, 2002.

11. The panel expects to consider this matter at its meeting to be held on March 21, 2002.

Dated 6 March 2002
For the Panel

A handwritten signature in cursive script that reads "Alan L. Limbury". The signature is written in dark ink and has a long, sweeping tail that extends to the right.

Alan L Limbury
Chairman