

COMPLAINT NUMBER	18/128
AWAP	18/002
COMPLAINANT	Progressive Enterprises Limited
ADVERTISER	Foodstuffs North Island
ADVERTISEMENT	PAK'nSAVE, Television and website
DATE OF MEETING	28 May 2018
OUTCOME	Settled, in part; Not Upheld, in part

SUMMARY

PAK'nSAVE promoted "The Real Shop off" in television, YouTube, digital banner and website advertisements. The advertisements focused on Nikki, a "real human person" who conducted her weekly household shop at Countdown and then repeated it at PAK'nSAVE. The advertisement promoted the savings Nikki received by shopping at PAK'nSAVE. A detailed shopping list was provided on the website which identified the products which formed the basis for the comparison from both supermarkets and provided further information on the methodology used.

The Complainant said the advertisements were misleading because no such shop took place at Countdown on the date specified in the website advertisement (7 August 2017) and Nikki was therefore not a "real shopper". The Complainant was also concerned the fine print was too small and contained qualifications which were of significance to the consumer. The Complainant said the advertising contained a testimonial which was exceptional and likely to mislead.

The Advertiser said it had made an error and the date the shopping took place was incorrect on the website. The Advertiser said the advertisements were not misleading and the shops were conducted following a thorough methodology. The fine print was clear and provided further explanation of that methodology.

The Panel accepted the submission from the Advertiser that the date on the website advertisement was an error and noted its self-regulatory action to ensure a more rigorous checking system was employed in future. The Panel ruled that the complaint, reflecting the Complainant's concern about the incorrect date making the advertisements misleading was Settled.

The Panel noted the information provided by the Advertiser regarding the methodology employed in selecting the shopper and conducting the shop. The Panel said Nikki and her shopping list were representative of a real shopper and consumers would not be misled by the representation of Nikki as a real shopper. The Panel ruled the "real shopper" representation was not in breach of Principle 3, Rule 2 of the Code of Ethics and Principle 1 and Guidelines 1(a), 1(b) and 1(c) of the Code for Comparative Advertising and ruled this aspect of the complaint was Not Upheld.

The Panel said the fine print on the video and website advertisements was clear and provided further explanation of the methodology used in the comparison which did not diminish the consumer take-out of the advertisements. The Panel ruled the fine print was not in breach of Principle 3, Rule 2 of the Code of Ethics and Principle 1 and Guidelines 1(a), 1(b) and 1(c) of the Code for Comparative Advertising and ruled this aspect of the complaint was Not Upheld.

The Panel found the advertisements before it did not contain a testimonial and ruled they were not in breach of Rule 9 of Code of Ethics.

Accordingly, the Panel ruled the complaint was Settled, in part; Not Upheld, in part.

Please note this headnote does not form part of the Decision.

PROCEDURE

The Chair ruled to deal with the matter by “adjudication with attendance of the parties” pursuant to Rule 3 of the Complaints Procedures of the Advertising Standards Complaints Board. This system is designed to resolve disputes between competitors and a Panel was appointed.

At the request of the Parties, the complaint was heard on the written submissions alone.

THE PANEL

Chair – R. Anderson, Chair of the Advertising Standards Complaints Board.

Co-panellists – S. Taylor (Public Member of the Advertising Standards Complaints Board) and P. Elenio (Industry Member of the Advertising Standards Complaints Appeals Board).

THE PARTIES

The Complainant, Progressive Enterprises Limited: Written submissions from James Radcliffe, General Counsel Progressive Enterprises.

The Advertiser, Foodstuffs North Island: Written submissions from Mike Brooker, General Counsel Foodstuffs North Island.

PANEL DECISION

The Chair directed the Panel to consider the advertisement with reference to Principle 3, Rule 2 and Rule 9 of the Code of Ethics and Principle 1 and Guidelines 1(a), 1(b) and 1(c) of the Code for Comparative Advertising.

Basic Principle 3 of the Code of Ethics requires that no advertisement is misleading or deceptive or likely to mislead or deceive the consumer.

Rule 2 of the Code of Ethics requires the Complaints Board to consider whether the advertisement contained any statement or visual presentation or created an overall impression which directly or by implication, omission, ambiguity or exaggerated claim was misleading or deceptive, was likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading).

Rule 9 of the Code of Ethics requires that advertisements not contain or refer to any personal testimonial unless it is genuine, current, related to the experience of the person giving it and

representative of typical and not exceptional cases. The claims in the testimonial should be easily identifiable.

Principle 1 of the Code for Comparative Advertising requires that comparisons in advertising should not mislead or deceive or be likely to mislead or deceive consumers. (Obvious hyperbole, identifiable as such, is not considered misleading).

Guideline 1(a) of the Code for Comparative Advertising requires that comparative elements are accurate and informative and offer a product or service on its positive merits.

Guideline 1(b) requires that where an advertisement makes a comparison, either explicitly or implicitly, it should be clear what comparison is being made (i.e. price to price, dimension to dimension, feature to feature).

Guideline 1(c) requires that price comparisons should not mislead by falsely claiming a price advantage.

The Advertisements

Advertisement 1 – Television and YouTube

The television advertisement for PAKnSAVE promoted the “Real Shop Off” and showed Nikki, a real shopper, in a PAKnSAVE Stickman cartoon. The advertisement said in part: “The Real Shop off starring Nikki, a real human person. Nikki did her household shop at Browns Bay Countdown – a real place. She then repeated her shop at PAKnSAVE Albany. Let’s see the difference.” The advertisement showed onscreen:

Countdown	PAK’nSAVE
Browns Bay	Albany
28/09/2017	28/09/2017
Basket Total	Basket Total
\$261.38	\$224.39

Saving of \$36.99

Fine print: “Groceries selected by Nikki. Equivalent (not exact) shops conducted. Weighed products and pack sizes equalised. Check out the shopping list and each store’s offers at paknsave.co.nz”

Advertisement 2 – Banner

The banner advertisement for the “Real Shop Off” appeared on the PAK’nSAVE website www.paknsave.co.nz and stated, in part, PAK’nSAVE’s real shop off reveals real savings!... Starring real people.” The advertisement was a clickthrough to another advertisement which detailed a basket shop comparison between Countdown and PAK’nSAVE.

Advertisement 3 – PAK’nSAVE website

The “Real Shop Off” advertisement on the PAK’nSAVE website said, in part: “Nikki’s Shop. Shops occurred on 7th August 2017 at Countdown Brown’s Bay, Auckland and PAK’nSAVE Albany, Auckland.” The advertisement included a shopping list which detailed the products purchased at each supermarket and their prices.

The advertisement showed the following:

TOTAL:

Countdown: \$261.38

PAK'nSAVE: \$224.39

PAK'nSAVE Saving \$36.99

Saving 14%

The fine print at the bottom of the email said: "Groceries were selected by Nikki to reflect a typical weekly shop for her family. Countdown was shopped first with the shop at PAK'nSAVE commencing within an hour of completing the Countdown shop. Pricing at your local PAK'nSAVE or Countdown may differ, pricing on another day may also differ. Onecard specials are included and equate to \$18.70 in savings. Rounding excluded. Weighted products were purchased in as similar pack sizes as possible and then equalised to the exact weight purchased at Countdown with the price adjusted accordingly. Equivalent products are noted above and were of same or better quality in PAK'nSAVE as determined by Nikki and verified by Foodstuffs. Four products were excluded. Other offers valid at time of shop; at Countdown Nikki qualified for Onecard reward points and the chance to enter a monthly prize draw for Countdown Gift Cards (up to \$500) by providing feedback. At PAK'nSAVE Nikki received a voucher for 6c per litre off fuel (up to a maximum of \$150 of discounted fuel), qualified for the chance to enter a draw for PAK'nSAVE Gift Cards (up to \$500) by providing feedback and Nikki received a number of discount vouchers from other vendors on the back of her receipt."

The Panel confirmed that both the television advertisement which appeared on YouTube and the content of the Advertiser's website before it met the definition of advertisements for the purposes of the Advertising Codes of Practice and noted jurisdiction was not disputed by either party.

Complainant's Submission

Complainant, Progressive Enterprises, was concerned the advertisements were misleading.

Progressive said the goods listed in the shopping list did not reflect the price of the goods at Countdown on 7 August 2017 and therefore no customer was able to purchase the basket of goods. The Complainant said the date of the shop was of critical importance in comparative advertisements due to price fluctuations of goods at supermarkets.

The Complainant said, "the size of the comparative total price difference was uncommon and, if such differences do occur, they are extremely short-lived". The Complainant provided the following information: "that over a period of three weeks (1 May-21 May 2017), it compared Countdown's average prices for a basket of 58 commonly purchased goods, against the average price that was charged in PAK'nSAVE stores for the same goods across a random sample of 12 PAK'nSAVE stores in the North Island. Out of the 58 items, only 4 items were cheaper at all PAK'nSAVE stores during the full three week period."

While the Complainant accepted that Nikki was a real person, it said that if she did not independently select the products and was limited in terms of the products she could purchase and how much could be spent, then she was not a "real shopper" which was a strong theme of the advertisement. The Complainant said while there was a reference in the fine print of the website advertisement to the groceries reflecting a "typical weekly shop", there was insufficient information to indicate to consumers that the "real shopper" was not selected at random. The Complainant said this information was significant, as it would influence a consumer's understanding and could affect their shopping decision.

The Complainant also said the fine print was too small and “unable to be read without significantly enlarging the size of the advertisements (which is obviously not possible for a television advertisement)” and the fine print in the advertisements was not enough to save it from being misleading.

The Complainant said that as Nikki's shop did not occur on 7 August 2017, it cannot be a genuine testimonial of Nikki's experience shopping at the two supermarkets and was not representative of the “typical” or average Countdown shopper and was, therefore, exceptional.

Advertiser's Submission

The Advertiser responded to the issues raised by the Complainant about the advertisement being misleading.

Regarding the dates the shop occurred, the Advertiser said “the incorrect date was mistakenly imposed in the website advertisement (only). The date on which the shops were carried out, and which should have been stated on the website, was 28 September 2017.” The Advertiser said it would undertake more rigorous checks of its website advertising in future, including by its legal team.

The Advertiser said the incorrect date did not make the advertisement misleading because it only appeared on the website, not in the television or YouTube advertisement and “while the date is important, customers want to know that if they shop for a reasonable time after they see the advertisement — that they will still be able to achieve a similar saving.” The Advertiser said that “because the information in the advertisement is more recent than what was stated, customers have not been misled by the mistake. The expectation of viewers once they see the advertisement remains the same - that they may be able to achieve a similar saving if they shop close in time to the advertisement.”

The Advertiser said the savings claim was not misleading as it also conducted a shop on 7 August 2017 where a similar savings result was achieved which “reiterates the fact that these results are achievable on different days in different stores and confirms that the snapshot message is not misleading.”

The Advertiser outlined the methodology used in the comparison, stating that “in order to ensure independence from Foodstuffs, we engage a third party research agency to select shopping lists. Real shoppers (in this case Nikki) submit their shopping lists to the agency. The agency makes a selection of the shopper on the basis that their shopping list represents a family's typical weekly shop and includes a wide range of goods. This shopping list then forms the basis of the comparative shops.

...The shopper is then directed to meet us on a specific day to carry out the shops as they would normally do. Nikki completed her Countdown shop first — no one accompanied her on the Countdown shop. She then completed the PAK'nSAVE shop accompanied by members of the PAK'nSAVE marketing team (and sometimes legal team). This is to ensure that proper comparable items were purchased as the second shop is a comparative shop (where accuracy is essential) unlike the first shop where the shopper has complete discretion.”

Referring to the Complainant's concern about the fine print in the advertisement, the Advertiser said, in part: “We have followed proper legal process in regards to fine print. Fine print cannot be used to change the message of an advertisement. In this instance, the fine print does not change the message, it simply clarifies the process that we followed for customers who are interested... We have tailored the fine print to suit the viewing audience of the particular representation of advertisements. For instance, the TVC has little fine print in it, so that it is easily digested by viewers in a short timeframe. The web has more detailed fine print as the audience can choose to take the time to learn more about our process, should they wish to.”

Panel Discussion

The Panel read all the relevant correspondence regarding the present matter, viewed copies of the advertisements and noted the Complainant's concerns that the Advertiser made misleading and unsubstantiated comparative claims in its advertising.

The Panel noted the robust advertising environment both companies operated in and that price was an important part of this environment and was also of significant interest to the consumer. In addition, the Panel confirmed that it would focus on the likely consumer take-out of the advertising.

The Panel confirmed its role was to consider the advertisements, and the claims made from the perspective of their likely audience. It then had to consider whether the information provided to it, when taken at face value, went far enough to substantiate the claims made in the advertisements. It also noted that the onus fell on the Advertiser to substantiate the claims in the advertisement.

Dates

The Panel noted the Complainant's concern that the comparative shop could not have occurred on 7 August 2017 and the timing of the shop is a critical component for consumers to be able to achieve similar savings.

The Advertiser said the shops were conducted on 28 September 2017 which was the date shown in the video advertisement and the website advertisement had the incorrect date of 7 August 2017. The Advertiser acknowledged the error and made an undertaking to ensure further checks were in place regarding their website advertisements in future. The Advertiser said the error did not make the advertisements misleading.

The Panel noted the error in the date on the website advertisement of 7 August 2017 when the shops actually occurred on 28 September 2017. The Panel also noted the Advertiser submitted that a similar shop off was conducted on 7 August 2017 which produced similar saving results and demonstrated a level of consistency in the savings promoted.

The Panel, noting the explanation from the Advertiser and their undertaking to be clearer in future, said the part of the complaint relating to the dates on which the shop occurred was Settled noting the advertisement needed to be corrected to reflect the date on which the shops were conducted.

Real Shopper

The Complainant was concerned that Nikki, whom the comparative advertisement was based on, did not represent a real shopper due to the constructed nature of the shopping comparison and the products purchased were not representative of a typical shop.

The Advertiser provided information on the methodology used in selecting the shopper and the shopping list, as well as how the shops were conducted.

The Panel considered whether the representation of the shopper as a real person was likely to mislead consumers. It accepted the realness of Nikki as a typical shopper was a strong theme of the advertisements and took into account that Nikki was a real person. The Panel considered the methodology employed by the Advertiser in selecting the shopping lists undertaken by a third party and that Nikki conducted her shop alone at Countdown. The Panel was of the view that having Foodstuff representatives accompany a shopper to ensure the products selected in a PAK'nSAVE were comparable to Progressive's was not, in itself, enough to make the advertisement misleading.

Taking into account the information provided by the Advertiser regarding the methodology employed in selecting the shopper and conducting the shop, the Panel said Nikki and her shopping list were representative of a real shopper and consumers would not be misled by the representation of Nikki as a real shopper.

The Panel ruled the representation of Nikki as a “real shopper” was acceptable. It said there was nothing to suggest Nikki’s shop was fictitious or the advertisements were falsely claiming a price advantage. The Panel said the “real shopper” representation was not in breach of Principle 3, Rule 2 of the Code of Ethics and Principle 1 and Guidelines 1(a), 1(b) and 1(c) of the Code for Comparative Advertising and ruled this aspect of the complaint was Not Upheld.

Fine Print

The Complainant said the fine print was misleading as it contained information which was relevant to the consumer and was not clear enough in the video and website advertisements.

The Advertiser said the fine print was clearly legible in both the website and video advertisements. The Advertiser said the information contained in the fine print of both advertisements did not change their key messages but acted to clarify the process that was followed.

The Panel referred to a previous Decision (13/516 AWAP 13/009) where one of the issues considered related to the fine print in a comparative advertisement. That Decision said, in part: “The Panel considered the fine print in the advertisement. It said the significantly small print held important information which contextualised several aspects of the advertisement. It confirmed that the fine print formed an important part of allowing consumers to make informed decisions about the products being compared. The Panel said that the fine print was too small and borderline illegible in newsprint.”

The Panel noted fine print in the advertisements before it which appeared in the video and on the website, with the latter including detailed information about how the various rewards schemes of each supermarket were applied in both shops. The Panel said the information contained in the fine print of the advertisements did not affect the overall consumer take-out that on a particular day Nikki compared her typical weekly shop between supermarkets and PAK’nSAVE was cheaper. The Panel said the information included in the fine print was supplementary detail about the comparison. The Panel said the information would act as clarification for consumers who wished to inform themselves further on the methodology used rather than containing information which significantly diminished the comparison.

The Panel then considered whether the fine print was legible. The Panel noted the brief time the fine print in the video advertisement was displayed. The Panel said the two lines provided information on key aspects of the methodology used in the comparison and directed consumers to the website to view the shopping lists in detail. The Panel said the fine print in the video advertisement did not significantly diminish the offer and could be read in the time it played.

The Panel then considered whether the fine print in the website advertisement was able to be read and noted the information provided further explanation of the methodology used in the comparison as well as the rewards programmes employed at the respective supermarkets. The Panel said the fine print in the website advertisement did not significantly diminish the offer and was legible.

The Panel said the fine print did not significantly diminish the consumer take-out. Rather, the fine print acted to further clarify the nature of the comparison in the advertisements. The Panel said the fine print was not in breach of Principle 3, Rule 2 and Rule 9 of the Code of Ethics

and Principle 1 and Guidelines 1(a), 1(b) and 1(c) of the Code for Comparative Advertising and ruled this aspect of the complaint was Not Upheld.

Testimonial

The Complainant said that as Nikki's shop did not occur on 7 August 2017, it was not a genuine testimonial of Nikki's experience shopping at the two supermarkets and was not representative of the "typical" or average Countdown shopper. The Complainant said Nikki's experience was exceptional, not typical.

The Advertiser said Nikki was picked independently and the shops were conducted using a sound methodology and it had also conducted another shop off which produced similar savings results, demonstrating consistency.

The Panel considered whether the "Real Shop Off" with Nikki as a shopper was a testimonial for the purposes of the Advertising Codes. It said testimonials were generally statements from individuals about the quality of service provided or the clear expression of a view about an outcome or product. The Panel said Nikki took part in a comparative exercise but made no statement in the advertisement as to her experience or a value judgement on which supermarket she preferred.

The Panel said the advertisements before it did not contain a testimonial and ruled they were not in breach of Rule 9 of Code of Ethics.

Summary

The Panel accepted the submission from the Advertiser that the date on the website advertisement was an error and noted its self-regulatory action to ensure a more rigorous checking system was employed in future. The Panel ruled the Complainant's concerns about the incorrect date making the advertisements misleading were Settled.

The Panel noted the information provided by the Advertiser regarding the methodology employed in selecting the shopper and conducting the shop, the Panel said Nikki and her shopping list were representative of a real shopper and consumers would not be misled by the representation of Nikki as a real shopper. The Panel ruled the "real shopper" representation was not in breach of Principle 3, Rule 2 of the Code of Ethics and Principle 1 and Guidelines 1(a), 1(b) and 1(c) of the Code for Comparative Advertising and ruled this aspect of the complaint was Not Upheld.

The Panel said the fine print on the video and website advertisements were able to be read and provided further explanation of the methodology used in the comparison which did not significantly diminish the consumer take-out of the advertisements. The Panel ruled the fine print was not in breach of Principle 3, Rule 2 of the Code of Ethics and Principle 1 and Guidelines 1(a), 1(b) and 1(c) of the Code for Comparative Advertising and ruled this aspect of the complaint was Not Upheld.

The Panel found the advertisements before it did not contain a testimonial and ruled they were not in breach of Rule 9 of Code of Ethics.

Accordingly, the Panel ruled the complaint was Settled, in part; Not Upheld, in part.

Decision: Complaint **Settled, in part; Not Upheld, in part**

DESCRIPTION OF ADVERTISEMENTS

Advertisement 1 – Television and YouTube

The television advertisement for PAKNSAVE promoted the “Real Shop Off” and showed Nikki, a real shopper, in a PAKnSAVE Stickman cartoon. The advertisement said in part: “The Real Shop off starring Nikki, a real human person. Nikki did her household shop at Browns Bay Countdown – a real place. Then repeated her shop at PaknSave Albany. Let’s see the difference.” The advertisement showed onscreen:

Countdown	PAK’nSAVE
Browns Bay	Albany
28/09/2017	28/09/2017
Basket Total	Basket Total
\$261.38	\$224.39

Saving of \$36.99

Fine print: “Groceries selected by Nikki. Equivalent (not exact) shops conducted. Weighed products and pack sizes equalised. Check out the shopping list and each stores offers at paknsave.co.nz”

Advertisement 2 – Banner

The banner advertisement for the “Real Shop Off” appeared on the PAK’nSAVE website www.paknsave.co.nz and stated, in part PAK’nSAVE’s real shop off revels real savings!... Staring real people.” The advertisement was a clickthrough to another advertisement which detailed a basket shop comparison between Countdown and Pak’Save.

Advertisement 3 – PAK’nSAVE website

The “Real Shop Off” advertisement on the PAK’nSAVE website said, in part: “Nikki’s Shop. Shops occurred on 7th August 2017 at Countdown Brown’s Bay, Auckland and PAK’nSAVE Albany, Auckland.” The advertisement included a shopping list which detailed the products purchased at each supermarket and their prices.

The advertisement showed the following:

TOTAL:

Countdown: \$261.38

PAK’nSAVE: \$224.39

PAK’nSAVE Saving \$36.99

Saving 14%

The fine print at the bottom of the website advertisement said: “Groceries were selected by Nikki to reflect a typical weekly shop for her family. Countdown was shopped first with the shop at PAK’nSAVE commencing within an hour of completing the Countdown shop. Pricing at your local PAK’nSAVE or Countdown may differ, pricing on another day may also differ. Onecard specials are included and equate to \$18.70 in savings. Rounding excluded. Weighted products were purchased in as similar pack sizes as possible and then equalised to the exact weight purchased at Countdown with the price adjusted accordingly. Equivalent products are noted above and were of same or better quality in PAK’nSAVE as determined by Nikki and verified by Foodstuffs. Four products were excluded. Other offers valid at time of shop; at Countdown Nikki qualified for Onecard reward points and the chance to enter a monthly prize draw for Countdown Gift Cards (up to \$500) by providing feedback. At PAK’nSAVE Nikki received a voucher for 6c per litre off fuel (up to a maximum of \$150 of discounted fuel), qualified for the chance to enter a draw for PAK’nSAVE Gift Cards (up to \$500) by providing feedback and Nikki received a number of discount vouchers from other vendors on the back of her receipt.”

The Panel confirmed that both the television advertisement which appeared on YouTube and the content of the Advertiser's website before it met the definition of advertisements for the purposes of the Advertising Codes of Practice and noted jurisdiction was not disputed by either party.

Complaint - Foodstuffs' "Real Shop Off" comparative advertising

1. I am writing on behalf of Progressive Enterprises Limited ("Progressive"). Progressive wishes to make a complaint, which is set out below.

Background

2. As the Advertising Standards Authority ("ASA") and the Advertising Standards Complaints Board ("Board") will be aware, Foodstuffs NZ Limited and/or Foodstuffs North Island Limited (together "Foodstuffs") have engaged in a long-running and high profile advertising campaign promoting the Pak'n Save brand and featuring "real life" shoppers.
3. In summary, the "Real Shoppers" campaign has been run at various points by Pak'n Save over the past five years (the "Campaign"). The Campaign has taken various forms over this time period, appearing in print, on television and online. The Campaign's central tenet is the comparison of a basket shop at Countdown to one at Pak'n Save, in which Foodstuffs compares the price of the "real shopper's" shop at the two supermarkets.
4. In all instances, the Pak'n Save shop is shown to be cheaper than the "comparable" shop at Countdown and, despite the "real shoppers" having discretion as to what to buy and how much to buy, the total baskets amounts and purported "savings" tend to be around the same amount.
5. Progressive has had a number of significant concerns with the Campaign. Progressive's view is that the Campaign is inherently misleading and deceptive and in breach of a number of the ASA's Advertising Codes of Practice ("Codes") and the Fair Trading Act 1986.
6. As a result of its concerns, Progressive has attempted to engage with Foodstuffs and it has made a number of complaints to the ASA. I do not propose to list Progressive's concerns with the overall Campaign, as Progressive appreciates that the Board has taken a different view on some of these points. However, notwithstanding the Board's previous decisions, Progressive believes that the more recent Foodstuffs' advertisements in the Campaign raise new, additional issues. These issues have not been considered by the Board previously. Progressive requests that this matter is heard on the papers, however, it is willing to attend a hearing if that is necessary.

The Advertisements

7. Around August 2017, the Campaign included a series of advertisements under the tagline "Real shop off" (the "Advertisements"). The Advertisements were published on television and the Pak'n Save website. There were also associated banner and webpage advertisements. A copy of a typical banner is shown below:



8. In the Advertisements, a voice over claims Nikki is "a real human person" and that she did her shop at Countdown Brown's Bay, which is a "real place". There is also a face image of Nikki, to reinforce that a "real person" has conducted the shop. A link is provided to a mock up of a shopping list, which claims that the shop occurred on 7 August 2017. Screenshots of the Advertisements and the banner are shown below and in Appendix One.



9. The Advertisements contain a number of express and implied representations. In particular, the clear overall impression of each Advertisement is that:
- (a) the shopper is a genuine shopper;
 - (b) the shopper was selected at random;
 - (c) the shopper is independent (in the sense that they have no pre-existing relationship with Foodstuffs or anyone associated with Foodstuffs that could influence their decision making);
 - (d) the groceries included in each shop:
 - (i) were chosen by the shopper independently of any influence of Foodstuffs or anyone associated with Foodstuffs; and
 - (ii) represent a genuine and typical weekly shop by the "real person" shopper;

- (e) the date and time of each shop was selected by the shopper independently of any influence from Foodstuffs;
 - (f) the actual shops took place on 7 August 2017; and
 - (g) the experience of the shopper demonstrates that Pak'n Save has the lowest food prices (when compared with Countdown supermarkets).
10. However, importantly, the Advertisements differ from previous advertisements used in the Campaign because the Advertisements contain false information. Progressive's position is that the representations listed above are not accurate for a range of reasons, including:
- (a) Progressive has undertaken a search of its records. The prices of the goods listed in the shopping list do not reflect the price of the goods at Countdown on 7 August 2017. The shopping list cannot be accurate and the representations in the Advertisements are false.
 - (b) No customer bought the basket of goods (or any basket resembling those goods) referred to in the Advertisements on 7 August 2017. In accordance with the Fair Trading Act and the Codes (referred to below), the onus is on Foodstuffs to substantiate its claims and it should have clear evidence to show the shop took place on 7 August 2017.
 - (c) As with other advertisements featured in the Campaign, the total value of the shop was substantial (\$224.39 at PAK'nSAVE and \$261.38 at Countdown). There is a reference in the fine print to the groceries having been selected to reflect a "typical weekly shop", but that is insufficient to indicate to consumers that the "real shopper" was not selected at random or as a fair reflection of a typical shopper.
 - (d) The size of the comparative total price difference is uncommon and, if such differences do occur, they are extremely short-lived. Again, that casts doubt on the suggestion that the shopper was selected at random or that they are a fair reflection of a typical, or real, shopper. To put this in context, over a period of three weeks (1 May — 21 May 2017), we compared Countdown's average prices for a basket of 58 commonly purchased goods, against the average price that was charged in PAK'n SAVE stores for the same goods across a random sample of 12 PAK'nSAVE stores in the North Island. Out of the 58 items, only 4 items were cheaper at all PAK'nSAVE stores during the full three week period.
11. Progressive considers that the express and implied representations and the overall impression of the Advertisements are both false and misleading, and therefore in breach of the Codes. We refer to the specific provisions of the Codes below.
12. Progressive has become aware that the Advertisement is still able to be accessed on YouTube through the "Stick Man's" YouTube channel. It was uploaded to YouTube on 23 October 2017 and as at 3 April 2018 had been viewed 1,384 times.

Breaches of the Codes

Code of Ethics

Basic Principle 3 — No advertisement should be misleading or deceptive or likely to mislead or deceive the consumer.

Rule 2 — Truthful Presentation — Advertisements should not contain any statement or visual presentation or create an overall impression which directly, or by implication, omission ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust if the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/ her lack of experience of knowledge (Obvious hyperbole, identifiable as such, is not considered to be misleading).

13. Progressive's position is that the Advertisements contain inaccurate information and representations. They therefore inevitably mislead consumers. "Nikki" states that her shop took place on 7 August 2017 at Countdown Browns Bay. The small print on the Advertisements states that the shop at Countdown took place first, with the shop at Pak'n Save Albany taking place within an hour of Nikki completing her shop at Countdown. As noted above, no such shop took place at Countdown Browns Bay 7 August 2017.
14. The date of the shop is of critical importance in advertisements of this nature because, due to price fluctuations of goods at supermarkets, a mere difference of a day could change both the prices of the fresh goods (a significant proportion of which were "Nikki's" shop) and the goods that were on special. It is therefore inherently misleading for Foodstuffs to allege that the shop took place on a day that it could not have (assuming the shop actually took place which is still to be confirmed).
15. Further, while Nikki is undoubtedly a real person, if she has not independently selected the products and has been limited in terms of the products she could purchase and how much could be spent, then she is not a "real shopper". This is the key theme in the Advertisements, and one which is heavily relied on by consumers.
16. Accordingly, the Advertisements are in breach of Basic Principle 3 and Rule 2.

Code for Comparative Advertising

Guideline (a) — comparative elements should be accurate and informative and should offer a product or service on its positive merits.

Guideline (c) - price comparisons should not mislead by falsely claiming a price advantage.

17. As the Advertisements contain false information, which is of critical importance to consumers, for the reasons outlined above in relation to Basic Principle 3 and Rule 2, the Advertisements are in breach of Guidelines (a) and (c)

Guideline (b) — where an advertisement makes a comparison, either explicitly or implicitly, it should be clear with that the comparison is being made (i.e. price to price, dimension to dimension, feature to feature).

18. The Advertisements contain the following fine print:

Groceries were selected by Nikki to reflect a typical weekly shop for her family. Countdown was shopped first with the shop at PAK'nSAVE commencing within an hour of completing the Countdown shop. Pricing at your local PAK'nSAVE or Countdown may differ, pricing on another day may also differ. Onecard specials

are included and equate to \$18.70 in savings. Rounding excluded. Weighted products were purchased in as similar pack sizes as possible and then equalised to the exact weight purchased at Countdown with the price adjusted accordingly. Equivalent products are noted above and were of same or better quality in PAK'nSAVE as determined by Nikki and verified by Foodstuffs. Four products were excluded. Other offers valid at time of shop; at Countdown Nikki qualified for Onecard reward points and the chance to enter a monthly prize draw for Countdown Gift Cards (up to \$500) by providing feedback. At PAK'nSAVE Nikki received a voucher for 6c per litre off fuel (up to a maximum of \$150 of discounted fuel), qualified for the chance to enter a draw for PAK'nSAVE Gift Cards (up to \$500) by providing feedback and Nikki received a number of discount vouchers from other vendors on the back of her receipt.

19. This information is significant, as it would influence a consumer's understanding of the Advertisements and, ultimately, affect their shopping decision. However, it is only included in fine print in the Advertisements. This exacerbates the falsehoods in the Advertisements and it is misleading in and of itself because:
 - (a) The fine print is very small and unable to be easily read without significantly enlarging the size of the Advertisements (which is obviously not possible for a television advertisement).
 - (b) Legal authority supports the position that fine print will not be sufficient to qualify (or "save") a misleading statement.'

Rule 9 - Testimonials — Advertisements should not contain or refer to any personal testimonial unless it is genuine, current, related to the experience of the person giving it and representative of typical and not exceptional cases. The claims in the testimonial should be easily identifiable.

20. As identified above, Nikki's shop cannot have occurred on the day that Foodstuffs and the Advertisements allege that it did. It therefore cannot be a genuine testimonial of Nikki's experience shopping at the two supermarkets.
21. Furthermore, as noted above, the shop is not representative of the "typical" or average Countdown shopper, and is therefore the exceptional case.

Conclusion

22. Progressive requests that the Board considers its complaint in relation to the Advertisements.
23. If the Board has any questions or requires clarification on any of the above, please do not hesitate to contact the writer in the first instance.

Relevant Codes of Practice

Code of Ethics

Basic Principle 3: No advertisement should be misleading or deceptive or likely to mislead or deceive the consumer.

Rule 2 Truthful Presentation: Advertisements should not contain any statement or visual presentation or create an overall impression which directly, or by implication, omission ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer,

makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge (Obvious hyperbole, identifiable as such, is not considered to be misleading).

Rule 9 Testimonials: Advertisements should not contain or refer to any personal testimonial unless it is genuine, current, related to the experience of the person giving it and representative of typical and not exceptional cases. The claims in the testimonial should be easily identifiable.

Code for Comparative Advertising

Principle 1: Comparisons in advertisements should not mislead or deceive or be likely to mislead or deceive consumers. (Obvious hyperbole, identifiable as such, is not considered to be misleading)

Guideline 1(a): comparative elements should be accurate and informative and should offer a product or service on its positive merits.

Guideline 1(b): where an advertisement makes a comparison, either explicitly or implicitly, it should be clear with that the comparison is being made (i.e. price to price, dimension to dimension, feature to feature).

Guideline 1(c): price comparisons should not mislead by falsely claiming a price advantage.

Response from Advertiser, Foodstuffs North Island

1. I refer to complaint 18/002 outlined in James Radcliffe's letter from Progressive Enterprises Limited (Progressive) dated 20 April 2018.
2. Progressive raises several concerns with the campaign. In particular, the 'realness' of the shopper and her shopping list and fine print. The shops that are the subject of the advertisement were carried out by Nikki, a real shopper, using her normal shopping list. Nikki independently shopped that list at Countdown Browns Bay and then immediately shopped at Albany PAK'nSAVE using the same methodology that we have used since 2012.
3. As the methodology has already been previously addressed in ASA decisions 13-042, 13-048, 13-318 and 14-003, we have not addressed those points again. What has occurred is that the incorrect date was mistakenly imposed in the website advertisement (only). The date on which the shops were carried out, and which should have been stated on the website, was 28 September 2017. We acknowledge this error but for various reasons, which are expanded on below, the incorrect date does not change the key message of the advertisement or make it misleading.
4. The ASA has been clear that someone cannot complain about a campaign, they must make a complaint about a particular advertisement. The TV advertisement and the YouTube advertisement are correct in all respects — including the date. Therefore, the only matter to be considered by the ASA is the incorrect date on the website advertisement.
5. The incorrect date was a technical error whereby we transposed the date of the previous advertisement — which was 7 August 2017. However, we have only made this error on the website advertisement. The date was correct in the television advertisement and on YouTube and these advertisements have a much larger audience. We have attached the TVC advertisement to our email response (the YouTube advertisement is the same).

6. We do not believe that the error in the date makes the advertisement misleading as a whole. The substance of the message, the place where the shops took place, the shopper, the shopping lists and the savings are all correct. The components that create the whole message (other than the date) are all correct. While the date is one element of this message, it does not make the advertisement misleading as a whole.
7. The mistake that we have made is in favour of the consumer because we have given viewers more current information than what we (mistakenly) stated. We mistakenly stated that the shops were carried out on 7 August 2017. The advertisement was then placed on the website on 23 October 2017 with the results of the shops carried out on 28 September 2017. While the date is important, what customers want to know that if they shop for a reasonable time after they see the advertisement — that they will still be able to achieve a similar saving. Because the information in the advertisement is more recent than what was stated, customers have not been misled by the mistake. The expectation of viewers once they see the advertisement remains the same - that they may be able to achieve a similar saving if they shop close in time to the advertisement.
8. We did do a comparison shop on 7 August 2017 at Sunnynook Countdown and then at Wairau PAK'nSAVE. This was advertised as usual. These stores are in neighbouring catchments and are a 12-minute drive from Countdown Browns Bay and PAK'nSAVE Albany. Both the 7 August shop (at Sunnynook Countdown and Wairau PAK'nSAVE) and the 28 September shop (Browns Bay Countdown and Albany PAK'nSAVE) produced a 14% difference. Therefore, even though we made an error in this instance, we do not believe that it misrepresents PAK'nSAVE's price position - given the fact that the very same level of difference were achieved on both days.
9. Stating the incorrect date in the advertisement was a genuine mistake. If Progressive or any consumer had written to us directly, we would have fixed the date immediately. As a result, we have now implemented a two-step checking process. While the TV advertisements were checked by the Legal Team, the website advertisements were not (as they should be an extension of the TV advertisement). Website advertisements will now be checked by the Legal Team going forward.
10. Finally, Progressive states that it has "attempted to engaged with us". This is potentially a misleading statement as it may imply we have not been forthcoming with information. However, we have fully engaged with Progressive whenever we have been asked for information. We have attached an example of the correspondence which we have had with Progressive to date showing our full co-operation and acknowledgement from Progressive of such.

Comment from Progressive on Advertiser's Response

1. We refer to your email of 15 May 2018 and Foodstuffs' letter of 14 May 2018.
2. We will leave it to ASA to form its own views in relation to the accuracy of the dates that appeared in the TV Advertisement and the YouTube advertisement, as we do not currently have access to a copy of those in the form they originally appeared.
3. In relation to the website advertisement, for the reasons we have previously stated, we do not accept that the advertisement is not misleading. This advertisement is not a general advertisement aimed at PAK'nSAVE's price position. It is a very specific advertisement and, in circumstances where an advertiser makes specific claims

focusing on the genuineness (or “realness”) of a shopper, the content of the shop and the place the shop took place, the actual date of the shop is critical.

4. The fact that the false representation was accidental, inadvertent or arose because there were inadequate processes in place for checking advertising material is not relevant to whether it was misleading. We also reject the implication in paragraph 9 of Foodstuffs’ letter that it is up to consumers or Progressive to check Foodstuffs’ advertising for accuracy.
5. Although not relevant to the issue before the ASA, we do not accept the statement in paragraph 10 of Foodstuffs’ letter that it has been fully engaged with us or we have received full cooperation. In our letter to Foodstuffs we expressly noted we had questions and concerns regarding the methodology used.
6. In summary, our view is:
 - (a) the date is crucial and the advertisement has to be factually correct;
 - (b) the case law is clear that false representations are misleading; and
 - (c) customers rely on the dates of the shops and there is no evidence to show the "shop" would have been the same the following week(s).

Further response from the Advertiser

Thank you for allowing us the opportunity to reply to James Radcliffe’s letter dated 17 May 2018.

Date in advertisement

1. We do not dispute that the date is an important part of creating a factually accurate comparative advertisement. We very much regret that the date was incorrect due to human error. However, while we acknowledge that one element in one representation of the advertisement in question had a factual inaccuracy in it, we do not think that the error 'in fact' causes the overall advertisement to be misleading.
2. The main message and key take out for the customer from the advertisement is a snapshot; a real shopper did a shop on a date in the not so distant past and achieved a particular saving. This remains true and correct. Given that actual shops did take place in the stores identified and those shops were 'in fact' more recent than we said, means that the advertisement does not reach the threshold to be misleading.
3. We have also given you another example of two shops which occurred in adjoining catchments on 7 August 2017 (being the incorrect date shown in this advertisement). As stated, the exact same result was achieved. This reiterates the fact that these results are achievable on different days in different stores and confirms that the snapshot message is not misleading.

Shopper

4. We have explained our methodology regarding selection of the shopper in previous correspondence but, for clarity, we set out the methodology again as a reminder to the ASA.
5. In order to ensure independence from Foodstuffs, we engage a third party research agency to select shopping lists. Real shoppers (in this case Nikki) submit their shopping lists to the agency. The agency makes a selection of the shopper on the basis that their

shopping list represents a family's typical weekly shop and include a wide range of goods. This shopping list then forms the basis of the comparative shops.

6. The shopper is then directed to meet us on a specific day to carry out the shops as they would normally do. Nikki completed her Countdown shop first — no one accompanied her on the Countdown shop. She then completed the PAK'nSAVE shop accompanied by members of the PAK'nSAVE marketing team (and sometimes legal team). This is to ensure that proper comparable items were purchased as the second shop is a comparative shop (where accuracy is essential) unlike the first shop where the shopper has complete discretion.

Fine Print

7. We have followed proper legal process in regards to fine print. Fine print cannot be used to change the message of an advertisement. In this instance, the fine print does not change the message, it simply clarifies the process that we followed for customers who are interested.
8. We have tailored the fine print to suit the viewing audience of the particular representation of advertisements. For instance, the TVC has little fine print in it, so that it is easily digested by viewers in a short timeframe. The web has more detailed fine print as the audience can choose to take the time to learn more about our process, should they wish to.
9. In all cases the fine print enhances the viewers' understanding rather than contradicting the message in any way. Again, this has been considered by the ASA in previous decisions.

Response from Google New Zealand Limited:

For your information, Google New Zealand Limited does not own or operate the YouTube service, and can't assess or remove content from the YouTube service. The YouTube service is owned by Google LLC and operated by YouTube LLC, both based in the United States. In an effort to assist you in handling this complaint, we can advise the ASA of the following matters:

We understand that this complaint concerns a commercial broadcast in New Zealand which has also been referenced as content uploaded to YouTube. We confirm that this commercial has not been uploaded as part of YouTube's advertising program.

Accordingly, we think this is a matter for the advertiser to respond as to its compliance with advertising codes in New Zealand. We note that you have also written to Foodstuffs NZ and assume that it is able to provide you with more informed comments on this particular commercial.

Given that the commercial is not part of YouTube's advertising program, we do not believe it would be appropriate for us to comment on the commercial's compliance with advertising regulations. In any event, as you would appreciate, YouTube in its role as a platform provider, is not in a position to review the accuracy of the claims contained within the commercial.

We appreciate you bringing this matter to our attention. Please let us know if we can be of any further assistance.