

COMPLAINT NUMBER	19/036
COMPLAINANT	K Lloyd
ADVERTISER	Optipharm Pty Ltd
ADVERTISEMENT	Optislim, Television
DATE OF MEETING	28 May 2019
OUTCOME	Not Upheld

SUMMARY

The Optipharm television advertisement for Optislim says in part: “Optislim or Optifast – The names are similar, the ingredients are similar, so which one should you chose?” The advertisement compares price and where the ingredients are sourced.

The Complainant’s concern said it is not correct to compare the Optislim product to Optifast, given that Optislim contains wheat and is therefore not gluten-free like the Optifast product.

The Advertiser said both products are VLCD (Very Low Calorie Diet) Meal replacement shakes and are therefore comparable products. The Advertiser said the comparisons made were that the products have a similar name, similar ingredients and the price difference. The Advertiser said the product is not intended to address the dietary needs of specific groups and is aimed at the average consumer.

The Complaints Board said the products featured in the advertisement are sufficiently alike to make the comparison between the two meaningful.

The Complaints Board agreed the Advertiser did not make a claim that the Optislim product is suitable for consumers with gluten intolerance and the advertisement does not target the product at any specific group of consumers.

The Complaints Board agreed that consumers who did have specific dietary restrictions are likely to be well versed in verifying ingredients at point of purchase and are therefore unlikely to be misled or deceived by the claims made in the advertisement.

The Complaints Board said the comparative claims made in the advertisement were clear and consumers were unlikely to be misled. The advertisement was not in breach of Principle 1 or Guideline 1(b) of the Code for Comparative Advertising or Principle 2 of the Code for Advertising Food.

The Complaints Board ruled the complaint was Not Upheld.

[No further action required]

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

COMPLAINTS BOARD DECISION

The Chair directed the Complaints Board to consider the complaint with reference to Principle 1 and Guideline 1(b) of the Code for comparative Advertising and Principle 2 of the Code for Advertising Food.

Principle 1 of the Code for Comparative Advertising requires the Board to consider whether comparisons made in the advertisement had not misled or deceived or be likely to mislead or deceive consumers. (Obvious hyperbole, identifiable as such, is not considered misleading).

Guideline 1(b) requires the Board to consider whether where an advertisement makes a comparison, either explicitly or implicitly, it has been clear what comparison is being made (i.e. price to price, dimension to dimension, feature to feature).

Principle 2 of the Code for Advertising Food requires the Complaints Board to consider whether the advertisement had by implication, omission, ambiguity or exaggerated claim misled or deceived or was likely to mislead or deceive consumers, abuse the trust of or exploit the lack of knowledge of consumers, exploit the superstitious or without justifiable reason play on fear.

The Complaints Board ruled the complaint was Not Upheld.

The Complaint

The Complainant's said it is not correct to compare the Optislim product to Optifast, given that Optislim contains wheat and is therefore not gluten-free like the Optifast product.

The Advertiser's Response

The Advertiser said both products are VLCD (Very Low Calorie Diet) Meal replacement shakes and are therefore comparable products. The Advertiser confirmed the advertisement states the ingredients are similar but does not claim the products are identical. It said the advertisement's only other comparisons are the source of ingredients and the price difference between the two products.

The Advertiser said the product is not intended to address the dietary needs of specific groups and is aimed at the average consumer.

The Media's Response

The Commercial Approvals Bureau said it approved the advertisement based on the verified comparison information it received for the two products. It said the comparisons are fair and it expects the small proportion of the audience with gluten issues would be used to making informed dietary choices when comparing the VLCD options available and are unlikely to be confused about the advertisement.

Complaints Board Discussion

Consumer Takeout

The Complaints Board began by discussing the likely consumer takeout of the advertisement and agreed it compared two meal replacement products to aid with weight-loss. The comparisons said that despite having similar names and similar ingredients, Optislim uses localised ingredients which the multinational produced Optifast may not and the price of Optislim is lower than Optifast.

Is the advertisement comparing like products?

The Complaints Board said the products featured in the advertisement are sufficiently alike to make the comparison between the two meaningful. The Complaints Board considered the

Advertiser had been very clear in the advertisement about the comparisons being made between the Optislim and Optifast products.

Does the presence of gluten in one product and not the other make the advertisement misleading?

The Complaints Board said the Advertiser did not claim the Optislim product is suitable for consumers with gluten intolerance and is not targeting the product at any specific group of consumers. The Complaints Board agreed that consumers who did have specific dietary restrictions are likely to be well-versed in verifying ingredients at point of purchase and are therefore unlikely to be misled or deceived by the advertisement.

The Complaints Board said the comparative claims in the advertisement were clear and consumers were unlikely to be misled. The advertisement was not in breach of Principle 1 or Guideline 1(b) of the Code for Comparative Advertising or Principle 2 of the Code for Advertising Food.

The Complaints Board unanimously ruled the complaint was Not Upheld.

DESCRIPTION OF ADVERTISEMENT

The Optipharm television advertisement for Optislim says in part “Optislim or Optifast – The names are similar, the ingredients are similar, so which one should you chose?” The advertisement compares where the ingredients are sourced and compares the price of the Optislim with that of Optifast.

COMPLAINT K LLOYD

Optislim weight loss product compares itself to Optifast.

Optislim contains wheat (gluten) and Optifast doesn't therefore how can it be a comparable when gluten free/Coeliacs only have the option of using Optifast.

CODES OF PRACTICE

CODE FOR COMPARITIVE 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(b) Where an advertisement makes a comparison, whether explicitly or implicitly, it should be clear with what the comparison is being made, i.e. price to price, dimension to dimension, feature to feature.

CODE FOR ADVERTISING FOOD

Principle 2 - Advertisements should not by implication, omission, ambiguity or exaggerated claim mislead or deceive or be likely to mislead or deceive consumers, abuse the trust of or exploit the lack of knowledge of consumers, exploit the superstitious or without justifiable reason play on fear.

RESPONSE FROM ADVERTISER, OPTIPHARM

As requested, we provide our comments in response.

Executive Summary

1. In summary, we do not consider the Advertisement breaches the Advertising Codes of Practice (Advertising Codes) for the following reasons:
 - a) The Advertisement does not mislead, deceive or confuse consumers; nor make false and misleading representations; nor abuses the trust of or exploits the lack of knowledge of consumers;
 - b) The Advertisement is truthful, balanced and factual;
 - c) The Advertisement compares "like" products, being meal replacement shakes, and does not denigrate competitors.
2. For the reasons set out above, we request that the complaint is not upheld.

Background

3. Optislim VLCD (Very Low Calorie Diet) Meal Replacement Shakes and OptiFast VLCD (Very Low Calorie Diet) Meal Replacements Shakes are considered by Healthcare Professionals (such as GP's & Dietitians) to be identical products as VLCD Meal Replacement Shakes, Bars or Soups.
4. The explanation of 'What is a VLCD product' is thoroughly explained by the owners of OptiFast, Nestle on their website <https://www.optifast.com.au/faq/>.

A VLCD is a low carbohydrate, total diet replacement for the dietary management of obesity. It provides 800 calories or less per day, whilst consisting of sufficient protein, fatty acids, carbohydrates, vitamins and minerals for safe and fast weight loss. Very low calorie diets (also known as VLEDs or Very Low Energy Diets) have been shown to be very effective in the management of obesity, with weekly weight losses averaging approximately 1-2.5kg per week, providing greater initial weight loss than other forms of calorie restriction. Reducing energy (calorie) intake to less than 800 calories as well as reducing carbohydrate intake leads to a whole body shift towards fat stores being utilised as the major source of energy through a process called ketosis. This results in consistent and successful weight loss.

5. In comparison, a formulated meal replacement means a single food or pre-packaged selection of foods that is sold as a replacement for one or two of the daily meals but not as a total diet replacement. A formulated meal replacement does not work by inducing ketosis to assist with weight loss. It works purely by restricting overall calorie intake.

The Advertisement

6. The Advertisement compares Optislim Meal Replacement Shake (Product) with the Optifast Meal Replacement Shake.
7. The Advertisement states the following information:
 - a) Optislim or Optifast, the names are similar, the ingredients are similar;
 - b) Optislim is made using Australian and New Zealand ingredients, the other isn't, and the other is owned by a Swiss multinational; and
 - c) Optislim is only \$43.50 per pack, per serve the other costs almost 50% more.

8. From the information provided in your email, the Complainant states that "Optislim contains wheat (gluten) and Optifast doesn't therefore how can it be a comparable when gluten free/Coeliacs only have the option of using Optifast"

Our reasoning

9. You have referred us to the following sections of the Advertising Codes of Practice that the complaint was originally assigned to:
- a) 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).*
 - b) Code for Comparative Advertising: Guideline 1(b): *Where an advertisement makes a comparison, whether explicitly or implicitly, it should be clear with what the comparison is being made, i.e. price to price, dimension to dimension, feature to feature.*
 - c) Code for Advertising Food: Principle 2: *Advertisements should not by implication, omission, ambiguity or exaggerated claim mislead or deceive or be likely to mislead or deceive consumers, abuse the trust of or exploit the lack of knowledge of consumers, exploit the superstitious or without justifiable reason play on fear.*
10. We also note the following sections from the current Advertising Standards Code that has since replaced the above Codes:
- a) Rule 2(b): *Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission, false representation or otherwise*
 - b) Rule 2(d): *Comparative advertisements, or advertising that identifies a competing product or service, must be factual, accurate, make clear the nature of the comparison, must not denigrate competitors and must be of like' products or services available in the same market.*
 - c) Guidelines: *Comparative advertisements must only compare "like with like". The basis of selection for a comparison must be clear and the elements compared must not be selected in a way that gives the advertiser an artificial or unfair advantage. Only identical products should be compared if price is the only comparative claim used in the advertisement.*
11. We comment as follows:
12. We do not accept the Advertisement has breached Principle 1 of the Code for Comparative Advertising, Principle 2 of the Code for Advertising Food, or Rule 2(b) of the Advertising Standards Code. This is because:
- a) the Advertisement does not create an overall impression that is:
 - i. misleading or deceptive or confusing; nor
 - ii. likely to deceive or mislead or confuse the consumer; nor
 - iii. makes false and misleading representations; nor

- iv. abuses the trust of the consumer or exploits his/her lack of experience or knowledge;
 - b) the Advertisement is truthful, balanced and not misleading. Further, the claims in the Advertisement are valid and substantiated; and
 - c) the Advertisement observes a high standard of social responsibility.
13. Further, we do not accept that the Advertisement has breached Principle 1 of the Code for Comparative Advertising or Rule 2(d) of the Advertising Standards Code.

This is because:

- a) the two products in the Advertisement are clearly "like" products (being VLCD meal replacement shakes), in the same market and therefore able to be compared. That is, the products are specially formulated to be meal replacement shakes, have similar ingredients, and are being sold in NZ.
- b) the Advertisement is accurate and makes clear the nature of the comparison. We clearly inform consumers that 'the ingredients are similar' as we do in relation to the name of the products i.e. "Optislim or Optifast, the names are similar". We do not claim to have identical ingredients, nor is there a requirement for ingredients to be identical.
- c) at consumer purchase point, gluten free/Coeliac consumers would, in their normal course of product evaluation, identify that our Product 'contains wheat' and is not 'gluten free'. In no way are we depicting our Product as being 'gluten free' so in no way are we misleading the general public. The fact that our product contains wheat in no way lessens the Product as a VLCD Meal Replacement Shake as the Product conforms with Codex International Standards as a VLCD Meal Replacement Shake.

It is important to note that the products are not intended to address the dietary needs of specific groups (such as gluten free consumers), but rather are intended to be used as meal replacement shakes for all consumers generally. This primary function as a weight management product is the basis of the products' similarity, and therefore the gluten content is irrelevant in this regard. Therefore, the Complainant's comment in relation to gluten in the Product does not seem to be relevant to the assessment of whether the Advertising Codes have been breached.

- d) The Advertisement does not denigrate competitors and simply states factual information.

Conclusion

- 14. It should be noted that our Company is no longer using the TVC in question. However, we dispute that the Advertisement misleads NZ consumers in any way by direct comparison and stands by the Advertisement as an accurate and fair portrayal of Optislim.
- 15. Thank you for the opportunity to dispute the complaint

RESPONSE FROM MEDIA, COMMERCIAL APPROVALS BUREAU

OPTISLIM TELEVISION ADVERTISEMENT

COMPLAINT: 19/036 KEY: GLOPT181130R RATING: GXC

We have been asked to respond to this complaint under the following codes:
Code for Comparative Advertising - Guideline 1 (b), Principle 1; Code for Advertising Food - Principle 2;

CAB approved this OptiSlim commercial on 15/11/18 with a GXC classification. This is the standard classification for nutrition products.

A complainant believes this commercial makes unfair or untruthful comparisons with a similar nutritional product, with specific regards to 'gluten'.

The advertiser, Optipharm, provided CAB with a verified comparison of the two products in a substantiating document (attached). The comparisons made are fair, and observe the high standard of responsibility required in both comparative advertising and the nutrition category respectively.

With regards to the 'gluten' issue, actual rates of Coeliac Disease in New Zealand are estimated to be at or around 1% according to national insurer Southern Cross*. Clearly this is a very small minority of viewers, and smaller still within the group of likely consumers.

Individuals living with genuine Coeliac Disease make informed choices about their diets on a regular basis, and are unlikely to be confused by quite plain advertising for a widely available product.

In CAB's view, there is no genuine risk of viewer's misinterpreting this commercial and the advertiser has met their duty of care to the viewing audience of New Zealand.

APPEAL INFORMATION

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website www.asa.co.nz. Appeals must be made in writing via email or letter within 14 days of receipt of this decision.