

HUGH RENNIE

CBE QC

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Advertising Standards Complaints Board – Decision on complaint AWAP 02/06 – Pharmac Advertisement

1. As instructed I have considered the decision (in reality a statement of opinion) issued by this Board, on 17 May 2002, in relation to a complaint by Glaxo Smith Kline.
2. The “Board” is an unincorporated entity created under the rules of an incorporated society. Its status in consequence is dependent upon persons contracting with the Society (or as members of the Society) to agree to be bound by it.
3. Pharmac is a statutory body (the Pharmaceutical Management Agency) operating under the provisions of Part IV New Zealand Public Health and Disability Services Act 2000, and constituted under section 46 of that Act. In addition to that statement of the functions and powers of Pharmac, there is an annual “Statement of Intent” which is agreed with Government. I have reviewed that Statement and taken it into account in this advice.
4. A number of media companies, and media industry organisations, have made agreements of this type. In practice,

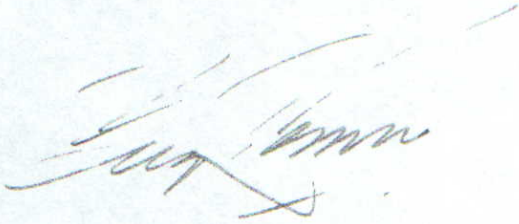
decisions of the "Board" may then guide those companies and groups in their later operation of their advertising activities.

5. A form of recognition of the "Board" arises from a provision in the Broadcasting Act 1989 which means that in general radio and television advertising complaints will be dealt with by the "Board". However the title of board is simply an assumed description of an unincorporated body of persons.
6. Any "decision" of the "Board" is in reality a statement of opinion by a group of persons selected by the society. For convenience however I refer to such a statement as a decision.
7. It has both been accepted by the society, and confirmed by the courts, that such a decision may be subject to judicial review. See *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA), although in that case the main point was whether the matter which was claimed to be an "advertisement" was in fact the performance by the Electoral Commission of a statutory power and function.
8. Pharmac is not, as a matter of law, subject to the decisions of the "Board", neither has it agreed to give the "Board" any general recognition or authority. On a case by case basis it may refer, or accept the referral, of a matter to the "Board".
9. In the present instance, Pharmac in the exercise of its own statutory powers and function sent individual letters to doctors and pharmacists. In each letter, reference was made to a pending change in the arrangements for the provision of pharmaceutical products. The information provided was factually correct, did not refer to any trademark or proprietary medicine, and was not a "medical advertisement" as defined in the Medicines Act 1981.
10. Pharmac informed the "Board" that the letters were not, in relation to any relevant definition, an "advertisement". The letters were sent by Pharmac in performance of its statutory powers and function. The "decision" of the "Board" has purported to find that each such letter was an "advertisement"

and in turn it has adopted an interpretation of its "Codes of Advertising Practice".

11. I have reviewed the "decision" and am unable to agree with either its analysis or the conclusion reached. The information which the letters contained, which was information about the operation and decisions of Pharmac in its performance of its statutory powers and function, is information which Pharmac was under a duty to convey to those persons who received each such letter. It is, on my analysis, not possible to convey that information in its entirety in a document which contained less than that which was sent. The conclusion reached in the opinion of the Board is in my opinion in error and unsustainable.
12. The conclusion I have stated rests on my interpretation. If the outcome of this matter rested only on that, then I would set out additional analysis to demonstrate the conclusion I have reached. In fact however the action of the "Board" fails for a more fundamental reason.
13. The letters sent were, as already stated, in performance of statutory functions and powers. Accordingly, on the authority of *Electoral Commission v Cameron* (above), the "Board" did not have the power to enter upon or to seek to "decide" the matter which was before it.
14. It would be open to Pharmac to apply to the High Court to have the "decision" quashed accordingly as there was no jurisdiction for it to be made; and in addition if there were any doubt as to that matter (which I do not consider to be the case) to have the "decision" set aside as being one which could not rationally be made. I doubt the value of undertaking either such proceeding. The "Board" has stated its opinion but it is in error and of no effect. Nothing further would be achieved by having that confirmed by the High Court.
15. In my opinion it would be appropriate for Pharmac to advise the "Board" of this advice, and to reaffirm that communications to pharmacists and doctors will continue to be sent, when required, in performance of the powers and function

provided by statute. Should the "Board" again seek to intervene in Pharmac's correspondence with doctors and pharmacists, court intervention at that time could be undertaken. I trust that that would not in fact prove necessary.

A handwritten signature in dark ink, appearing to read "Hugh Rennie", written in a cursive style with a long horizontal flourish extending to the right.

Hugh Rennie QC
26 November 2002