



TRADE PRACTICES ACT 1974

Undertaking to the Australian Competition and Consumer Commission given for the purposes of section 87B

BY

Pierre Fabre Australia Pty Limited

Background

1. Pierre Fabre Australia Pty Limited A.C.N. 089 647 361 ("Pierre Fabre") of 29 Eastbourne Road, Windsor, Victoria is incorporated in the State of Victoria.
2. Between 1 October 2000 and 20 August 2001 Pierre Fabre marketed, advertised, promoted, and distributed a product referred to as Elancyl Cellu-stop ("Cellu-stop"). The packaging and point of sale material made claims with respect to the effect a lipo-active concentrate had on the reduction of stubborn cellulite.
3. Elancyl Cellu-stop and the future representations made on its packaging relating to cellulite were drawn to the attention of the Australian Competition and Consumer Commission ("the Commission").
4. The Commission required Pierre Fabre to provide the reasonable grounds on which it based its future representations relating to Cellu-stop and its effect on cellulite.
5. Pierre Fabre provided to the Commission the following documentation
 - (a) *"Evaluation Performed on Cellu-stop from Elancyl"*;
 - (b) *"Localised slimming: a new approach using extracts of apple tree branches containing specific amounts of phloridzine"*;
 - (c) A technical dossier topical product including:
 - Physiological aspect;
 - Cellu-stop (concept, active ingredients, formula, directions for use);
 - Results;
 - Packaging;
 - Competition;
 - Summary of evaluation studies;

- Appendix I - New findings about cellulite and how it is formed;
- Appendix II - Phloridzine; and
- Appendix III - Evaluation studies on Cellu-stop.

6. The Commission engaged the use of independent experts to assess and review the grounds on which Pierre Fabre based these representations. The conclusion of the experts was that there were a number of deficiencies in several aspects of the studies provided to the Commission.
7. On the basis of the Commission's investigation, the Commission formed the view that the representations made by Pierre Fabre in respect of Cellu-stop and its performance characteristics, uses and benefits in relation to cellulite to be in contravention of section 53(c) of the Trade Practices Act 1974 ("the Act") and considers the conduct to be misleading and deceptive in contravention of section 52 of the Act.
8. The concerns the Commission had with the representations made by Pierre Fabre were expressed in correspondence dated 20 August 2001 addressed to Pierre Fabre's Managing Director, Mr Jean Pascal Marcel.
9. On 6 September 2001 Pierre Fabre acknowledged receipt of the Commission's concerns and attached proposed amendments to the packaging of Cellu-stop. Pierre Fabre also proposed to over-label all Cellu-stop products currently on the market. Pierre Fabre halted its current campaign of Cellu-stop products and undertook not to resume it until the Commission was satisfied with the over-labels.
10. On 11 September 2001 the Commission notified Pierre Fabre, through correspondence, that the Commission's concerns would not be alleviated by the proposed amendments to the packaging. The Commission's concerns with respect to the packaging were twofold:
 - (i) **The Plastic Container** - on the plastic container containing the green concentrate are the words: "Cellulite..."; Lipo-Active concentrate Stubborn cellulite; and on the back of the container are the words: "*Effect visiblement la cellulite incrustee*".
 - (ii) **The Packaging** -
 - (a) on the top of the plastic sleeve are the words: "*visible reduction of Cellulite*";
 - (b) on the bottom of the plastic sleeve are the words: "In 14 days *VISIBLE REDUCTION OF CELLULITE*";
 - (c) inside the front of the plastic sleeve are 3 diagrams showing the effect of cellulite "*AT THE HEART OF FAT CELL*";
 - (d) on the right hand side of the plastic sleeve are the words: "*All products of the Galenic Laboratories are systematically tested in a Research Centre*".

by doctors and pharmacists, and each production batch is subjected to stringent controls to guarantee good product tolerance”;

- (e) on the back of the sleeve at the top are the words: “CELLU-STOP Stubborn Cellulite”; and
 - (f) on the back of the plastic sleeve there is the paragraph which defines the skin condition cellulite.
11. On 19 September 2001 Pierre Fabre acknowledged receipt of the Commission’s further concerns and proposed further amendments to the packaging to address the representations set out in paragraph 9. The Commission accepted the proposed amendments as addressing the Commission’s immediate concerns in relation to the representations made on the packaging.
12. In light of the concerns expressed by the Commission that Pierre Fabre’s conduct may have contravened sections 52 and 53(c) of the Act, Pierre Fabre has now ceased the conduct referred to in paragraph 7 of this undertaking.

Undertakings

13. Pierre Fabre gives the following undertakings to the Commission for the purposes of section 87B of the Act. Pierre Fabre undertakes that it (and its officers and employees):
- (a) will not represent the effect of Elancyl Cellu-stop on cellulite;
 - (b) will provide refunds to any consumer who subsequently complains about Cellu-stop in respect of its effect on cellulite;
 - (c) has replaced the card inside the plastic pack with an amended version that does not have representations with respect to Cellu-stop’s effect on Cellulite;
 - (d) has relabelled the plastic container in such a way that no representation is made about the performance characteristic of Cellu-stop in respect of cellulite; and
 - (e) will within three (3) months of the acceptance of this undertaking by the Commission, create and maintain, at its own expense, a trade practices compliance program (“the Compliance Program”) in accordance with Appendix I.

Acknowledgments

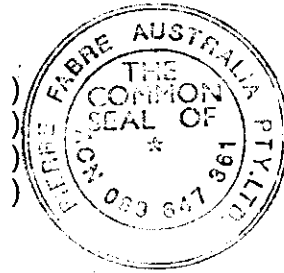
14. Pierre Fabre acknowledges the Commission’s right to make this undertaking available to the public including by placing it on a register, publishing it and allowing third parties to publish it.
15. Pierre Fabre acknowledges that the Commission may issue a media release about this undertaking and may, from time to time, publicly refer to the undertaking.

16. Pierre Fabre acknowledges and accepts that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.
17. Pierre Fabre acknowledges the Commission's right to make the Compliance Program available to the public by placing it on a public register with the accompanying Audit Report (in the form agreed to and implemented by Pierre Fabre) and make it available to third parties.

IN WITNESS OF THIS UNDERTAKING

This *11th* day of *December* 2001

THE COMMON SEAL of **PIERRE FABRE AUSTRALIA PTY LTD** A.C.N. 089 647 361 was hereunto affixed in accordance with its Constitution in the presence of:



[Handwritten Signature]

Jean Pascal Marcel - Managing Director

**ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT 1974**

[Handwritten Signature]
(Professor Allan Fels)
Chairperson

This *20* day of *December* 2001

Appendix I

Trade Practices Compliance Program

This Trade Practices Compliance Program ("the Compliance Program") to be undertaken by Pierre Fabre Australia Pty Ltd A.C.N. 089 647 361 ("Pierre Fabre") will be implemented as follows:

General

1. Within two (2) months of the undertaking coming into effect, Pierre Fabre will develop for consideration by the Australian Competition and Consumer Commission ("Commission"), a trade practices compliance program ("the Draft Compliance Program").
2. Pierre Fabre will in good faith consider and if reasonably required make any changes to the Draft Compliance Program that the Commission may reasonably require.
3. Once the Commission has approved the Compliance Program, Pierre Fabre will, within one (1) month of receipt of the Commission's approval in writing, implement the Compliance Program at its own expense.
4. Pierre Fabre will place responsibility for the implementation and effectiveness of the Compliance Program with its Managing Director.
5. Pierre Fabre will appoint either its Managing Director or another senior officer as the trade practices compliance officer ("the Compliance Officer"). The Compliance Officer will be appointed at the time the Compliance Program is implemented.

Advertising Reviews

6. Pierre Fabre will require the Compliance Officer to review all advertising, promotion and packaging ("Advertising Review") of Pierre Fabre (by any medium) to ensure that it complies with the *Trade Practices Act 1974* ("the Act"), prior to its publication, broadcast or public display.
7. Pierre Fabre will require the Compliance Officer to maintain documentary record of the Advertising Reviews. Such documentary record will include:
 - (i) a description of the advertisement;
 - (ii) a description of the publication (including name, date, pages and publisher);
 - (iii) a copy of the advertisement; and
 - (iv) written notation that the advertisement had been reviewed and cleared by the Compliance Officer (including the date on which the advertisement was reviewed and cleared). The notation should include any action taken to address any trade practices issues raised in the review.

8. Pierre Fabre will ensure that the documentary records of the Advertising Reviews are available to the Commission to be reviewed from time to time. Such records are to be available from one (1) week after the date of publication of the advertisement for a period of three (3) years after that date. Such records shall be provided to the Commission within five (5) working days of a written request for those records.

Complaints Handling

9. Pierre Fabre will ensure that the Compliance Program incorporates appropriate complaints handling mechanism.

Education

10. Pierre Fabre will develop and implement an education program calculated to have the Relevant Staff, conversant with the Part V provisions of the Act to a level where:
 - (i) the Relevant Staff can avoid obvious contraventions and can identify more complex trade practices problems for referral to the Compliance Officer;
 - (ii) the Compliance Officer can carry out his or her responsibilities; and
 - (iii) the Compliance Officer can address more complex trade practices issues or, if not legally qualified or able to give the relevant advice, identify issues which require referral to Pierre Fabre's legal adviser.
11. The term "Relevant Staff" referred to in paragraph 10 means Pierre Fabre's Managing Director and any other Pierre Fabre officers or staff directly involved in the development, creation, input or approval of advertising or promotional material for or on behalf of Pierre Fabre.
12. Pierre Fabre will ensure that training sessions covering all aspects of Part V of the Act be given to Relevant Staff on two (2) occasions within twelve (12) months after the implementation of the Compliance Program. The first of these training sessions is to be completed within three (3) months of the Compliance Program being implemented and the second one nine (9) months later.

Review

13. Pierre Fabre will ensure that an independent external person, with expertise in trade practices law, conducts an audit ("the Audit") of the Compliance Program with a view to assessing and, if necessary, improving its effectiveness. The Audit will be conducted within twelve (12) months after the implementation of the Compliance Program. The Audit will assess and identify any deficiencies and, where applicable, make recommendations as to possible improvements to the Compliance Program. The Audit may be carried out by a commercial lawyer.

Reporting

14. Pierre Fabre will provide the Commission with the following:
- (i) within ten (10) working days of the implementation of the Compliance Program, a copy of the Compliance Program;
 - (ii) within ten (10) working days of the implementation of the Compliance Program, notice of the appointment of the Compliance Officer including name, position and contact details;
 - (iii) within ten (10) working days after each of the training sessions, notice of completion of the training session, including an outline of the session; and
 - (iv) within ten (10) working days of the completion of the Audit, a copy of the Audit together with advice as to any changes that Pierre Fabre intends to incorporate in the Compliance Program as a result of the Audit.
15. Pierre Fabre will in good faith consider and if reasonably required make any changes that the Commission may reasonably require to be made to the Compliance Program after the Commission has considered the Audit. Such changes are to be implemented within two (2) weeks of the Commission's reasonable request.

Duration

16. The Program will remain in effect for three (3) years following the undertaking coming into effect.