

30 September 2011

Steve Anthony
Chief Advisor
Fair Trading Branch
Commerce Commission
P O Box 2351
WELLINGTON



Dear Steve,

Thank you for your letter dated 16 August 2011 regarding alleged misleading representations by sunbed operators.

Prohibited Conduct

Thank you for the clarification of the prohibited conduct in terms of the Fair Trading Act. We have taken the liberty of writing to our trade customers with further explanation of your letter to assist with their compliance. We particularly note your comments about 'RELYING ON STUDIES' and the importance of any information being up to date, reliable and accurate.

Independent Expert- Elizabeth Baird

We requested and subsequently learned the identity of the independent expert you consulted during this investigation. We respectfully but strenuously disagree that Elizabeth Baird was a suitable candidate for the task. The Commission was no doubt unaware of a pre-existing issue of contention between Baird and the indoor tanning industry involving an Advertising Standards Authority (ASA) complaint. We brought this complaint to the ASA in 2009 as a consequence of a television advertisement being played on TV3. The full judgement of this upheld complaint can be viewed here: <http://203.152.114.11/decisions/09/09031.doc>

The advertisement was for Elizabeth Baird's clinic 'Remuera Dermatology', paid for by Johnson & Johnson. The ad showed Baird standing in front of an open 'clamshell-style' sunbed discussing the dangers of sunbed use, and directly encouraging viewers to "never use a sunbed". In summary, the ASA Board ruled the complaint upheld, as they felt the ad contained exaggerated and insufficiently supported claims likely to mislead the consumer. It was also found in breach of the ASA's Code of Ethics by failing to be prepared with a due sense of social responsibility due to the seriousness of the health issue discussed (skin cancer).

In light of this outcome, and the subsequent involvedness on the part of Baird's clinic, you can appreciate our concern about the suitability of this dermatologist to provide information about sunbed use on an independent basis.

Another major point of concern for us regarding Elizabeth Baird's suitability as an independent expert is her close association with the pharmaceutical giant Johnson & Johnson through their skincare brand 'Neutrogena'. Baird is regularly seen in this country's media endorsing and recommending the Neutrogena range of cosmetic sunscreen-enriched products.

Sun-blocking products like these are marketed as providing protection against skin damage, ageing of the skin, and the possibility of skin disease (i.e skin cancer)- all of which is supposedly caused by sun exposure that may be prevented by use of these products. The provision of sun exposure services (i.e sunbeds) can therefore be viewed as competitive to the provision of sun-blocking products (i.e cosmetic brands like Neutrogena skincare) because the more that people are afraid of the consequences of exposure to sunlight, the more they will be inclined to purchase sun-prevention-assisting products (such as sunscreen-enriched cosmetics.)

In short, brands like Neutrogena have a vested interest in discouraging consumers from using our indoor tanning services, beyond the 'neutral' stance of general consumer health protection. Because the cosmetic/pharmaceutical industry enjoys direct benefit from Baird's professional advice to avoid ultraviolet radiation exposure from sun or sunbeds, and because her affiliation with this industry is proven, again we feel it is extremely unlikely Baird was able to provide a truly independent submission on this issue.

Specific comments on the Benefits and Risks of Sunbed Use points 1.-9

1. The carcinogenic risks of inappropriate exposure to ultraviolet radiation (UVR) are undisputed and as industry leaders we encourage industry members to follow the existing guidelines of AS/NZS 2635:2008 with regard to warning notices and full disclosure to clients that UV light from sunbed equipment is a known human carcinogen.
2. In the interests of accuracy, it is of concern that there is no reference to the comments contained in the second sentence of this point with regard to pre-cancerous actinic keratosis and Bowen's disease appearing in sunlight-protected but sunbed-exposed skin.
3. Skin Ageing: Industry guidelines suggest clients should be warned about the increased likelihood of skin ageing via UVR. While we do this, and recommend operators do so also, we disagree that the point is relevant to the betterment of public health outcomes for skin cancer. This point is a purely aesthetic, cosmetic concern and the highlighting of it by dermatologists is ethically questionable given the nature of their provision of commercial, non-essential skin therapy services. Ageing of the skin via UVR has not been shown to cause an increase in the likelihood of contracting skin cancer. Eyes: Dangers of over-exposure to eyes are well documented and undisputed. While it is equally well-documented that NZ sunbed operators failed to score complete marks in the Consumer 2010 mystery shop survey, those surveyed did achieve an 85% success rate at offering eye protection to their clients- an improvement on previous years.
4. The Commission was advised by Baird that "UV light on a sunbed does not replicate that from the sun." This statement is both true and untrue, and therefore it is a misleading over-simplification. While we understand it is made to discourage sunbed operators from making wild claims about indoor tanning- with which we agree- we would like to clarify this point for the record. By definition, the statement is incorrect because the UV emission of a sunbed (as a measurement of light) mimics the UV emission characteristics making up the sunlight that reaches the earth (being UVA and UVB in the spectrum 280 – 400nm); the light is the same regardless of the source. (A

- simple point of proof is that UVB light stimulates the production of vitamin D in the skin- whether from the sun or a sunbed.) By comparison the statement is also true, because the emission of outdoor sunlight is subject to myriad confounding variables (e.g exact location, time of year, time of day, cloud cover etc), while the emission of a sunbed is much more steady.
5. Baird refers to the school of thought that UVR can improve the mood, arguing that this effect is “increasingly” thought to be due to white light instead of UV light. Quoting a psychiatric study from 1983 as relevant scientific proof clearly contravenes the principle set down by the Commission under ‘RELYING ON STUDIES’- that information should be “up to date, reliable and accurate”- and as such we feel it is not acceptable.
 6. We accept that currently the benefits of Vitamin D are officially and cautiously limited to bone health only, and we advise sunbed operators to ensure they do not make inappropriate links between sunbed use and vitamin D-related health improvement. However we know that this field is increasingly of interest to consumers, and therefore we defend our right to disseminate information about vitamin D and its potential benefits, without making the link to claim that “sunbed use has health benefits”.
 7. Sunbed use will produce vitamin D in the skin. As this fact is now clarified and universally accepted we advise that operators may agree with clients that there are proven health benefits from vitamin D, and that vitamin D is made in the skin in response to UVB light from a sunbed, without making claims that sunbed use itself has health benefits. We note the Commission states “more information is becoming available” on this topic, and even the Cancer Society tells us “possible benefits [of vitamin D] include protective effects against various cancers, heart disease, and some auto-immune disorders.” These facts cannot be overlooked- but we agree operators should not ‘talk up’ these benefits or understate the risks, and we advise them accordingly.
 8. The issue of how much vitamin D is required for optimum health is under debate, as is the issue of whether people are able to obtain sufficient vitamin D from incidental exposure to the sun. We note the Cancer Society has recently amended their advice from ‘everyone should use sunscreen 365 days of the year’ to now recommending skin types 5 and 6 may never need to use sunscreen in case of vitamin D deficiency. While Baird relied on the American Academy of Dermatology for her comments, we approached local expert Professor Robert Scragg to respond to point 8. He advised that because research is ongoing, currently he is “taking a neutral position about the level of sun exposure and vitamin D required for optimum health.” We therefore suggest nothing should be claimed about vitamin D in terms of the appropriate serum levels or how best to obtain it. (It should be noted that the American Academy of Dermatology receives millions of dollars from the cosmetic sunscreen industry in return for endorsement logos.) Locally again, in 2005 the Medical Journal of Australia amended their position statement on vitamin D, stating “it is a fallacy that Australians receive adequate vitamin D from casual exposure to sunlight”. Further, we can refer you to medical experts who confirm that use of sunbeds is an appropriate way to boost vitamin D levels. These experts include Holick, Veith, Grant, Cannell, Moan, Mercola, Sorenson and more. (Please see the attached affidavits of Holick, Veith and Grant for more.)

9. This comment regarding sunburn protection from a sunbed tan is oxymoronic, and was extrapolated on in our original submission to the Commission regarding the alleged misrepresentations complained about by Consumer NZ and the Cancer Society. The statements here claim one truth, and then go on to claim the opposite. A sunbed tan is generally accepted to give a Sun Protection Factor of 2-3. Therefore it is factually incorrect to claim that a sunbed tan offers no protection against sunburn. We advise operators on this, adding that they must not claim that a base tan (SPF of 2-3 acquired as natural facultative pigmentation via a moderate course of indoor sun-tanning) will prevent skin damage. However, the generally accepted figure of SPF2-3, combined with the landslide of anecdotal global industry evidence that the SPF provided by a natural tan can be at least this (and often up to 6-8 depending of course on skin type), is evidence enough to agree with clients who suggest tanning in this way may provide sunburn protection to their skin- as long as they also warn clients of the potential risks to vulnerable groups and of damage to skin and eyes.

Further Relevant Information to the Commission Investigation

Enclosed please find copies of three affidavits related to the Canadian Competition Tribunal case- where in similar fashion the Tribunal investigated possible misleading claims made by Fabutan Sun Tan Studios. The outcome of this 2005 investigation was the permitting of Canadian indoor tanning salons to advertise that exposure to UVB light from sunbeds makes vitamin D in the skin naturally.

We appreciate the Commission plans to take no further action at this time. However, I must state for the record how unfortunate it is our company was given only one opportunity to submit information to you regarding this issue. Given the thorough nature of the initial process on the Commission's part and the detailed communication that took place between your investigator Kate Stringer and ourselves- we were under the impression we would be given an opportunity for response and discussion after your initial review was complete. As you can see from this letter, relevant information would have been supplied affecting your 280-odd letter distribution and the accompanying media statement release.

Regardless of this- our company, along with our concerned colleagues in the industry, remain committed to doing whatever we are able to do to ensure all tanning operators provide a better service to the New Zealand public in the interests of better health outcomes for skin cancer. We sincerely hope the Commerce Commission is able to help us along with this intention. In the meantime I will very much appreciate your comments on the points here raised, and thank you in anticipation.

Yours faithfully,

Tiffany Brown
Managing Director
Get Brown Tanning