

16 August 2017

AFT Pharmaceuticals Limited
Level 1, Neilson Building
PO Box 33-203
Takapuna
Auckland 0704

By Email

Dear Directors

AFT Pharmaceuticals Limited – Fair Trading Act 1986: Warning

1. The Commerce Commission has been investigating the distribution and marketing of certain Maxiclear branded products by AFT Pharmaceuticals Limited (AFT) under the Fair Trading Act 1986 (the Act).
2. Specifically, we have investigated the Maxiclear product pairs below, each of which contain the same ingredients:
 - 2.1 Maxiclear Cold & Nasal Relief (**Cold & Nasal**) / Maxiclear Hayfever & Sinus Relief (**Hayfever & Sinus**);
 - 2.2 Maxiclear Cold & Flu Relief (**Cold & Flu**) /Maxiclear Sinus & Pain Relief (**Sinus & Pain**).
3. We have now completed our investigation and are writing to you to warn you that, in our view, the packaging and marketing for Cold & Nasal, Hayfever & Sinus, Cold & Flu and Sinus & Pain is likely to breach sections 10 and/or 13(e) of the Act.
4. Section 10 of the Act prohibits traders from engaging in conduct that is liable to mislead the public as to the nature or characteristics of goods or their suitability for a purpose.
5. Section 13(e) of the Act prohibits traders from making false or misleading representations that goods have performance characteristics, uses or benefits.
6. AFT has advised that it does not believe it has breached the Act however, since the investigation it intends to introduce new packaging. The decision to change the packaging has been taken into consideration in the Commission's decision to issue a warning to AFT.

The investigation

7. AFT cooperated fully with the Commission and supplied information and product packaging in relation to the distribution and sales in New Zealand of the products and originating products including documents in relation to the history of relevant Medsafe approvals.
8. The investigation showed that each pair of products had the same active ingredients but were marketed for different therapeutic purposes.
9. We have investigated whether specific representations made by AFT, on packaging and in advertising (including website advertising) for the products created the overall impression that the specific product:
 - 9.1 had been specially formulated for the purpose stated on the product packaging; and/or
 - 9.2 was more effective for treating the named purpose of the product than the originating product; and/ or
 - 9.3 was solely effective in treating the pain state named on packaging for the product.
10. Copies of the packaging with representations for the products and originating products investigated are at **Attachment A**.

Maxiclear Cold & Nasal Relief/Maxiclear Hayfever & Sinus Relief

11. AFT marketed the Cold & Nasal and Hayfever & Sinus tablet products for different purposes even though they had identical active ingredients. A copy of the packaging is at Attachment A.
12. We were concerned that the packaging and marketing for the products created the impression that:
 - 12.1 each product was specifically formulated or designed for the purpose of treating nasal symptoms associated with colds or Hayfever and sinus symptoms respectively;
 - 12.2 each product was solely effective in providing relief of nasal symptoms associated with colds or Hayfever and sinus symptoms respectively;
 - 12.3 each product was more effective for treating nasal symptoms associated with colds or Hayfever and sinus symptoms than the other product.
13. In our view this impression was likely to mislead because Cold & Nasal was not specifically formulated or designed for the purpose of treating nasal symptoms associated with colds. Cold & Nasal contains the same active ingredients as Hayfever & Sinus and Cold & Nasal was approved by Medsafe as an additional name of Hayfever & Sinus.

14. The Medsafe therapeutic product database report stated the treatment indications for Hayfever & Sinus (of which Maxiclear Cold & Nasal Relief was an additional trade name) as:

For the temporary relief of nasal and sinus congestion, Hayfever, runny nose, watery and itchy eyes and sneezing (Label claim).

15. This means that Cold & Nasal was equally effective in treating Hayfever symptoms which was not included in the uses of the product listed on the back of pack.

Packaging and website representations

16. In our view the packaging and the www.aftpharm.co.nz website description of Cold & Nasal and Hayfever & Sinus, through its name and the representations made as to its uses was likely to create the impression set out in paragraph 12 above.
17. Promoting these products on the website alongside each other reinforced the impression that each product was different and formulated for the purpose of treating different conditions.

Advertising

18. A 2012 television commercial for Cold & Nasal in 2012 stated:

that's why I invented and patented Maxiclear Cold & Nasal Relief right here in NZ, to effectively relieve the symptoms of the common cold. It's the **only** cold treatment combining a nasal decongestant to relieve a runny or blocked nose and a non-drowsy antihistamine for sneezing (emphasis added).

19. 2011 advertising in Woman's Day and New Idea described Cold & Nasal as "Unique new treatment for colds" and referred to it as being "Unique and Patented".

20. Television advertising in 2012 for Hayfever & Sinus stated that it is:

the **only** product that contains both a non-drowsy antihistamine AND a nasal decongestant (emphasis added).

21. The same statement was also made in 2011 advertising in New Idea and Woman's Day magazines and instore advertising in 2011.

22. Instore marketing in 2011 promoted Hayfever & Sinus as:

"**unique** dual action relief from hayfever and blocked sinus" (emphasis added).

23. In our view, these statements were likely to be misleading as Cold & Nasal contains the exact same ingredients as Hayfever & Sinus.

Maxiclear Cold & Flu Relief/Maxiclear Sinus & Pain Relief

24. Similar issues arise with the product packaging and marketing of the Cold & Flu and Sinus & Pain which both had the same ingredients. A copy of the packaging is at Attachment A.

Packaging and website

25. In our view the packaging and the www.aftpharm.co.nz website description of Sinus & Pain, through its name and the representations made as to its uses was likely to create the impression set out in paragraph 12 above.
26. Promoting these products on the website alongside each other also reinforced the impression that each product was different and was formulated for the purpose of treating different conditions.

Advertising

27. Sinus & Pain and Cold & Flu were promoted together in 2011 advertising in New Idea (New Zealand Health Update) alongside each other as part of the Maxiclear winter range.
28. Consumers were likely to get the impression from the advertisements that the two products were different and formulated for the purpose of relieving different symptoms, being either sinus pain, or cold and flu symptoms.

The Commission's view

29. The Commission's view is that AFT's representations about the products were likely to have breached sections 10 and/or 13(e) of the Act.
30. In our view the packaging and some marketing for the products misrepresented the characteristics and / or suitability of the products. The packaging and marketing created the overall impression that the product had been specifically formulated, was more effective and / or solely effective in treating the stated indications for that product when that was not the case. In fact, the product had the same efficacy for treating either the same or broader pain indications or symptoms as represented on the originating product packaging.
31. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.
32. While we will not be taking any further action against AFT at this time, we will take this warning into account if this conduct continues or if you engage in similar conduct in the future.
33. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against AFT.
34. This warning letter is public information. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

35. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the Act. The Act

prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the Fair Trading Act

36. Only the courts can decide if there has actually been a breach of the Act. The court can impose penalties where it finds the law has been broken. A company that breaches the Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
37. You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

Further information

38. We have published a series of fact sheets and other resources to help businesses comply with the Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.
39. You can also view the Act and other legislation at www.legislation.co.nz.
40. Thank you for your assistance with this investigation. Please contact Catherine Butterworth, Chief Adviser on 09 9203485 or by email at catherine.butterworth@comcom.govt.nz if you have any questions about this letter.

Yours sincerely



Stuart Wallace
Consumer Manager
Competition

Attachment A:

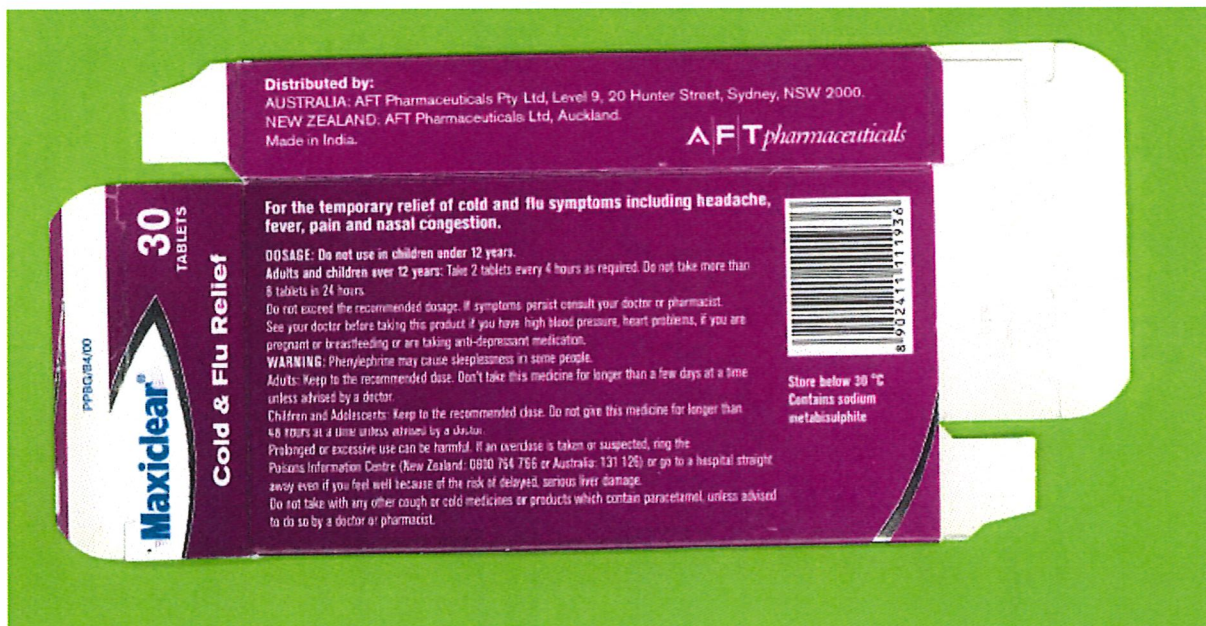
Maxiclear Cold & Nasal Relief packaging:



Maxiclear Hayfever & Sinus Relief packaging:



Maxiclear Cold & Flu Relief packaging:



Maxiclear Sinus & Pain Relief Packaging:

