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| 1. Matter reference | INT/SON/00 |
| 2. Advertiser | Sony Australia Limited |
| 3. Complainant | International Dynamics Pty Ltd |
| 4. Type of advertisement | Print |
| 5. Nature of complaint | Section 1 of the Code of Ethics |
| 6. Product | Telecommunications |
| 7. Date of determination | 10 November 2000 |
| 8. Board members | Peter Leonard (Chair) – <i>Gilbert & Tobin</i>
Kathryn Everett – <i>Freehills</i>
Kim O'Connell – <i>Andersen Legal</i> |
| 9. DETERMINATION | COMPLAINT UPHELD
ADVERTISING MODIFIED |

DESCRIPTION OF THE ADVERTISEMENT

The complainant, International Dynamics Pty Limited, complained about advertising material of Sony Australia Limited relating to Sony's 'Digital Reality Creation', or 'DRC', television sets.

The advertising material on which the complainant primarily relied appeared in a lengthy magazine-style catalogue entitled *Pulse* which is made available by Sony Australia to prospective retail purchasers of Sony products including DRC television sets. The market for DRC television sets is primarily consumers.

The Winter 2000 issue of *Pulse* includes at page 38 the following text:

"You can buy a Sony right now that has such highly refined picture quality that it will make the most of digital signals when broadcasts start next year. The Sony Wega Digital Reality Creation ES Series* redefines the industry standard for high quality video and audio reproduction.

DRC1250 doubles horizontal and vertical scanning lines, providing four times the picture resolution of conventional screens – perfect for digital sources such as Digital Video or DVD. In DRC100 mode, the latest field doubling technology provides perfectly clear flicker free still images from digital cameras, multi-media devices and web based terminals. And Virtual Dolby Digital sound emulates 5.1 sound channels through two discreet slimline speakers.

And next year when digital signals hit the airwaves, by simply adding an affordable set top converter (which you can do to any TV in the Sony range),

the units. Further, it would be appropriate for the qualification to be made whenever the television sets are represented as digital television sets capable of providing a significant enhancement in picture quality over other television sets.

23. The key point of difference between the parties was as to whether an improvement (if any) in picture quality as perceived by a viewer of the DRC television set was an increase in the "resolution" of that television set. The Claims Board believes, with a reasonable level of satisfaction, that the ordinary reasonable reader is likely to infer from the advertisement that the picture quality is 4 times better than that available on a standard television set due to the fact that the screen is able to display four times the number of individual picture elements.
24. Given that this is in fact not the case, we conclude that the advertising material in question is misleading or deceptive or likely to mislead or deceive.
25. In accordance with the procedural guidelines, the Claims Board will proceed to notify the advertiser and request the advertiser to provide an Advertiser Statement as to whether it agrees to modify or discontinue the advertising.

ADVERTISER'S STATEMENT

"Whilst it does not consider that it engaged in any conduct which was misleading or deceptive or likely to mislead or deceive, Sony has already modified its promotional material, and proposes to further modify its promotional material in order to ensure that the Board's concerns are appropriately addressed in the following manner:

- (a) In order to ensure that its promotional material addresses the Board's concerns, Sony proposes to further modify its description of DRC technology in the next issue of Pulse to add an express and proportional statement to the effect that Televisions using DRC technology are not digital televisions; and
- (b) In future promotional material, Sony proposes to add further explanation to the diagrams in order to:
 - (i) make it clear that DRC improves signal processing and
 - (ii) ensure consumers do not infer that a particular number of lines of resolution or picture elements will be displayed by a television screen using DRC processing."

you'll be ready to make the most of the digital free to air broadcast, with the very best television technology available today...".

This text appears above a bold headline statement "**Digital TV starts January 1st 2001. But you don't have to wait until then**". Small text footnoted by an asterisk (*) next to the words "Sony Wega Digital Reality Creation ES Series" states "DRC is not a digital television".

On page 47 of the same issue of *Pulse* the following text appears under the heading "**DRC - Digital Reality Creation**":

"Only Sony's DRC technology delivers true - two-life images by recreating incoming, normal video signals to higher-defined signals. This is achieved by using a real-time signal processing algorithm. The result is a vast improvement in picture quality as compared to conventional, delayed-time processing, which very often leads to loss of TV signals".

A diagram then appears beneath this text, which compares a "normal" picture quality image of 625 lines (vertical pixel) by 720 pixels (horizontal pixel) to 1250 lines and 1440 pixels for "DRC 1250". Next to this diagram the following text appears:

"Sony has developed a unique digital-signal processing system that improves picture resolution by doubling both the horizontal and vertical resolution in real-time. With the recreated, double interlaced scanning lines and horizontal pixels, picture density improves tremendously and the visual scanning lines are significantly minimised...."

The Autumn 2000 edition of *Pulse* at page 5 includes similar text to the text quoted above from page 47 of the Winter 2000 edition of *Pulse*.

International Dynamics in its correspondence with the Advertising Claims Board also made reference to an advertisement which appeared in the July 3 2000 issue of *Time Magazine* under the banner headline "**Do you want to be four times closer to the action?**". This advertisement appeared in the Asia Pacific edition, published in Singapore but available from newsstands and circulating in Australia, of *Time Magazine*. Although *Time Magazine* was published outside Australia, the Claims Broad Panel considered that the circulation of the magazine within Australia was sufficient to bring this issue within the purview of the Claims Board. However, at the open meeting of the Advertising Claims Board Panel on Friday 10 November 2000, Mr Clarrie Burton, Company Secretary of Sony Australia Limited, advised the Claims Board Panel that the advertisement had not been placed by Sony Australia Limited. It would appear that the advertisement was probably placed by an overseas affiliated corporation of Sony Australia's Japanese parent corporation. As the advertisement had not been placed by the respondent (Sony Australia Limited), the Claims Board Panel determined that it was not appropriate to proceed to a determination in relation to the advertisement which appeared in *Time Magazine*. Accordingly, this Determination relates to the text published in the two issues of *Pulse*, as quoted above.

ADVERTISING CLAIMS BOARD DETERMINATION

Introduction

1. This is a determination by a Panel of the Advertising Claims Board in relation to an advertising dispute between International Dynamics Pty Limited (**Complainant**) and Sony Australia Limited (**Advertiser**) concerning a number of magazine advertisements for the Advertiser's range of television sets.

Preliminary Observations

2. The role of the Advertising Claims Board is to consider complaints concerning advertisements published or broadcast in Australia. The Claims Board administers the voluntary Advertiser Code of Ethics published by the Australian Association of National Advertisers (AANA).

The Code of Ethics

3. Section 1 of the Code of Ethics provides as follows:
 - (i) Advertisements shall comply with Commonwealth law and the law of the relevant State or Territory.
 - (ii) Advertisements shall not be misleading or deceptive or be likely to mislead or deceive.
 - (iii) Advertisements shall not contain a misrepresentation which is likely to cause damage to the business or goodwill of a competitor.
 - (iv) Advertisements shall not exploit community concerns in relation to protecting the environment by presenting or portraying distinctions in products or services advertised in a misleading way or in a way which implies a benefit to the environment which the products or services do not have.
 - (v) Advertisements shall not make claims about the Australian origin or content of products advertised in a manner which is misleading.
4. In the first determination of a Panel of the Advertising Claims Board, in relation to a complaint brought by Jalna Dairy Foods Pty Limited against Pauls Limited in relation to "Vaalia" yoghurt products (matter reference JAL/PAU/99, date of determination 22 September 1999), the members of that Panel of the Advertising Claims Board made a number of preliminary observations in relation to the role of the Claims Board and that Panel's interpretation of the Code of Ethics (paragraphs 1 to 17, at pages 2 to 5 of that Determination). The Panel in the current Determination considers that those observations provide an appropriate basis on which to proceed in relation to the current Determination. In particular, this Panel adopts the same view as the previous Panel, that the requirement in paragraph 1.2 of

the Code of Ethics that "advertisements shall not be misleading or deceptive or be likely to mislead or deceive" should be interpreted by reference to the extensive case law as to conduct prohibited by section 52 of the *Trade Practices Act 1974* (C'th) and equivalent provisions of the State and Territory *Fair Trading* laws in the context of advertising.

5. The following principles, from *Farquhar v Bottom* [1980] 2 NSWLR 380, have been adopted by the Federal Court of Australia to assist in determining whether advertisements are in breach of section 52:

- (a) the reader is an ordinary reasonable reader of fair, average intelligence;
- (b) ordinary readers can and do read between the lines in light of general experience and knowledge;
- (c) ordinary readers are not lawyers and their capacity for implication is much greater;
- (d) it is necessary to consider the degree of care with which the ordinary reader would have read the advertisement, the degree of analytical attention such a person would apply to it and the degree of accuracy he or she may expect; and
- (e) a wide degree of latitude should be given to the capacity of the matter complained of to convey particular imputations where the words are imprecise, loose, fanciful or unusual.

6. The Claims Board is required to reach a reasonable level of satisfaction that the advertisement is misleading or deceptive. The Claims Board sees its role as to determine objectively whether a significant number of readers of the advertisements would be likely to be misled or deceived by claims made in the advertisements, read in context and having regard to relevant qualifications in the advertisement as might be expected to be adhered to by ordinary readers of the advertisement. As noted by the Federal Court of Australia in *Telstra Corporation Ltd v Optus Communications Pty Ltd* (1997) ATPR 41-541, "... even though every sentence considered separately is true, the advertisement as a whole may be misleading because factors are omitted which should be mentioned or because the message is composed to highlight the appealing aspects".

7. The Claims Board considers that there should not be strict legalistic rules in relation to the procedure by which material relevant to a determination is placed before the Claims Board or the manner in which claims are stated for determination. The Claims Board should endeavour to meet an objective of providing a mechanism for review of advertisements that is fair, just, economical, informal and quick. The Claims Board is not bound by technicalities, legal forms or rules of evidence, and should act according to substantial justice and the merits of the case: see by analogy the statement of the role of the Migration Review Tribunal in section 353 of the *Migration Act 1958* (C'th).

8. To meet the above objectives, the Advertising Claims Board has published "Procedural Guidelines for Participants" which state at paragraph 4.6 that it is the responsibility of the complainant to establish and substantiate the complainant's claim. The Procedural Guidelines envisage that a complaint will be initiated in writing and that the written complaint "should set out as much detail as possible to facilitate a response by the advertiser. In particular, it should include details as to the nature of the alleged misrepresentations, details as to the sections of the code that are alleged to have been breached, a description of the relevant advertisement and all supporting data to substantiate the complaint": paragraph 2.1 of the Procedural Guidelines. The advertiser is then copied with the complaint and all supporting data and afforded an opportunity to provide "a substantial written response": paragraph 2.3 of the Procedural Guidelines. The advertiser's response is then copied to the complainant and the complainant may reply to the response by way of final submission: paragraph 2.4. The advertiser is then provided with an opportunity to submit a response to the reply by way of the advertiser's final submission: paragraph 2.5. The Claims Board may request additional information or clarification from either party: paragraph 2.6.
9. In the current matter for determination there was extensive correspondence between the complainant, the advertiser and the secretariat of the Advertising Claims Board. The complainant in a number of letters referred the advertisements quoted above in this determination but the complaint as lodged by International Dynamics on 5 July 2000 did not identify in precise terms the particular claims in the advertisements which were the subject of complaint. In correspondence between the complainant, the advertiser and the secretariat of the Advertising Claims Board up to and including a letter sent by Sony to the Advertising Claims Board on the date of the meeting to consider this matter (10 November 2000), there was a lack of clarity as to the scope of the claims challenged by International Dynamics.
10. In particular, the correspondence focussed on the meaning of "four times the picture resolution of conventional screens" and the definitions of "pixels", "line doubling" and "resolution" as used in the claims. Although the extensive discussion of these issues in the correspondence assisted the Claims Board in reaching this Determination, the Claims Board's considerations were hampered by a technical focus by each of the complainant and the advertiser on the words referred to above, rather than a consideration of the conclusions and inferences that ordinary consumers might be likely to draw from a reading of the advertising material in question. The Claims Board was in consequence left to form its own view as to conclusions and inferences that ordinary consumers might be likely to draw from a reading of the advertising material, assisted by the technical arguments and dictionary definitions of the above terms. Although the Claims Board was ultimately able to form a view as to these matters, it would assist the Claims Board in future determinations if the complainant was requested to provide a concise statement of the matters in issue at the commencement of the correspondence with the Claims Board in relation to the matter. It may also assist complainants and advertisers responding to complaints if they are provided with some guidance as to the principles that the Claims Board may apply in reaching its determination.

11. As the Panel of the Claims Board considered that the parties should be allowed an opportunity to present on the technical issues raised by the complaint and to clarify the points at issue between the parties, the Panel acceded to a request by International Dynamics that its managing director, Mr Alex Encel, be allowed an opportunity to address the Panel, followed by a similar opportunity for representatives of Sony Australia. Sony Australia then requested that Sony Australia be afforded an opportunity to demonstrate a DRC Television at a meeting of the Claims Board which was constituted on 10 November 2000. Although members of the Claims Board did not consider that a visual demonstration of a DRC television set would assist the Claims Board in reaching its determination, the Claims Board decided to accede to Sony Australia's request, in the interests of allowing each of the complainant and advertiser to present their arguments as they saw fit and as no additional cost would be incurred to the complainant in a brief visual demonstration.
12. The meeting of the Panel of the Claims Board on 10 November 2000 was attended by Alex Encel, Managing Director of International Dynamics, Clarrie Burton, Company Secretary of Sony Australia, Alex Streeter, Product Manager, Television and Home Video of Sony Australia and David Harris, Technical Support Specialist, Consumer Products Division of Sony Australia. Each of these representatives made presentations to the Claims Board and were afforded an opportunity to respond to submissions made on behalf of the other party.
13. In the case of most complaints likely to be brought before the Claims Board the issues should be capable of identification and argument in correspondence and accordingly a meeting of the Panel with representatives of the complainant and advertiser will not be necessary or desirable to facilitate prompt and proper determination in relation to a complaint. In this case, however, it was apparent from the correspondence between the parties that there was substantial, but not clearly defined, divergence as to technical questions as to the processing and presentation capabilities of Sony's DRC television sets. Accordingly, the Claims Board considered it appropriate to allow the complainant's request for a meeting with the Claims Board.
14. In reaching its determination the Claims Board was not assisted by the visual demonstration of a DRC television set. The DRC Television was not presented in juxtaposition with other television sets. Accordingly, members of the Claims Board were not able to form any view as to the comparative visual appearance of a DRC television set and other television sets. The Claims Board has however been able to reach a determination without any necessity for form a view as to the comparative visual appearance of the DRC Television and a conventional television set.

Technical Claims

15. We turn first to deal with the technical claims made by the advertiser: first, the increase in pixel count as referred to in the diagram as appears on page 47 of the Winter 2000 issue of *Pulse* magazine, second, the claim as to improved picture resolution.

Pixels

16. The complainant argues that a pixel is "the smallest element with controllable colour and brightness in a video display or in computer graphics" - *Chambers Science & Technology Dictionary*, published 1991. The advertiser suggests that pixel is a general term and that it has a slightly different meaning according to the technology in which it is being employed. They suggest that the complainant's definition of pixel belongs more to the display of computer graphics than television signals. The advertiser claims that the technology used in its television sets does not consist of stationary dots but of an electronic scanning beam which is targeted at particular points on a phosphorous coated screen but which does not always hit the same point. The advertiser defines pixel in relation to the signal sent to the display not in relation to the actual number of dots displayed. They contend that this definition is more appropriate because of the subjective nature of the assessment or measurement of resolution by the human eye. They claim that the only way to quantify how resolution is improved is by describing the process of improvement. They argue that, as a consequence, it is more appropriate for consumers to know what goes into the making the picture they see and that if more information goes into making the picture then that resolution improves proportionately.
17. The advertiser's supporting documentation refers to "processing pixels" to distinguish them as pixels comprising the signal as compared with pixels actually appearing on the screen. To summarise the difference between these two approaches:
- (a) the complainant argues that a pixel relates to a physical dot of colour and brightness on the screen of a television set; and
 - (b) The advertiser argues that a pixel relates to the individual piece of information sent to the display, irrespective of whether that information is actually visible on the screen.

Double Vertical Resolution

18. The advertiser claims the use of a unique design in its television sets comprising the use of an aperture grill with continuous vertical lines as opposed to the more common shadow mask with distinct holes. This allows the advertiser to effectively fill in the gaps between the distinct horizontal scans with another horizontal scan which has been derived using algorithms that interpolates data, effectively creating additional information, relating to colour and brightness. This has been distinguished from line doubling where the same information is simply repeated. The advertiser claims that while this information may not have been derived from the original image it does provide a real improvement in picture resolution to the viewer. On the basis of this, the advertiser, in its supporting documentation, claims "improved picture resolution by doubling the vertical lines of resolution".

Double Horizontal Resolution

19. The advertiser initially claimed, in its supporting documentation, that it achieves "improvements in horizontal resolution through increased sampling speed with each sample representing a new pixel". The advertiser claims that this results in a "sharper picture and improved resolution on the screen". The advertiser in a letter to the Claims Board on 10 November 2000 corrected its earlier statement of the technology, stating that "rather than doubling the speed of the sampling, Sony's DRC 1250 technology takes the standard rate of sampling and interpolates additional points of signal definition into the signal path using twice the originally sampled pixels. In effect, this process intelligently predicts the shape of the shape of the signal pulse, thereby doubling the sensitivity and likely accuracy of Sony's processing of picture information".

Four Times The Resolution

20. The Advertiser claims, in its supporting documentation, that their technology delivers "four times the information which contributes to the picture resolution". This wording is more guarded than the actual advertising material which claims "four times the picture resolution of conventional screens".

Determination

21. The Claims Board has given careful consideration to the complaint, including careful review of the material received from the complainant and the advertiser. In this case, the Claims Board has been able to reach a determination without seeking further assistance.
22. The Claims Board considers it reasonable to assume that an ordinary reader of the advertisements would have limited understanding of digital signal processing technology and the distinctions between digital inputs, digital signal processing and digital screen presentation. Uncertainty and possible confusion of consumers about digital technology is exacerbated by the labelling practices of many manufacturers of electronic devices which process analogue signals utilising digital transmission technology as "digital" devices, while at the same time there is considerable media comment about the forthcoming introduction of "digital television" and "high definition television" transmission in Australia. Uncertainty and possible consumer confusion as to the technical capability of digital devices and in particular television sets which are stated to be "digital" while not of themselves providing digital TV processing capability accentuates the need for advertisers to endeavour to state the technical capabilities of advertised devices with a degree of precision and clarity. The Claims Board takes note of the footnoted qualification which appears in fine print on page 38 of the winter 2000 edition of Pulse and states that "DRC is not a digital television". This qualification assists in tempering the effect of the statement that the television sets in question "will make the most of digital signals when broadcasts start next year". However, the Claims Board considers it appropriate that the qualification be made more prominent so as to be more likely to come to the attention of an ordinary reader of the advertisements for

the units. Further, it would be appropriate for the qualification to be made whenever the television sets are represented as digital television sets capable of providing a significant enhancement in picture quality over other television sets.

23. The key point of difference between the parties was as to whether an improvement (if any) in picture quality as perceived by a viewer of the DRC television set was an increase in the "resolution" of that television set. The Claims Board believes, with a reasonable level of satisfaction, that the ordinary reasonable reader is likely to infer from the advertisement that the picture quality is 4 times better than that available on a standard television set due to the fact that the screen is able to display four times the number of individual picture elements.
24. Given that this is in fact not the case, we conclude that the advertising material in question is misleading or deceptive or likely to mislead or deceive.
25. In accordance with the procedural guidelines, the Claims Board will proceed to notify the advertiser and request the advertiser to provide an Advertiser Statement as to whether it agrees to modify or discontinue the advertising.

ADVERTISER'S STATEMENT

"Whilst it does not consider that it engaged in any conduct which was misleading or deceptive or likely to mislead or deceive, Sony has already modified its promotional material, and proposes to further modify its promotional material in order to ensure that the Board's concerns are appropriately addressed in the following manner:

- (a) In order to ensure that its promotional material addresses the Board's concerns, Sony proposes to further modify its description of DRC technology in the next issue of Pulse to add an express and proportional statement to the effect that Televisions using DRC technology are not digital televisions; and
- (b) In future promotional material, Sony proposes to add further explanation to the diagrams in order to:
 - (i) make it clear that DRC improves signal processing and
 - (ii) ensure consumers do not infer that a particular number of lines of resolution or picture elements will be displayed by a television screen using DRC processing."