

## **Advertising Discontinued**

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| <b>Advertiser</b>            | Lloyd Brooks Pty Limited  |
| <b>Complainant</b>           | Unilever Australasia  |
| <b>Type of Advertisement</b> | Television  |
| <b>Nature of Complaint</b>   | Sections 1.2 and 1.3 of AANA Code of Ethics   |
| <b>Panel members</b>         | Jennifer Huby (Chair), Tress Cocks and Maddox<br>Paul Holm, Phillips Fox<br>Michael Bradley, Gadens Lawyers |
| <b>Determination</b>         | Complaint Upheld -- Advertising Discontinued  |

### **Background**

The Complainant lodged a complaint (the Complaint) with the Advertising Standards Bureau (ASB) concerning the Advertiser's television advertisement (the Advertisement). The ASB referred the Complaint to the Advertising Claims Board (the Board) and a panel (the Panel) of legal practitioners was convened in order to deal with the Complaint, in accordance with the Board's Procedural Guidelines (the Guidelines).

In accordance with the Guidelines, the Complainant and the Advertiser were given the opportunity to serve submissions on each other, as detailed below.

### **Complaint**

The essence of the Complaint was that the Advertiser's Advertisement was misleading and deceptive and therefore in breach of the Australian Association of National Advertisers Code of Ethics (the Code) and in particular, sections 1.2 and 1.3 of the Code. The specific misrepresentation complained of was the claim that Sparkle for Bathrooms, the advertised product, was "equally as powerful as Domestos", the Complainant's product.

The Complainant submitted that consumers recognised Domestos as a strong and highly effective bathroom cleaner with excellent bleaching performance. Further, it submitted product comparison tests which it said demonstrated that the Advertiser's claim could not be supported.

### **Advertiser's Response to Complaint**

The Advertiser responded by stating that consumers do not recognise Domestos as a bleach or for its bleaching performance. Instead, the Advertiser submitted that Domestos was recognised and marketed as a hospital grade disinfectant and bathroom cleaner. Further, the Advertiser submitted that there were no directions on Domestos packaging on how to use it as a bleach. Hence, it was not appropriate when comparing Domestos with other products to refer to bleaching ability. The Advertiser also claimed that because Sparkle for Bathrooms was registered as a disinfectant by the Therapeutic Goods Administration, Sparkle for Bathrooms could claim to be equally as powerful as Domestos. Consequently, the Advertiser maintained that the Complainant had erred in claiming that the Advertisement contained a misrepresentation concerning the bleaching properties of its own product as compared with Domestos.

### **Complainant's Response**

The Complainant stated in reply that it had never claimed that consumers purchased Domestos on the basis of it being a bleaching agent. Rather, Domestos was promoted on the basis of it being a disinfectant and bathroom cleaner. Further, bleaching ability (eg ability to remove mould) was an important measure of the effectiveness of a bathroom cleaner. Therefore, any comparison between Domestos and a competing product must consider the bleaching properties of Domestos. While the Complainant did not dispute that Sparkle for Bathrooms was a hospital grade disinfectant, this factor alone did not determine its effectiveness as a bathroom cleaner. Accordingly, any comparison made by the Advertiser between Sparkle for Bathrooms and Domestos must hold true in relation to all of the matters that go to make Domestos an effective bathroom cleaner, and not just Domestos' effectiveness as a disinfectant. Accordingly, the Complainant argued that Domestos' superior bleaching ability rendered the claim made by the Advertiser misrepresentative.

### **Advertiser's Response**

In reply, the Advertiser pointed out that the Complainant had not provided any evidence of Domestos' effectiveness as a mould remover. Instead, it had provided evidence of its bleaching ability and in particular the usefulness of Domestos in bleaching tea stains. The Advertiser further submitted that its product was superior to Domestos in its ability to kill and remove mould. No evidence was provided by the Advertiser in this regard.

### **Determination of the Panel**

In accordance with the Board's Guidelines, the Complaint and submissions of each of the Complainant and Advertiser were referred to the Panel for determination.

The Panel made the following determination on 9 September 2002:

## **DETERMINATION OF THE ADVERTISING CLAIMS BOARD**

**Advertiser:** *Lloyd Brooks Pty Limited*  
**Complainant:** *Unilever Australasia a division of Unilever Australia Limited*

### **1. Determination**

This is a determination of the Advertising Claims Board in relation to a dispute between Unilever Australasia, a division of Unilever Australia Limited ('**Complainant**') and Lloyd Brooks Pty Limited ('**Advertiser**') arising from a 15 second television commercial which compares the Advertiser's '*Sparkle for Bathrooms*' branded bathroom cleaning product with the Complainant's '*Domestos*' branded cleaning product ('**Advertisement**').

## 2. Claims Board

The Advertising Claims Board (**'Board'**) consists of a panel comprising Jennifer Huby (Chair), Michael Bradley and Paul Holm, each of whom has confirmed that he or she is a lawyer with experience and expertise in advertising and/or trade practices law.

## 3. The Advertisement

The Advertisement features a bottle of *'Sparkle for Bathrooms'* and a bottle of *'Domestos'*. A beagle dog walks around and investigates each product. The voice over states:

*'Sparkle for Bathrooms is equally as powerful as Domestos but there's no chlorine bleach which means it doesn't smell.'*

*'So it is obvious which bathroom cleaner is better.'*

[During the above statement the dog knocks over the bottle of *'Domestos'*.]

*'Sparkle for Bathrooms – with no harmful fumes.'*

## 4. The Complaint

The Complainant claims that the Advertisement may breach the AANA (Australian Association of National Advertisers) Advertiser Code of Ethics, specifically sections 1.2 and 1.3 which we have set out below.

1.2 *Advertisements shall not be misleading or deceptive or be likely to mislead or deceive.*

1.3 *Advertisements shall not contain a misrepresentation which is likely to cause damage to the business or goodwill of a competitor.'*

The Complainant asserts that the Advertisement contains a claim that is misleading and deceptive, specifically the following statement:

*'Sparkle for Bathrooms is equally as powerful as Domestos' ('Claim').*

## 5. Submissions

### 5.1 The Complainant's Submissions

The Complainant's submissions include that:

- (a) *'Domestos'* contains sodium hypochlorite as its bleaching and cleaning agent;
- (b) *'Sparkle for Bathrooms'* contains the bleaching agent hydrogen peroxide;
- (c) sodium hypochlorite is generally found to give superior bleaching performance and as a result *'Domestos'* has superior bleaching ability;

- (d) bleaching agents are a significant component of a cleaning product's effectiveness and as such any comparison between the products must take into account their bleaching ability;
- (e) a bleaching agent is important for the effective removal of coloured and in-ground stains such as mould and this is an important factor for consumers in determining which product to purchase to clean a bathroom;
- (f) 'Sparkle for Bathrooms' is, like 'Domestos', a hospital grade disinfectant however that is only one element contributing to the product's effectiveness as a bathroom cleaner;
- (g) as a result, the Claim that 'Sparkle for Bathrooms' is equally as powerful as 'Domestos' does not hold true in respect of all relevant characteristics of the products.

## 5.2 The Advertiser's Submissions

The Advertiser's submissions include that:

- (a) the Complainant submits that 'Domestos' is a better bleach than 'Sparkle for Bathrooms' but does not challenge any other element of the Advertiser's product;
- (b) the Complainant states that 'Domestos is recognised by consumers as a strong and highly effective bathroom cleaner, with excellent bleaching performance' – the Advertiser does not believe that consumers acknowledge 'Domestos' as a bleach or purchase it for its bleaching performance (and the Advertiser provided historical and current examples of how 'Domestos' has not been advertised or presented as a product used for bleaching);
- (c) consumers do not buy 'Domestos' for its bleaching function, therefore its effectiveness as a bleach should not be used in a comparison between 'Domestos' and 'Sparkle for Bathrooms';
- (d) 'Sparkle for Bathrooms' is registered with the TGA as a hospital grade disinfectant, as is 'Domestos', which allows them to make the Claim;
- (e) the Advertiser believes that 'Sparkle for Bathrooms' is superior in its ability to, not only kill and remove mould but, prevent the regrowth of mould for up to 28 days.

## 6. Matters to be taken into Consideration

### 6.1 Overall Impression

In determining whether the Advertisement is misleading or deceptive (or likely to mislead or deceive), the Board has considered the likely overall impression the Advertisement would give to its target audience. The Board notes the following comments of Gibbs J in *Parkdale Custom Built Furniture Pty Ltd and Puxu Pty Ltd* (1982) ATPR 40-307 in this regard:

*'[t]he conduct of the defendant must be viewed as a whole. It would be wrong to select some words or act which, alone, would be likely to mislead if those words or acts, when viewed in their context, were not capable of misleading. It is obvious that where the conduct complained of consists of words it would not be right to select some words only and to ignore others which provided the context which gave meaning to the particular words. The same is true of the facts.'*

The Board finds that the Advertisement is likely to give viewers of the Advertisement the overall impression that:

- (a) 'Sparkle for Bathrooms' is just as good a disinfectant and cleaning product as 'Domestos';
- (b) 'Sparkle for Bathrooms' has the advantage that it does not have harsh chemical smells and does not give off fumes, unlike 'Domestos';
- (c) 'Sparkle for Bathrooms' is therefore a better product than 'Domestos'.

## 6.2 Accuracy of Impression

In cases of comparative advertising, particular care is required by an advertiser to ensure that its statements are accurate (see: *State Government Insurance Commission v JM Insurance Pty Ltd* (1984) ATPR 40-465 at 45,362), otherwise, 'it may mislead a consumer into thinking there is a basis for a choice where, in truth, there is not; or that a choice may be made on grounds which are not truly valid' (see: *Duracell Australia Pty Ltd v Union Carbide Australia Ltd* (1988) ATPR 40-918 at 49,86).

In this regard, '[w]hen a person produces a television commercial that not only boosts his own product but ... compares it critically with the product of another so that the latter is shown up in an unfavourable light by the comparison ... he ought to take particular care to ensure that the statements are correct': (*Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 53 FLR 307 at 310; ALR 161).

The Board has carefully considered the submissions of and evidence provided by both the Advertiser and Complainant.

Both parties acknowledged that their respective products were registered with the TGA as hospital grade disinfectants and did not dispute the effectiveness of each others product as a disinfectant. The Complainant provided product comparison tests showing the superior bleaching performance of 'Domestos' compared to 'Sparkle for Bathrooms'. The Complainant did not provide evidence relating to the mould removal ability of 'Domestos' and the Advertiser did not provide any evidence to support its claim that 'Sparkle For Bathrooms' is able to prevent mould re-growth for a longer period of time than 'Domestos'.

## 7. Determination

From the evidence before the Board, the Board has determined that:

- (a) the representation that 'Sparkle for Bathrooms' is just as good ('equally as good') as 'Domestos' is a representation that it is at least as good as 'Domestos' in all facets of performance relevant to a hospital grade disinfectant and bathroom cleaner;
- (b) from the evidence provided, 'Domestos' has superior bleaching ability to 'Sparkle For Bathrooms' which the Board views as a relevant element in its effectiveness as a bathroom cleaner, in particular with respect to its ability to remove stains;
- (c) the Claim that 'Sparkle for Bathrooms' is equally as powerful as 'Domestos' is therefore misleading and deceptive (or likely to mislead or deceive) and contravenes section 1.2 of the AANA Advertiser Code of Ethics;

- (d) the impression given by the Advertisement that '*Sparkle for Bathrooms*' is a better product than '*Domestos*' can, to some extent, be justified by reference to it not containing chlorine bleach and therefore not having a strong smell. Whether or not this feature outweighs the lesser bleaching ability of the product is a subjective matter and will differ for different members of the consumer audience. However, as noted above, we consider that a representation of being a better product, unless otherwise specifically qualified, is a reference to all relevant performance characteristics of the product concerned. In this instance '*Sparkle for Bathrooms*' (in terms of its bleaching ability) is not as an effective cleaner as '*Domestos*' and therefore the impression given by the Advertisement that '*Sparkle for Bathrooms*' is a better product than '*Domestos*' is also misleading or deceptive (or likely to mislead or deceive) in contravention of section 1.2 of the AANA Advertiser Code of Ethics;
- (e) as no evidence was received by the Board upon which it could judge whether the Advertisement contains a representation which is likely to cause damage to the business or goodwill of the Complainant, the Board makes no finding on this aspect of the Claim.

In accordance with the procedural guidelines, the Board will notify the Complainant and the Advertiser of the determination.

9 September 2002

#### **Advertiser's Statement**

On 10 September 2002 the Advertiser was provided with a copy of the Panel's determination. In accordance with the Guidelines and on the basis of the Panel's determination, the Advertiser was requested to provide an Advertiser's Statement indicating whether it would modify or discontinue the Advertisement.

On 16 September 2002, the Advertiser indicated that it would withdraw further use of the Advertisement at least until such time as an appeal was lodged by it in respect of the Panel's determination. On 26 September 2002 the Advertiser was informed that the Guidelines did not permit an appeal. The Advertiser was therefore requested to withdraw its qualification on the further use of the Advertisement. Accordingly, on 16 September 2002 the Advertiser informed the Board that it would not make further use of the Advertisement.