

From: "Odette Gourley" <odette.gourley@minterellison.com>
To: <james@bennettlaw.com.au>, <sarah_whitaker@colpal.com>, <ian.m.adams@gsk.com>
Date: 20-Jun-05 7:08:03 pm
Subject: Advertising Claims Board - Complaint in relation to Colgate Simply White toothpaste advertisement

Dear All,

I refer to the complaint made to the Advertising Claims Board by GlaxoSmithKline in relation to a Colgate Palmolive advertisement for its whitening toothpaste product 'Simply White'.

As you are aware, the Panel issued a Preliminary Determination on 15 April 2005, and has since received further materials from both GlaxoSmithKline and Colgate Palmolive.

After careful consideration, the Panel has determined that Colgate Palmolive has sufficiently substantiated the claims complained about in the Advertisement and, accordingly, dismisses GlaxoSmithKline's complaint.

On behalf of the Panel, I attach the Panel's reasons for its determination.

Regards
Odette Gourley

Minter Ellison
Lawyers
Aurora Place
88 Phillip Street
SYDNEY NSW 2000

Ph: +61 2 9921 4806 (direct line)
Ph: +61 (0) 413 186 947
Fax: +61 2 9921 8154

Email: odette.gourley@minterellison.com

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CC: <conway_restom@corrs.com.au>, <lhartley@dbgglaw.com.au>, <ian.robertson@holdingredlich.com.au>, "Kylie Millar" <kylie.millar@minterellison.com>, "Mia O'Brien" <mia.o'brien@minterellison.com>

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Created By: odette.gourley@minterellison.com

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lhartley CC (Laura Hartley)

minterellison.com

mia.o'brien CC (Mia O'Brien)

kylie.millar CC (Kylie Millar)

holdingredlich.com.au

ian.robertson CC

corrs.com.au

conway_restom CC

gsk.com

ian.m.adams

colpal.com

sarah_whitaker

bennettlaw.com.au

james

Post Office

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Junk Mail handling disabled by User
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**Final Decision in relation to a complaint to the Advertising Claims Board in the matter of
*GlaxoSmithKline v Colgate Palmolive***

Introduction

1. This is the final decision in relation to a complaint made to the Advertising Claims Board arising from an advertising dispute between GlaxoSmithKline ('**Complainant**') and Colgate Palmolive ('**Advertiser**') concerning a print advertisement for the Advertiser's product Simply White Advanced Whitening Toothpaste ('**Simply White**'). The Claims Board is constituted by a panel comprising Odette Gourley (Chair), Conway Restom, and Ian Robertson ('**Panel**'). Each of us is a lawyer who has certified that he or she has experience and expertise in advertising and/or trade practices law.
2. The complaint relates to a full page consumer print advertisement for Simply White which appeared in the Sunday Telegraph, Sunday Magazine on 3 October 2004, and also in subsequent issues of that magazine and in other consumer print media ('**Advertisement**'). The Advertisement, and others like it, has also appeared in other locations, including on billboards across Sydney (though the Panel has not seen the billboard version). A black and white photocopy of the Advertisement is attached to these observations.
3. The Complainant says that claims made by the Advertiser in the Advertisement are in breach of the section 1.2 of the AANA Advertisers Code of Ethics ('**Code**'), which provides that '*advertisements shall not be misleading or deceptive or likely to mislead or deceive*'.
4. In its Preliminary Decision issued on 15 April 2005, on the basis of the materials made available to it by the parties at the time, the Panel found that the Advertiser had not sufficiently substantiated the representations conveyed in the Advertisement. The Advertiser has now, however, furnished the Panel with further materials ('**Advertiser's Further Materials**') on which it wishes to rely as substantiating material and the Complainant has furnished the Panel with its response to the Advertiser's non-confidential Further Materials ('**Complainant's Further Response**'). The Panel considered that it was not necessary to request a response from the Advertiser to the Complainant's Further Response.

The task for the Panel

5. Readers are referred to the discussion in earlier Board decisions in *Jalna Dairy Foods Pty Limited v Pauls Limited* (matter reference JAL/PAU/99, dated 22 September 1999) and *International Dynamics Pty Limited v Sony Australia Limited* (matter reference INT/SON/00, dated 10 November 2000) and *Unilever Australia Limited v Safcol Australia Pty Limited* in relation to the role and approach of the Board. We agree with the observations of the Panels in those decisions.
6. The major issue in the present complaint is whether the representations complained of are misleading or deceptive, or are likely to mislead or deceive, in breach of section 1.2 of the Code. In assessing this, the Panel has considered whether the representations complained of are conveyed by the Advertisement, and secondly, whether the representations conveyed have been substantiated by the Advertiser in a manner that is sufficient to satisfy the Panel that they are not misleading or deceptive or likely to mislead or deceive.
7. As noted in the Board's decision in *Jalna Dairy Foods*, the minimum standard that is applied by the Board in establishing whether there has been a breach of section 1.2 of the Code is the standard established by decisions of the Federal Court of Australia and other courts as to conduct prohibited by section 52 of the *Trade Practices Act* and equivalent provisions of *Fair Trading* laws, in the context of advertising.
8. Although the Board takes a 'legal' approach to the standards that are applied, it avoids an overly legal approach on matters of proof. If, on the information ultimately made available to it by the parties, the Board is able to reach a reasonable level of satisfaction that an advertisement is misleading, it will find that there has been a breach of section 1.2 of the Code. If it is not reasonably satisfied that the advertisement is misleading, then the Board will determine that there is no breach of section 1.2 of the Code.
9. Where advertisements make claims of a scientific nature, an insufficient scientific foundation for those claims may establish that the claims are misleading. In the current context, claims made by the Advertiser should be taken to imply that there is an adequate foundation in scientific knowledge to enable them to be made: *Janssen Pharmaceutical Pty Ltd v Pfizer Pty Ltd* (1986) ATPR 40-654 at 47,292.
10. Where an Advertisement makes a claim explicitly or implicitly that one product will outperform another product, the nature and existence of any tests available to demonstrate the truth of such a claim will be relevant to whether the claim amounts to

misleading and deceptive conduct in the circumstances: *Makita (Aust) Pty Ltd v Black & Decker (Australasia) Pty Ltd* (1990) 18 IPR 270 at 279.

11. In the circumstances here, the Panel considers that, if the Advertiser is not able sufficiently to substantiate the representations complained of, the Complainant would be successful in its complaint that the Advertisement is misleading or deceptive or likely to mislead or deceive.

Background

12. The Complainant and the Advertiser are competitors in the oral care market, manufacturing and distributing *inter alia* toothpastes, including toothpastes which claim to remove stains and whiten teeth, using a range of different mechanisms to do so. An Aztec sales scan from October 2004 indicates that there are at least 18 different whitening toothpastes available on the Australian market.
13. There is a variety of over-the-counter teeth whitening products available to consumers, including toothpastes, gels, mouth rinses, gum, sprays and paints, whitening strips, and one-size-fits-all tray systems. The efficacy of these products varies according to the composition and the mechanism employed for whitening action.
14. The materials provided to the Panel indicate that tooth stains can generally be divided into two main categories, extrinsic and intrinsic.
15. Extrinsic stains are stains that adhere to the tooth surface, and are sometimes referred to as 'surface stains'. Extrinsic stains can be caused by build-up of residue on the tooth surface (for example as a result of red wine and coffee consumption or smoking cigarettes). These stains are usually treated through a combination of in surgery treatment (dental prophylaxis), and regular dental hygiene, including brushing with a dentifrice (toothpaste).
16. Intrinsic stains are embedded in the tooth structure, and can be caused by organic molecules trapped inside the tooth when it is forming, or they can be the result of extrinsic stains that diffuse to below the surface of the tooth.
17. The materials provided to the Panel identify two general categories of whitening dentifrices, those which target extrinsic stains through the use of strong abrasives, and those which incorporate an ingredient (usually hydrogen peroxide) to target intrinsic stains. Bleaching of the teeth is achieved after prolonged direct contact of the bleaching agent with the teeth.

18. Simply White contains 1% hydrogen peroxide. It also contains manganese gluconate which is claimed to accelerate the whitening efficacy of hydrogen peroxide on teeth. Simply White comes in a dual-chambered container. One chamber dispenses the activator paste containing manganese gluconate, and the other dispenses paste containing hydrogen peroxide.
19. The Advertiser claims that Simply White is the only toothpaste available to consumers in Australia which contains hydrogen peroxide alone or in combination with manganese gluconate, or utilising the technology of the dual chamber container. The Complainant did not dispute this claim.

The complaint

20. The Advertisement depicts a tube of Simply White in front of a toothbrush. The representations the subject of the complaint are made in three types of text, graded from bold and large, to bold and significantly smaller, and then not bold and small.
21. The Advertisement makes a number of specific claims about the efficacy of Simply White. These include the following claims:
- (a) 'Simply whiter than any ordinary whitening toothpaste';
 - (b) 'Noticeably whiter teeth in just 14 days';
 - (c) 'Here's something new. A whitening toothpaste that actually does what it says';
and
 - (d) In just 14 days, Colgate Simply White will give you the whitest teeth you can get from a whitening toothpaste.* Guaranteed.[†]
- (*compared with ordinary whitening toothpastes) ([†] See pack for details).
22. In its letter to the Advertising Claims Board dated 5 May 2005, the Advertiser indicates that the sentence '*A whitening toothpaste that actually does what it says*' was withdrawn earlier this year, before the Advertiser had received notification of the complaint from the Board. The sentence is no longer used by the Advertiser in any form of its advertising for Simply White. In accordance with paragraph 1.6 of the Procedural Guidelines, the Panel does not address whether claim (c) above has been substantiated by the Advertiser.

23. The Complainant's complaint refers specifically to the claims '*simply whiter than any ordinary whitening toothpaste*' and '*the whitest teeth you can get from a whitening toothpaste. Guaranteed*'.
24. The Complainant says that these claims are 'absolute superiority claims' which require substantiation in the form of demonstrations of Simply White's performance against a representative set of other whitening products available on the Australian market.
25. The Complainant says that the Advertiser has not provided sufficient substantiation for the claims that are made in the Advertisement, and that accordingly, the Advertisements are misleading or deceptive or likely to mislead or deceive in breach of clause 1.2 of the Code.
26. The Panel is of the view that nothing turns on the use of the asterisk in claim (d), as the asterisk leads consumers to information in fine print that does not attempt to alter the dominant representation in claim (a), and merely repeats that the comparison is against ordinary whitening toothpastes.
27. In regard to the guarantee offered, the Panel is of the view that there is some ambiguity as to what is being guaranteed in the Advertisement. However, although the guarantee does give the claims a greater degree of 'genuineness' and this in effect leads consumers to put more faith in the truth and accuracy of the claims, the Panel does not consider that the guarantee itself significantly affects the determination as to whether the advertisement is misleading or deceptive or likely to mislead or deceive.

The representations

28. The claims complained of convey a representation that Simply White provides greater whitening efficacy than any other whitening toothpaste. The use of the word 'ordinary' is not considered by the Panel to make any significant impact on the representation conveyed to consumers. This is because a consumer would not distinguish between 'ordinary' whitening toothpastes and any other type of whitening toothpaste. Rather, the presumption would be that the toothpastes referred to are those whitening toothpastes that can be purchased over-the-counter in regular supermarkets or chemists, as an alternative to or substitute for the advertised product.
29. The Panel is of the view that the advertisement conveys a clear representation that Simply White, when used as directed for a period of 14 days, will make a consumer's

teeth noticeably whiter, and more so than any other commercially available whitening toothpaste.

30. As noted above, it is not necessary for the Panel to consider the issues arising from the representation relating to unreliable efficacy claims made for other whitening toothpastes.
31. As noted above, if the Panel is of the view that the Advertiser is not able sufficiently to substantiate these representations, it would regard the Advertisement as misleading or deceptive or likely to mislead or deceive.

Advertiser's Materials

32. In making its Preliminary Determination, the Panel had before it only the following materials from the Advertiser, being materials that had passed between the Advertiser and the Complainant in their earlier correspondence:
- (a) Hoic D, Dixit N, Prencipe M *et al* 'The Technology Behind Colgate Simply White Toothpaste' *Journal Clinical Dentistry* 15:37-40, 2004; and
 - (b) notes from a 'discussion of the issues' with Professor Walsh, Professor of Dentistry at the University of Queensland.
33. The Advertiser's Further Materials comprised two bundles, Volume 1, containing non-confidential materials, and Volume 2 containing confidential materials. Volume 1 of the Advertiser's Further Materials comprised the following non-confidential materials:
- (a) an overview of the Advertiser's Further Materials;
 - (b) articles from the *Journal of Clinical Dentistry*, Volume XV, 2004:
 - (i) Kakar A, Rustogi K *et al* 'A Clinical Investigation of the Tooth Whitening Efficacy of a New Hydrogen-Containing Dentifrice';
 - (ii) Soparkar, P, Rustogi K *et al* 'Comparative Tooth Whitening and Extrinsic Tooth Stain Prevention Efficacy of a New Dentifrice and a Commercially Available Tooth Whitening Dentifrice: Six Week Clinical Trial';
 - (iii) Sharma, N, Galustians, H J *et al* 'Comparative Tooth Whitening and Extrinsic Tooth Stain Prevention Efficacy of a New Dentifrice and a

Commercially Available Tooth Whitening Dentifrice: Six Week Clinical Trial;

- (c) summary of Confidential Test Reports by William De Vizio, Colgate-Palmolive Company, dated 23 April 2005;
 - (d) memo dated April 2005 on Laboratory Methods for Assessing Whitening Toothpastes by Ravi Subramanyam, Colgate-Palmolive, with attached reference materials;
 - (e) letter from Professor L Walsh of the University of Queensland dated 30 April 2005, with CV attached and letter dated 28 April 2005 headed 'Independence of Report';
 - (f) letter from Professor P Abbot dated 4 May 2005 of the University of Western Australia;
 - (g) letter dated 3 May 2005 from Professor I Meyers of the University of Queensland;
 - (h) list of ingredients of Whitening Toothpastes in Australia;
 - (i) memo dated 2 May 2005 on composition of various toothpastes;
34. Although the index provided by the Advertiser in Volume 1 of its materials suggests the following materials have been provided, they have not been included in the Advertiser's Further Materials:
- (a) studies reported in the Journal of Clinical Dentistry, Vol X(3): 80-83 (1999);
and
 - (b) studies reported in the Journal of Clinical Dentistry, Vol XI(3) 84-87 (2000).
35. Volume 2 of the Advertiser's Further Materials contains the full written reports of the following clinical investigations of the toothwhitening efficacy of a dentifrice delivering 1% hydrogen peroxide and sodium tripolyphosphate in a high-cleaning silica base:
- (a) Kakar, A & Proskin, H, A four week study on adults in India, July 2003;
 - (b) Sharma, N & Proskin, H, A six week study on adults in Canada, September 2003;

- (c) Soparkar, P & Proskin H, A six week study on adults in Pennsylvania, November 2003;
 - (d) Dr Boneta, A & Proskin, H, A two week study on adults in Puerto Rico, December 2003;
 - (e) Dr Li, Y & Proskin, H, A two week study on adults in California, December 2003;
 - (f) Conforti, N & Proskin, H, An eight week study on adults in Buffalo, May 2003;
 - (g) Singh, S & Proskin, H, An eight week study on adults in New Jersey, July 2003;
 - (h) A report dated 12 May, 2004 of a study conducted at the University of Puerto Rico comparing Colgate Simply White, Rembrandt Plus Whitening and Metadent Advanced Whitening toothpastes;
 - (i) Memo relating to an Exposure Assessment date 19 July 2004, by Brian Slezak, Colgate Palmolive Company;
 - (j) Laboratory evaluation of the whitening efficacy of Simply White Toothpaste Australia and Macleans Advanced Whitening ('**Confidential Materials**')
36. The Panel has determined that the Confidential Materials are comprehensively summarised in the materials in Volume 1, which have been provided to the Complainant. Accordingly, the Panel will refer to the non-confidential summaries of the Confidential Materials, and has not relied on and will not refer to the Confidential Materials in this determination.

Complainant's materials

37. In making its Preliminary Determination, the Panel reviewed the following materials provided by the Complainant:
- (a) Wagner BJ '*Whiter Teeth, Brighter Smiles*' Access- Special Supplementary Issues, September- October 1999

- (b) Gerlach RW & Zhou X 'Vital Bleaching with whitening strips: Summary of Clinical Research on effectiveness and tolerability' *The Journal of Contemporary Dental Practice*, 2(3): 1-165, 2001
- (c) Collins LZ, Maggio B, Gallagher et al 'Safety evaluation of a novel whitening gel containing 6% hydrogen peroxide and a commercially available whitening gel containing 18% carbamide peroxide in an exaggerated clinical study' *Journal of Dentistry* 32 (Supplement 1) 47-50, 2004
- (d) Broughton B & Loperfido A 'Making the "White" Choice: OTC Tooth-Whitening Products' *Pharmacy Times*, 2004.

38. In making its Preliminary Determination, the Panel concluded that the articles at (a), (b) and (c) above were general articles on teeth whitening technologies that were of limited assistance in determining the issues raised by the complaint.
39. The article by Broughton and Loperfido provides relevant information on the efficacy of whitening dentifrices and the mechanisms by which they work. The article is considered in further detail below.
40. In making its final determination, the Panel also carefully considered the Complainant's Further Response. Unfortunately, the Panel did not find the Further Response particularly helpful. The Further Response added no relevant new material and failed squarely to address the substantial volume of material provided by the Advertiser which included significant new material, particularly statements from respected and qualified academic experts.
41. The Complainant provided two further articles in support of its claim:
- (a) Walden GL, McMillan DA, Sagel ML *et al* (2004) *Kinetics of 10% hydrogen peroxide whitening strips*. Report 13 March 2004;
 - (b) Mahony C, Barker ML, Engel TM, Walden GL (2003) *Peroxide degradation kinetics of a direct application percarbonate bleaching film*. *American Journal of Dentistry*, 16 (Special Issue), 9B-10B.
42. The extract from Walden GL, McMillan *et al* is an abstract relating to a study on the efficacy of *whitening strips* containing 10% hydrogen peroxide. The article by Mahony C, Barker ML *et al* considers the efficacy of a direct application bleaching gel (containing 19% sodium percarbonate). Again, the Panel considers that these articles

have only limited relevance to the issues before the Panel, as they consider the efficacy of different types of whitening technologies, and do not take account of the effect of manganese gluconate on the reaction efficacy of hydrogen peroxide.

43. These articles also provide relevant information on whitening dentifrices and the mechanisms by which they work, but were of only limited relevance to the issues to be determined by the Panel.

Relevance of whitening studies from the United States

44. The Complainant claims that as the majority of the studies on the efficacy of Simply White were conducted in the United States, using the United States formulation of Simply White, they do not provide relevant evidence of the efficacy of the Australian Simply White product.
45. The Advertiser addresses this issue in its Further Materials with a letter from Professor Ian Meyers, Professor of General Practice Dentistry at the University of Queensland, which states:

While I am aware that there are differences between the Australian formulation of Colgate Simply White Toothpaste from that used in the scientific studies, the only difference between the American and Australian formulations of Colgate Simply White Toothpaste is the fluoride level, and this difference would have no role in the comparative whitening ability of the toothpastes. Results from a scientific report (Lagman et al- unpublished) support this by showing that the final whitening effect of the Australian formulation of Colgate Simply White Toothpaste is the same as that obtained with the American formulation.

46. The Panel is satisfied that the studies on whitening efficacy of Simply White from the United States provided by the Advertiser are relevant evidence of the efficacy of the Australian formulation of Simply White.

Whitening efficacy

47. The Advertiser claims that Simply White's superior whitening efficacy is a result of its actions on both extrinsic and intrinsic tooth stains. It is the operation of Simply White on intrinsic stains (through its ingredient hydrogen peroxide) which the Advertiser claims is the attribute of Simply White which gives it superior efficacy over other

whitening toothpastes. The Complainant does not distinguish between Simply White's efficacy on extrinsic and intrinsic tooth stains, but does question the efficacy of the hydrogen peroxide addition to Simply White.

48. The Complainant says that the extent of whitening efficacy of hydrogen peroxide has been demonstrated in dental literature to be dependent on the length of time that the hydrogen peroxide is in contact with the teeth. The Complainant also says that published scientific data demonstrates that increasing the concentration of peroxide does not increase whitening efficacy if the contact time is reduced.
49. The Complainant also says that at concentrations as low as 1%, hydrogen peroxide delivered as a toothpaste is unlikely to remain in contact with teeth for long enough to deliver the benefits of free radicals.
50. Accordingly, the Claimant claims that in the case of Simply White, the limited brushing time during a typical episode of tooth brushing, combined with the limited amount of hydrogen peroxide in the toothpaste, and the break down of that peroxide in the mouth by bacteria and saliva, will limit any whitening efficacy.
51. The Panel has been provided with many materials, from both the Advertiser and the Complainant, to indicate that hydrogen peroxide is a well documented tooth bleaching agent. The article by Broughton and Loperfido provided by the Complainant notes that the most effective tooth-whitening products are those that contain carbamide or hydrogen peroxide and keep the bleach in contact with the teeth for prolonged periods of time. Relevantly, the article states:

Peroxide containing whitening products lighten extrinsic stains. However, the relatively short exposure time during a typical episode of tooth brushing, flossing and mouth rinsing, combined with the rapid breakdown of peroxides in the mouth by bacteria and saliva, limit the tooth-lightening effectiveness of these products, compared with other bleaching kits that contain peroxide.

52. This information supports the Complainant's contention that the whitening efficacy of Simply White is limited by the short time in which the bleach is in contact with the teeth during brushing, and by other factors such as break down of the hydrogen peroxide when in contact with bacteria and saliva.
53. In its Preliminary Determination, the Panel noted that the information provided by the Complainant does not address the effect of the added ingredient in Simply White,

manganese gluconate, which is claimed to accelerate the whitening efficacy of hydrogen peroxide on teeth.

54. The Panel's concerns discussed in the paragraph above are addressed in a letter dated 4 May 2005, from Professor Paul V Abbott, a Professor of Clinical Dentistry at the University of Western Australia. The letter is included in the Advertiser's Further Material and in it Professor Abbott states:

In contrast to such thinking the various clinical and laboratory studies . . . performed with Colgate Simply White Toothpaste quite clearly show that these extended periods of contact between hydrogen peroxide and the tooth surface are not required with this toothpaste. The studies have clearly shown significant whitening of teeth within two weeks when the toothpaste was used twice daily . . . for two minutes each time. In my opinion, it is very likely that the manganese gluconate is responsible for this rapid whitening effect as it has been shown to be an effective accelerator for hydrogen peroxide.

55. The technology behind Simply White is considered in some detail in the article by Hoic D, Dixit N, Prencipe M *et al.* The article states that the incorporation of hydrogen peroxide in whitening dentifrices leads to a product that 'performs better than an ordinary whitening dentifrice'. The article also notes that manganese gluconate can accelerate the whitening efficacy of hydrogen peroxide on teeth. The article goes on to explain the effect of manganese gluconate on the whitening efficacy of Simply White and elaborates on the dual-chamber design of the Simply White container.

56. The article indicates at p.38 that:

during the development of Colgate Simply White Toothpaste, it was found that an alkaline formulation that contains manganese gluconate can activate hydrogen peroxide to provide, in vivo, a superior whitening effect.

57. The dual-chamber design of the Simply White container allows the toothpaste to be kept in two parts, or streams. This design is intended to keep the hydrogen peroxide stable and keep it separate from the other ingredients with which it would otherwise react if mixed. Once the two streams are dispensed together for use, the hydrogen peroxide is mixed with the manganese gluconate which is in the other stream. The manganese gluconate works as an accelerator to accelerate the whitening effect of the hydrogen peroxide when they are mixed.

58. Professor Meyer's memorandum dated 3 May 2005, contained in the Advertiser's Further Materials, notes:

The presence of 1% hydrogen peroxide would appear to be the most important inclusion in providing intrinsic tooth whitening. The effectiveness of hydrogen peroxide as a bleaching agent has been well documented and the delivery of the peroxide in the dual chamber delivery tube ensures the peroxide remains active at the time of application. As no other toothpaste currently available in Australia contains hydrogen peroxide, this bleaching mechanism would be specific to the Colgate Simply White Toothpaste.

59. Professor Meyers further notes:

In reviewing the literature, the efficacy of Colgate Simply White Toothpaste appears to be related to several components, namely hydrogen peroxide, sodium tripolyphosphate and a high-cleaning silica particle. In addition the inclusion of manganese gluconate acts to accelerate the degradation of hydrogen peroxide and thereby accelerates whitening. Surface or extrinsic discolouration may be removed by polishing or by a chemical reaction while intrinsic discolouration may only be removed by chemical reaction, usually oxidation of compounds and removal of chromogens. Colgate Simply White Toothpaste by virtue of its ingredients is able to produce both extrinsic and intrinsic discolouration removal and thereby produce overall whitening of teeth.

60. Given the well documented intrinsic stain bleaching efficacy of hydrogen peroxide on teeth, and the use of the dual chamber toothpaste tube to harness the scientifically supported accelerating effect of manganese gluconate on the bleaching process, the Panel is satisfied that Simply White is effective at whitening teeth through action on intrinsic stains.

Noticeably whiter teeth in 14 days

61. The study by Hoic D, Dixit N, Prencipe M *et al* considers an in-vitro laboratory study comparing removal of extrinsic and intrinsic stains by Simply White on bovine teeth to three other whitening toothpastes commercially available in the USA (including Aquafresh Whitening toothpaste). The results demonstrate that Simply White performed at a similar level to ordinary whitening dentifrices for extrinsic stain

removal. In the investigation of intrinsic stain removal, Simply White exhibited greater whitening efficacy than any of the other toothpastes tested.

62. The Complainant makes several criticisms of these results. It suggests that the study is not robust enough to support a general absolute superiority claim because it may not reflect the manner in which a regular consumer would use the toothpaste. The Complainant points out that, during normal use, Simply White would be expected to be in contact with the user's teeth for only one to two minutes, twice a day, not for the four sets of seven brushing cycles (300 strokes per cycle) technique or the 60 minute soaking time which are the reported techniques adopted as part of this study.
63. On the material available to it when making its Preliminary Determination, the Panel was of the view that the 60 minute soaking time results were not compelling evidence of the efficacy of Simply White when used in a regular manner by consumers. The Panel also noted that the study by Hoic D, Dixit N, Prencipe M *et al* does not provide an indication of whether the brushing technique adopted simulated regular consumer brushing action.
64. The letter from Professor Laurence Walsh of the School of Dentistry at the University of Queensland dated 30 April 2005 in the Advertiser's Further Materials provides comment on these issues. Professor Walsh's curriculum vitae (attached to his letter) reveals his impressive qualifications in science and dentistry, and his extensive clinical and research experience in a wide range of tooth whitening technologies. At page 6 of his letter, Professor Walsh notes that an *in vitro* soaking study where teeth are immersed for 60 minutes is designed to replicate *in vivo* contact time in the order of approximately 2 minutes per brushing cycle twice a day, or 4 minutes per day, for 15 days (approximately 2 weeks). Professor Walsh states that such contact time '*would have relevance from the perspective of a consumer*'. This is consistent with the instructions for consumer use on the Simply White packaging.
65. Similarly, Professor Walsh also notes at page 6 of his letter that the number of cycles (30 seconds twice per day) in the *in vitro* brushing model used by Hoic *et al* would be considered '*normal exposure for one tooth surface*'. With a horizontal stroke frequency of 5 cycles per second being, according to Professor Walsh, '*typical for most individuals*' typical daily tooth surface exposure (with two cleaning sessions) would be 300 strokes. Accordingly, Hoic D, Dixit N, Prencipe M *et al's* brushing model of 4 sets of 7x300 strokes would be equivalent to typical consumer use over a period of 4 weeks.

66. The material provided to the Panel about the Hoic D, Dixit N, Prencipe M *et al* study does not indicate whether 'interim' results were recorded after a period of two weeks in the brushing study.
67. Details of further studies are included in the Advertiser's Further Materials, including details of a study conducted in New Dehli by Kakar, A, Rustogi, K *et al*. The report on this study (published in the *Journal of Clinical Dentistry*, Volume XV, 2004) considers the whitening efficacy of Simply White based on a four week, human clinical study. In this study 44 subjects were instructed to brush their teeth for two minutes twice daily using only the dentifrice provided. Roughly half the subjects were provided with Simply White ('**Test Group**'), and the other half were issued with a with a non-whitening placebo toothpaste ('**Control Group**'). An initial tooth shade examination was carried out before the subjects commenced using their respective products, and further tooth shade examinations were carried after two weeks, and after four weeks of product use.
68. The results of tooth shade examinations of the Test Group after two weeks of product use revealed that members of the Test Group had improved their tooth shade score by 4.05 compared to baseline, whereas the Control Group recorded an improvement of 0.41 compared to baseline. The Journal Report concludes that these results indicate that Simply White '*provides a level of tooth whitening activity which is both statistically and clinically significant*'.
69. The Advertiser has provided summaries (full reports provided in the Confidential Materials) of several unpublished human clinical studies in its Further Materials. These studies, conducted in Canada, Pennsylvania, New Jersey, Puerto Rico, and California, used methods very similar to those described above and reveal improvements in the shade scores of the Test Groups after two weeks of product use of between 4.49 and 2.90 compared to baseline. In each of these studies the difference in the shade test results between the Test Group and the Control Group was statistically significant.
70. In its Further Response, the Complainant claims that Australian consumers, having seen the Advertisement, will expect Simply White to produce a *visibly* different whitening result.
71. The Panel does not have before it information on the correlation between statistically significant colour shade changes, and changes that are noticeable to the human eye. Although the Complainant is not obliged to provide information on this issue, (and

neither did the Advertiser provide such material), or indeed conduct studies in order to demonstrate *lack* of efficacy in a 14 day period, it appears to the Panel that the Complainant could have generated such information and studies without undue cost and effort, and would have expected it to do so, given its own attitude to the failure of the Advertiser to undertake comparative studies, if it regarded the matter as significant and likely to assist the Panel.

72. (The Panel notes that it is not clear whether the Complainant in fact takes issue with the '*Noticeably whiter teeth in just 14 days*' claim. The Complainant's initial letter of complaint does not raise this as an element of the complaint, and its Further Response merely makes passing reference to issues relating to the significance of colour changes and whether they would be visible to consumers, without explicitly linking this concern with the 14 day representation.)
73. Given these matters and the data summarised in this determination, particularly in paragraphs 64-69, the Panel has concluded that the Advertiser has sufficiently substantiated its claim of '*Noticeably whiter teeth in just 14 days*' in relation to the efficacy of Simply White.

Relevance of comparative studies from the United States

74. The Complainant claims that the laboratory and clinical studies carried out by the Advertiser do not provide sufficient substantiation for the comparative superiority claims ('*Simply whiter than any ordinary whitening toothpaste*' and '*Colgate Simply White will give you the whitest teeth you can get from a whitening toothpaste*') made in the Advertisement because the comparisons made in those studies are to toothpastes commercially available in the United States and no whitening toothpastes actually available on the Australian market were used.
75. The Complainant claims that in order to make superiority claims about Simply White to Australian consumers, comparative in-use clinical studies of Simply White against a comprehensive range of whitening toothpastes commercially available to Australian consumers are required to support the claim.
76. In its Preliminary Determination the Panel agreed with the Complainant that given the logical doubt and in the absence of direct comparative testing which the Advertiser appears to have been able to undertake but chose not to, some other convincing scientific support would need to be available. The Panel also found that notes of a

discussion with Professor Walsh, setting out how the United States studies were relevant to the Australian claims, either alone or in combination with the other material apparently relied on by the Advertiser, did not sufficiently substantiate the comparative representations conveyed by the Advertisement.

77. A memorandum from Jim Bennett, Sarah Whitaker and Robert Koltai to Bill DeVizio and Ravi Subramanyam dated 2 May 2005, provided in the Advertiser's Further Materials, sets out a cross-analysis between the whitening ingredients in toothpastes which were the subject of the United States comparative studies, with the whitening ingredients of all the whitening toothpastes on the Australian market as identified in the Aztec scan data mentioned above.
78. Those whitening technologies are as follows:
- (a) regular abrasive (silica);
 - (b) enhanced abrasives (high cleaning silica, alumina, sodium bicarbonate, carbonates etc);
 - (c) anti-tartar agents (phosphates, pyrophosphates, polyphosphates, hexametaphosphates);
 - (d) polymers (polyvinyl methyl ether/maleic anhydride copolymer, polyvinyl pyrrolidone etc);
 - (e) bleaching agents (hydrogen peroxide, urea peroxide, calcium peroxide, sodium percarbonate, sodium chloride etc) with or without activating systems.
79. Each one of these whitening technologies, or combinations of them, was represented in the whitening toothpastes used in the United States Simply White comparative studies.
80. The memorandum also sets out a breakdown of the various combinations of these technologies contained in the whitening toothpastes commercially available in Australia. The Panel has reviewed the cross-analysis provided and is satisfied that each of the technologies above and the relevant combinations of them reflect ingredients of whitening toothpastes commercially available in Australia.
81. The Panel finds that the Advertiser's cross-analysis demonstrates that the United States comparative studies tested formulations containing each of the whitening agents which are contained in the Australian formulations. Accordingly, given its determination

above that the United States version of Simply White is substantially identical to the Australian version of the product, the Panel is satisfied that all of the whitening technologies present in commercially available whitening toothpastes in Australia have been adequately and relevantly tested against Simply White toothpaste.

Comparative claims

82. As it is the only whitening toothpaste commercially available in Australia containing an ingredient which is effective on intrinsic stains (hydrogen peroxide), in combination with other ingredients which are effective against extrinsic tooth stains, the Panel is satisfied that Simply White is the only commercially available toothpaste in Australia which is capable of efficacy against both *intrinsic* and *extrinsic* tooth stains.
83. The Panel is satisfied that the reports of the numerous laboratory and human clinical studies conducted, and the academic opinions of several Professors of Dentistry, convincingly demonstrate that using Simply White twice a day in the manner directed for a period of 14 days will produce whiter teeth than any other commercially available whitening toothpaste in Australia.
84. Since the Panel has determined that the United States comparative tests are relevant, and is satisfied that those tests do indeed demonstrate superior whitening efficacy of Simply White, the Panel is satisfied that the Advertiser has substantiated the comparative efficacy claims contained in the Advertisement.

Further matter

85. In its Further Response, the Complainant queried why the Advertiser, having conducted comparative tests in the United States, abstained from making comparative references, such as those made in the Advertisement, in its advertising for Simply White in the United States.
86. The Advertiser explained in its letter to the Board dated 2 June 2005 that this is because, in the United States, unlike the situation in Australia, Simply White is not the only whitening toothpaste commercially available to consumers containing peroxide.

Final Determination

87. Having regard to all of the matters above, the Panel finds that the Advertiser has sufficiently substantiated the advertising claims the subject of complaint and, accordingly, the Complainant's complaint is dismissed.

Date: 20 June 2005