

## Advertising Claims Board Determination

Advertiser	SCA Hygiene Australasia
Complainant	Kimberly-Clark Australia Pty Limited
Type of Advertisement	Television
Nature of Complaint	Sections 1.1, 1.2 and 1.3 of the Australian Association of National Advertisers Code of Ethics
Product	Sorbent Toilet Tissue
Panel Members	Katrina Rathie, Chair - Mallesons Stephen Jaques Lisa Ritson - Blake Dawson Waldron John Clayton - Cropper Parkhill
Determination	Advertising Modified or Discontinued – Advertisement discontinued voluntarily, prior to determination.
Date of Determination	22 August 2006

This is a determination of the Advertising Claims Board in relation to a complaint made by Kimberly-Clark Australia Pty Limited (“**Complainant**”) in relation to a 30 second television commercial for SCA Hygiene Australasia’s (“**Advertiser**”) Sorbent brand of toilet tissue. The Complainant is a competitor and markets the Kleenex brand of toilet tissue.

### The Advertisement

The Advertisement which is the subject of the complaint is for Sorbent toilet tissue and is narrated by a boy. It depicts a dining table scene where the boy characterises his younger sister, older twin brothers and parents as “scrunchers” of toilet paper, whereas he and his great aunt are “folders”. At the end of the Advertisement, there is a screen shot which contains a pack shot of Sorbent toilet tissue with the words:

*“Whether you’re a folder or a scruncher*

*It’s still Australia’s favourite”.*

The words “It’s still Australia’s favourite” scroll onto the screen for the last 1-2 seconds of the Advertisement. There is no voiceover that accompanies the words, “Whether you’re a folder or a scruncher, It’s still Australia’s favourite”.

This determination of the Advertising Claims Board relates only to the claim “It’s still Australia’s favourite”. There is no complaint made in relation to any other part of the Advertisement.

## The Complaint

1 The Complainant alleges that the claim that Sorbent is “still Australia’s favourite” contravenes sections 1.1, 1.2 and 1.3 of the *Australian Association of National Advertisers Code of Ethics* (“**AANA Code**”). The relevant sections of the AANA Code provide:

1.1 *Advertisements shall comply with Commonwealth law and the law of the relevant State or Territory.*

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.*

2 The Complainant alleges that the representation that Sorbent is “still Australia’s favourite” contravenes section 52 of the *Trade Practices Act 1974*.

3 The members of the Advertising Claims Board comprising Katrina Rathie, Mallesons Stephen Jaques (Chair), Lisa Ritson, Blake Dawson Waldron and John Clayton, Cropper Parkhill have carefully considered:

(a) the Advertisement;

(b) the Complainant’s submission of 31 May 2006;

(c) the Advertiser’s response of 18 July 2006;

(d) the Complainant’s reply of 26 July 2006; and

(e) the Advertiser’s letter of 3 August 2006 and emails of 8 and 14 August 2006.

### **Advertising Claims Board - jurisdiction to hear complaints about advertisements that have been withdrawn or discontinued before challenge**

4 The Advertiser denies that it has breached the AANA Code or the *Trade Practices Act* but informed the Advertising Claims Board and the Complainant on or about 3 August 2006 that the Advertiser has ceased to use the words which are subject of the complaint. In an email of 14 August 2006, the Advertiser informed the Advertising Claims Board that the Advertisement had not gone to air since early July 2006 and alleged that the Advertising Claims Board should not consider complaints about advertisements that have been withdrawn or discontinued before challenge, relying on section 1.6 of the *Advertising Claims Board Procedural Guidelines for Participants*. The Advertiser stated that it would be unfair and inappropriate for the Advertising Claims Board to continue with the process.

5 The Advertising Claims Board Procedural Guidelines for Participants relevantly provide:

“1.6 *The Claims Board does not usually consider the following:*

- *Complaints about advertising that has been withdrawn or discontinued before challenge.”*

The Advertising Claims Board notes that the Advertisement was not withdrawn or discontinued *before* challenge by the Complainant, but only *after* it was challenged by the Complainant.

6 Sections 4.3 and 4.4 of the Procedural Guidelines for Participants state:

“4.3 *Settlement of proceedings*

*The complainant and the advertiser are naturally free to settle the dispute at any stage during the course of the proceedings. In this instance, the complainant forfeits fees paid and should notify the Secretariat, in writing, that the matter has been settled and the complaint is withdrawn for that reason.*

4.4 *Withdrawal by complainant from proceedings*

*The complainant is entitled to withdraw from the proceedings at any time. In this instance, the complainant forfeits fees paid and should notify the Secretariat in writing providing reasons for its withdrawal.”*

7 Despite the Advertiser’s cessation of the use of the words “still Australia’s favourite” since some time in July 2006, the Complainant has elected to proceed with the process and has not notified the Secretariat that it has withdrawn the complaint. To the contrary, the Complainant wrote to the Secretariat in early August 2006 specifically requesting that it wished to proceed with the Complaint and have it determined by the Advertising Claims Board. Accordingly, the Advertising Claims Board is of the view that it is entitled to proceed to make a determination of this complaint.

### **Summary of Determination**

8 The Advertising Claims Board is unanimously of the view that in the circumstances, the claim “still Australia’s favourite” in the Advertisement contravenes sections 1.1 and 1.2 of the AANA Code on the grounds that the claim is misleading or deceptive, or is likely to mislead or deceive in contravention of section 52 of the *Trade Practices Act*. However, the Advertising Claims Board does not have sufficient evidence to determine that there has been a breach of section 1.3 of the AANA Code.

### **“Still Australia’s favourite”**

9 The claim in question are the words “still Australia’s favourite”. It is the exact combination of these three words that the Advertising Claims Board has considered in this determination.

10 According to the Oxford Dictionary, “favourite” means “preferred above others”.

11 The Advertising Claims Board does not agree with the Advertiser’s submission that the term “Australia’s favourite” is mere puffery. While the term “favourite” is a subjective term, the Advertising Claims Board is of the view that the claim “Australia’s favourite” is a specific representation which should be capable of objective substantiation either by qualitative or quantitative research. In our view, “Australia’s favourite” is a preference claim to the effect that more Australians prefer Sorbent to any other brand of toilet tissue. The accuracy of this claim could be measured by qualitative research (such as interviews with consumers) or quantitative research of a statistically significant sample of people, but need not necessarily be both. Quantitative market share data showing higher sales could also be used to support the "favourite" claim.

- 12 The Advertiser has not submitted any qualitative research to support the claim of “Australia’s favourite”. Instead, the Advertiser stated that Sorbent was established in 1952 and has had a long history with the word “favourite”. The Advertiser relied on:
- (a) The Sorbent jingle used in the first television commercial in 1956 which included the words “Buy Sorbent at your favourite store”;
  - (b) The 1988 paper boy television commercial which included the words “Australia’s favourite morning paper”; and
  - (c) The “Australia’s favourite” advertising and promotional campaign for Sorbent in 2001.
- 13 While samples of this advertising were not provided to the Advertising Claims Board, we do not need to view them to determine this complaint. Reference to a “favourite store” is not a reference to Sorbent toilet paper. If reference to “Australia’s favourite morning paper” in a 1988 television commercial was a reference to Sorbent toilet paper, that does not, in our view, assist the Advertiser. That the Advertiser was able to make such a claim in 1988 does not mean that it is able to make a similar claim in 2006. Sorbent’s “Australia’s favourite” advertising and promotional campaign was run in 2001 and five years have passed since that time. It is evident from the quantitative market share information provided to the Advertising Claims Board by the parties that the market share of Sorbent and Kleenex has changed between 2001 and 2006, so what might have been a valid claim in 2001 might no longer be valid in 2006. This is relevant in the context of a claim that Sorbent is “*Still* Australia’s favourite” which must be accurate at the time the Advertisement is (or was) broadcast.

### Market Share Information

- 14 Both the Complainant and the Advertiser provided quantitative market share information to the Advertising Claims Board. Although the market share information provided was different, neither party challenged the accuracy of the information provided by the other.
- 15 The Complainant provided evidence to the following effect for the year 2005 and for the period to 21 May 2006:

National				
	Year 2005		YTD to 21/05/06	
	Total Premium Kleenex Superbrand	Total Premium Sorbent Superbrand	Total Premium Kleenex Superbrand	Total Premium Sorbent Superbrand
Dollars (000) Share of Total Toilet Tissue	25.2	23.0	25.4	23.8
Equivalent Rolls (000) Share of Total Toilet Tissue	22.1	19.9	22.5	20.7
Actual Rolls (000) Share of Total Toilet Tissue	21.4	20.3	21.9	21.2

Std Unit Share of Total Toilet Tissue	19.6	17.0	20.2	17.9
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- 16 In response, the Advertiser provided AC Nielsen Australia Scan Track data showing the Total National Toilet Tissue market for the years 1999, 2000, 2001, 2002, 2003, 2004 and 2005.

[CONFIDENTIAL]

The Advertiser also provided Aztec National combined figures for the toilet roll market excluding wipes and including wipes.

[CONFIDENTIAL]

- 17 The market share information shows that for the years 1999, 2000, 2001, 2002, 2003 and 2004, Sorbent sold more toilet tissue than Kleenex by units, volume and value. However, for the year 2005 and the period to May 2006, Kleenex sold more toilet tissue than Sorbent by unit, volume and value. In these circumstances, while Sorbent might have been “Australia’s favourite” during the period from 1999 to 2004, the same cannot be said of 2005 and the period during 2006 for which market share information has been provided. Accordingly, the Advertising Claims Board believes that the use of the words “Still Australia’s favourite” is misleading and deceptive or is likely to mislead or deceive. In the view of the Advertising Claims Board, the word “still” suggests that Sorbent was in the immediate past and still currently is Australia’s favourite toilet paper.
- 18 The Advertising Claims Board wishes to stress that apart from the closing words, the visuals in the Sorbent Advertisement are not misleading or deceptive, or likely to mislead or deceive. The only aspect of the Advertisement which contravenes the AANA Code is the final screen shot insofar as it contains the words “Still Australia’s favourite”. If these words were removed from the Advertisement, the Advertisement would not contravene the AANA Code.
- 19 On the basis of the evidence provided in the submissions, the Advertising Claims Board does not find that the Advertisement contains a misrepresentation, which is likely to cause damage to the business or goodwill of the Complainant. The majority of the Advertisement does not focus on the “Still Australia’s favourite” claim and it only occupies one to two seconds of the Advertisement. Furthermore, there is no voiceover reinforcing the “Still Australia’s favourite” claim in the final screen shot. The Complainant submitted no evidence to support its claim that the Advertisement is likely to cause damage to its business or goodwill.
- 20 Accordingly, the Advertising Claims Board upholds the complaint in relation to sections 1.1 and 1.2 of the AANA Code but dismisses the complaint under section 1.3. Our determination is that the Advertisement should be modified by removing the claim “Still Australia’s favourite” from the Advertisement.