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| Advertiser | Samsung Electronics Australia Pty Limited |
| Complainant | LG Electronics Australia Pty Limited |
| Type of Advertisement | Television, Website (including User Manual), Point of Sale material, Training Module |
| Nature of Complaint | Breach of clauses 1.1-1.4 of the AANA Code of Ethics Breach of section 18 of the Australian Consumer Law (ACL) and section 29(1)(g) of the ACL |
| Panel of Members | Mary Still, Chair - Clayton Utz Catherine Chant - Thomsons Lawyers Paul Holm - Anzarut & Holm Lawyers |
| Determination | COMPLAINT UPHELD with respect to clauses 1.1 and 1.2 of the AANA Code of Ethics in relation to each of the Advertisements complained of, except the Training Module. COMPLAINT DISMISSED with respect to alleged breaches of clauses 1.3 and 1.4 of the Code. ADVERTISING DISCONTINUED. |

Background

A complaint was lodged on 24 October 2011 (**the Complaint**) with the Advertising Claims Board (**the Claims Board**) by LG Electronics Australia Pty Limited (**Complainant**) against Samsung Electronics Australia Pty Limited (**Advertiser**) regarding the Advertiser's advertising for the Advertiser's Bubble Wash Technology washing machines. The Claims Board convened a panel of legal practitioners (**the Panel**) to deal with the complaint in accordance with the Claims Board's procedural guidelines.

The Complainant and the Advertiser were given an opportunity to serve submissions on each other in accordance with the Claims Board's procedural guidelines. Their submissions are detailed below.

Complaint

The Complainant submitted that a number of advertisements promoting the Advertiser's washing machines incorporating what is styled "Bubble Wash Technology" breached a number of clauses of the AANA Code of Ethics, being:

- (a) clause 1.1, which prohibits advertising or market communications that do not comply with Commonwealth law and the law of the relevant State or Territory;

- (b) clause 1.2 of the Code of Ethics which states that advertising or marketing communications shall not be misleading or deceptive or likely to mislead or deceive;
- (c) clause 1.3 of the Code of Ethics which states that advertising or marketing communications shall not contain a misrepresentation, which is likely to cause damage to the business or goodwill of a competitor; and
- (d) clause 1.4 of the Code of Ethics which provides that advertising or marketing communications shall not exploit community concerns in relation to protecting the environment by presenting or portraying distinctions in products or services as advertised in a misleading way or in a way which implies a benefit to the environment which the product does not have.

Specifically, the Complainant claimed that the Advertisements conveyed the following 3 representations:

- (a) that Bubble Technology is responsible for, or delivers, energy savings of up to 60% **(Representation (a))**;
- (b) that Bubble Technology is responsible for, or delivers, a wash (in terms of soil removal) in cold water which is "similar" to that which would be achieved using warm water **(Representation (b))**; and
- (c) that Bubble Technology is responsible for, or delivers, improved wash cleanliness **(Representation (c))**.

The Complainant provided evidence which demonstrated that:

- (a) any energy savings which are achieved by the Advertiser's Bubble Wash machines are due solely to the use of cold water rather than warm water; this occurs even without the Bubble Technology including with Samsung non-Bubble models;
- (b) the Advertiser claims "similar" wash performance in cold and warm water also occurs even without Bubble Technology, including with Samsung non-Bubble models; and
- (c) Bubble Technology is irrelevant to, and does not improve, wash performance, whether in cold water or warm water.

Advertiser's Response to Complaint

The Advertiser in its response dated 5 December 2011 submitted that the advertising materials complained of were part of a discontinued campaign. On that basis, the Advertiser submitted that the Claims Board should dismiss the Complaint.

Complainant's response

The Complainant indicated that the advertising, the subject of the Complaint remained in place and available to, and accessible by, consumers throughout Australia notwithstanding the fact that Samsung claimed to have discontinued the campaign.

The Complainant advised that the advertising campaign containing the offending material was still running on internet sites which could easily be accessed by Australian consumers conducting a search for information on the Advertiser's Bubble Technology

Advertiser's response

The Advertiser submitted that any materials still in publication at the date of the Complaint were only available in error as the materials were part of a discontinued campaign.

Determination of the Panel

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

Advertising Claims Board: Panel Determination

October 2011 Complaint by LG Electronics Australia Pty Limited (Complainant) against Samsung Electronics Australia Pty Limited (Advertiser)

1. Preliminary Information

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| Advertiser | Samsung Electronics Australia Pty Limited (Advertiser) |
| Complainant | LG Electronics Australia Pty Limited (Complainant) |
| Types of Advertisement | Television, Website (including User Manual), Point of Sale material, Training Module. |
| Nature of Complaint | Sections 1.1-1.4 of the AANA Code of Ethics s18 of the Australian Consumer Law (ACL), s29(1)(g) of the ACL |
| Product | Samsung "Bubble Technology" Washing Machines |
| Panel Members | Mary Still, Chair - Clayton Utz Catherine Chant - Thomsons Lawyers Paul Holm - Anzarut & Holm Lawyers |
| Determination | Each of the Advertisements complained of, except the Training Module, breaches clauses 1.1 and 1.2 of the AANA Code of Ethics by conveying one or more representations which are misleading or deceptive or likely to mislead or deceive. The Panel was not satisfied that clauses 1.3 or 1.4 of the Code were breached. |
| Date of Determination | 9 February 2012 |

2. Introduction

This is the determination of a Panel appointed by the Advertising Claims Board in relation to a complaint made by LG Electronics Australia Pty Limited (**Complainant**) regarding a number of advertisements in various media published by or on behalf of Samsung Electronics Australia Pty Ltd (**Advertiser**). The Complainant is a competitor of the Advertiser for the sale of washing machines in Australia.

The Complaint specifies a number of publications promoting the Advertiser's washing machines incorporating what is styled "Bubble Wash Technology". Four of those publications are described by the Complainant as being "of particular concern". These are:

- (a) **Point of Sale Displays.** In various retail outlets, the Complainant alleges that print displays incorporating a video presentation were displayed at the date of the Complaint. Copies of these publications are Annexures A and B to the Complaint.
- (b) **Website publications.** Two website publications, referred to by the Advertiser as "press releases"; were available on the Advertiser's website at the time of the complaint. Copies of these publications are Annexures C and E to the Complaint.

- (c) **Television Advertisement.** A television advertisement for the Advertiser's "Bubble Wash" washing machines which was, available on YouTube at the time of the Complaint. A copy of this advertisement is Annexure D to the Complaint.

The Complaint also specifies two additional publications which were "provided by way of background information". It is unclear whether those publications are also complained of by the Complainant. The Panel has nevertheless considered in this Determination whether these publications contravene the Code.

- (d) **Training Module.** An electronic training manual provided by the Advertiser to staff of retail outlets. A copy of this publication is Annexure F to the Complaint.
- (e) **User Manual.** A copy of the user manual for the Advertiser's "Bubble Wash" washing machines was available on the Advertiser's website at the time of the Complaint. A copy of this advertisement is Annexure G to the Complaint.

(collectively, **Advertisements**)

The Advertiser submits that the board should dismiss the Complaint or, alternatively, the Complainant should withdraw the Complaint, because the advertising campaign complained of is no longer running and was discontinued before challenge. The Advertiser submits that any materials still in publication at the date of the Complaint were only available in error as the materials were part of a discontinued campaign.

3. Complaint

3.1 Relevant sections of the Code

The Complainant asserts that the Advertisements complained of breach a number of sections of the AANA Code of Ethics:

- clause 1.1 prohibits advertising or market communications that do not comply with Commonwealth law and the law of the relevant State or Territory;
- clause 1.2 of the Code of Ethics states that advertising or marketing communications shall not be misleading or deceptive or likely to mislead or deceive;
- clause 1.3 of the Code of Ethics states that advertising or marketing communications shall not contain a misrepresentation, which is likely to cause damage to the business or goodwill of a competitor;
- clause 1.4 of the Code of Ethics provides that advertising or marketing communications shall not exploit community concerns in relation to protecting the environment by presenting or portraying distinctions in products or services as advertised in a misleading way or in a way which implies a benefit to the environment which the product does not have.

3.2 Representations complained of

The Complainant claims that the Advertisements convey the following three representations:

- (a) that Bubble Technology is responsible for, or delivers, energy savings of up to 60% (**Representation (a)**);

- (b) that Bubble Technology is responsible for, or delivers, a wash (in terms of soil removal) in cold water which is "similar" to that which would be achieved using warm water (**Representation (b)**); and
- (c) that Bubble Technology is responsible for, or delivers, improved wash cleanliness (**Representation (c)**).

3.3 The evidence

The Complainant has provided evidence which demonstrates that:

- (a) any energy savings which are achieved by the Advertiser's Bubble Wash machines are due solely to the use of cold water rather than warm water; this occurs even without the Bubble Technology including with Samsung non-Bubble models;
- (b) the Advertiser claims "similar" wash performance in cold and warm water also occurs even without Bubble Technology, including with Samsung non-Bubble models; and
- (c) Bubble Technology is irrelevant to, and does not improve, wash performance, whether in cold water or warm water.

The Advertiser has not provided any evidence in response to the Complainant's evidence. In the absence of any evidence to the contrary, the Panel can see no reason why it should not accept the Complainant's evidence.

It follows that if the Panel determines that the Complainant's representations are conveyed by the Advertisements, then the evidence supports a determination that the Advertisements are misleading and deceptive or likely to mislead or deceive for the purposes of section 18 of the ACL and therefore contravene clauses 1.1 and 1.2 of the Code of Ethics.

If the Complainant has established that any misrepresentation conveyed is likely to cause damage to its business or goodwill, then clause 1.3 of the Code of Ethics will also be breached.

The Panel does not believe that a breach of clause 1.4 of the Code of Ethics is supported by the evidence presented by the Complainant. This is because the evidence suggests that there *is* an energy saving attributable to the washing machine when cold water rather than warm water is used. It cannot be said that the products do not have the benefit to the environment which is asserted for them when cold water is used.

4. Samsung response

The Advertiser in its response dated 5 December 2011 does not address the evidence presented by the Complainant, but rather submits that the advertising materials complained of were part of a discontinued campaign that is no longer running. On that basis, the Advertiser submits that the Claims Board should dismiss the Complaint.

However, the Advertiser admits that each of the Advertisements were still publicly available in some form at the date of complaint. The Advertiser asserts in its response that if any marketing materials created under the discontinued campaign remained available, this was an error, and that it had now removed all references to the discontinued campaign from its website and is continuing to liaise with its distribution channels to ensure that any other materials are removed and not reused.

5. Threshold questions for determination

Prior to considering the Advertisements, the Panel has considered the following threshold questions.

First, the Advertiser submits that the claims board should dismiss the Complaint because the Complaint relates to an advertising campaign that is no longer running and has been discontinued before challenge. The matter has been referred to the Panel by the Board, and the Panel has no power to dismiss the Complaint on this basis. In addition we note that it appears that the Advertisements were publicly available at the time of the Complaint and remained in dispute, as the Advertiser continued to make 'no admissions' regarding the allegations made.

Secondly, on 1 January 2012, a revised Code of Ethics was published by the AANA. That revised Code included a new definition of advertising or marketing communication, a matter which is directly relevant to this determination. The AANA also published a practice note which facilitates the interpretation of specific aspects of the Code. The Panel has considered which Code should be applied in this determination. The Complaint was made in October 2011 and whilst not expressly referred to, the parties appear to have proceeded on the basis of the previous Code of Ethics. Furthermore, the new Code of Ethics states:

"This Code comes into effect on 1 January 2012. It replaces the previous AANA Code of Ethics and applies to all advertising and marketing communications on and from 1 January 2012."

It follows that the Panel is of the view that the August 2009 Code of Ethics is the appropriate Code to be applied in this determination.

Finally, each of the Advertisements complained of must satisfy the definition of "Advertising or Marketing Communications" for the purposes of the Code. The Panel's views on each Advertisement complained of is as follows:

- (a) **Point of Sale Display.** The Panel considers that the Point of Sale displays (including the video presentation) constitute a "medium" for the purposes of the Code. That definition is very broad and includes a number of specific examples including print and things which are analogous to a point of sale display, for example, "direct-to-consumer" media. The Panel therefore considers that the Point of Sale displays constitute "Advertising and Marketing Communications" for the purposes of the Code.
- (b) **Website publications.** The Panel is of the view that each of the website publications are "Advertising and Marketing Communications" for the purposes of the Code.
- (c) **Television Advertisement.** The Panel considers that the Television Advertisement satisfies the definition of "Advertising and Marketing Communications" under the Code.
- (d) **Training Module.** It appears from the Advertiser's response that the Training Module was not available to the public or a substantial section of the public, and therefore cannot be considered an "Advertising or Marketing Communication" for the purposes of the Code.
- (e) **User Manual.** The Panel considers that the User Manual satisfies the definition of "Advertising and Marketing Communications" under the Code since it was available on the Advertiser's website.

6. Are the Representations conveyed?

In light of the evidence provided by the Complainant the Panel has limited itself to considering whether Representations set out in paragraphs 3.2(a) to (c) are conveyed. Each Advertisement is considered separately in the paragraphs below, except the Training Module, which, as discussed in paragraph 5 above, is not considered by the Panel to be an "Advertising or Marketing Communication" for the purposes of the Code.

6.1 Annexures A and B, Point of Sale display

The Complainant notes that point of Sale print displays including a video presentation were on display at various retail outlets across Australia on or after the date of the Complaint. These displays are intrinsically connected and, in the view of the Panel, should not be considered separately.

The video presentation shows two front-loading washing machine drums, with the left drum marked labelled with a "BubbleWash" logo and the right drum marked as "Conventional". It then proceeds to make various claims about each of these machines in that comparative format. In particular, in one screen, the text on the left side states:

"Save energy up to 60% by cold wash"

and the text on the right side states:

"Need to heat the water to 40°C".

The static display states:

"Find out how you can use 60% less energy!".

The Panel unanimously agreed that Representation 3.2(b) was conveyed by the Point of Sale Displays.

A majority of the Panel also found that Representation 3.2(a) was conveyed. One member however considered that the claim for a 60% saving in energy was linked to the use of cold water as compared to warm rather than the "Bubble Technology".

The Panel found that Representation 3.2(c) was not conveyed by the Point of Sale Displays, as it made no reference to the cleanliness of the wash beyond that set out in Representation 3.2(b).

6.2 Annexure C, "The Smart and Economical Way to Wash"

Annexure C to the Complaint is a marketing communication made by the Advertiser on its website at the URL

http://www.samsung.com.au/news/articles/home_appliance_news/washing_machines/the-smart-and-economical-way-to-wash.

Annexure C clearly states in bold:

"Introducing Samsung's new 'BubbleWash' washing machine. These machines are designed to deliver excellent cold water washing performance so that it uses up to 60% less energy"*.

The asterisk refers the reader to a footnote which states *"Energy saving of 60% based on full load using BubbleWash ..."*. The Panel considered that these words used in combination with the footnote and the sentence which follows being *"As a result you can achieve similar performance to a warm water wash using cold water"* convey Representations 3.2(a) and

3.2(b). The representation is clearly that the energy saving is at least partly the result of the "Bubble Wash" technology.

The Panel was also of the view that Representation 3.2(c) is not conveyed by Annexure C. The webpage states that an excellent wash is achieved, not "improved wash cleanliness".

6.3 **Annexure D, Television Advertisement**

The Complainant has provided in Annexure D to its complaint, a copy of a television commercial which was still available on YouTube at the time of the Complaint.

The Television Advertisement features a woman in a laundry listing the features of the Advertiser's washing machines. She states that:

"because it delivers a similar wash when using cold water compared to warm water you'll use 60% less energy. Samsung Bubble Wash Washing Machine, the smart and economical way to wash."

The Panel was unanimously of the view that Representation 3.2(b) is conveyed by the Television Advertisement.

A majority of the Panel was also of the view that Representation 3.2(a) is conveyed by the Television Advertisement. One member of the Panel considered however that the claim for a 60% saving in energy was linked to the use of cold water as compared to warm rather than the "Bubble Technology".

The Panel was of the view that Representation 3.2(c) was not conveyed by the Television Advertisement, as it made no reference to the cleanliness of the wash beyond that set out in Representation 3.2(b).

6.4 **Annexure E, "Samsung introduces washing machines with new Bubble Wash Technology"**

Annexure E to the Complaint was a marketing communication made by the Advertiser on its website at the URL

http://www.samsung.com.au/news/articles/home_appliance_news/washing_machines/samsung-introduces-washing=machines-with-new-bubble-wash-technology.

Annexure E states:

"Samsung's BubbleWash technology mixes detergent and water with air to create a powerful bubble cushion that dissolves deep into clothing. Not only is BubbleWash technology gentler on clothes, but it also delivers a similar wash when using cold water compared to warm water, consuming up to 60% less energy"

That phrase is footnoted with the following text:

"Energy Saving of 60% based on full load using Bubble Wash..."

The Panel was of the view that Annexure E conveys Representations 3.2(a) and 3.2(b). The representation is clearly that the energy saving is at least partly the result of the "Bubble Wash" technology.

The Panel was of the view that Representation 3.2(c) is not conveyed by Annexure E. The webpage states that the Bubble Wash machines achieve "great washing performance", not "improved cleanliness".

6.5 Annexure G, "User Manual"

Annexure G is a "User Manual" for the Samsung "BubbleWash" washing machines. Page 2 of the User Manual makes the following claims:

"Energy Saving... this model offers more efficient energy use compared to standard A rated machine with the special Bubble generator system and Quiet Drive inverter motor"

"Eco Bubble Wash...Samsung's effective Eco Bubble delivers improved cleanliness with advanced fabric care. Eco Bubble allows detergent to distribute evenly and penetrate fabrics faster and deeper"

The Panel was of the view that Annexure G conveys Representations 3.2(a) and 3.2(c).

The User Manual contains no representation comparing the wash results of warm and cold water, so the Panel finds that Representation 3.2(b) was not conveyed.

7. Determination of the Panel

The Panel is therefore of the view that, with the exception of the Training Module, each of the Advertisements complained of breaches clauses 1.1 and 1.2 of the AANA Code of Ethics by conveying one or more representations which are misleading or deceptive or likely to mislead or deceive.

The Complainant has submitted that it is "concerned" that the Advertisements have caused, and will continue to cause damage to its business and goodwill by virtue of their misleading nature. The submission on this point does not assist the Panel in reaching a conclusion that the Advertisements are likely to cause damage to the Complainant's business or goodwill. The Panel is therefore not able to make any finding on this allegation.

9 February 2012

Advertiser's Statement

On 9 February 2012, the Advertiser was provided with a copy of the Panel's determination. In accordance with the Claims Board's procedural 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 February 2012, the Advertiser provided its Advertiser's Statement indicating that the Advertisements had been discontinued. In its response, the Advertiser stated:

As Samsung Electronics Australia has previously indicated, Samsung Electronics Australia's decision to discontinue using the advertising materials the subject of the Complaint was made before the Complaint was lodged by LG with the Claims Board and received by Samsung Electronics Australia on 21 November 2011. However, Samsung Electronics Australia confirms that it will refrain in the future from using the advertising materials the subject of the Complaint or from making the claims the subject of the Complaint in advertising campaigns for the Bubble Wash machine.

In doing so, Samsung Electronics Australia does not admit or accept that it has contravened any codes or legislation