

## Advertising Claims Board Determination

1. Matter reference	LEH: ADV001/4021
2. Advertiser	Miele Australia Pty Limited
3. Complainant	Dyson Appliances (Aust) Pty Limited
4. Type of Advertisement	Variety of media – online, television and print
5. Nature of complaint	Sections 1.1 and 1.2 of the Australian Association of National Advertisers Code of Ethics (the <b>AANA Code</b> )
6. Product	Vacuum cleaners
7. Panel Members	Andrew Christopher – Chair – Webb Henderson Catherine Logan – Hunt & Hunt Alistair Little – TressCox
8. Determination	Advertising Substantiated except Advertising Modified or Discontinued in relation to video of vacuum cleaners operating accompanied by images/graphics of years ticking by
9. Date of Determination	17 April 2013

This is a determination by a panel of the Advertising Claims Board (**Board**) in relation to the Complaint made by Dyson Appliances (Aust) Pty Limited (**Complainant**) regarding an advertising campaign for Miele branded vacuum cleaners manufactured by Miele Australia Pty Limited (**Advertiser**). The Complainant is a competitor of the Advertiser and markets Dyson branded vacuum cleaners.

### Description of the advertisements

The advertisements which are the subject of the Complaint are for Miele branded vacuum cleaners and comprise:

- (a) website promotional material including print material and video material displayed at the website [www.miele20years.com.au](http://www.miele20years.com.au);
- (b) a television commercial;
- (c) promotional brochure for Miele products entitled "Our quality pledges";
- (d) product Brochure for Miele vacuum cleaners entitled "Miele Floorcare";
- (e) print advertisement appearing in "Appliance Retailer" with the heading "*Mention 20 years and cut your selling time in half*";
- (f) online advertising.

together referred to as "**the Advertisements**", as set out in tabs 2-7 inclusive of the folder of documents and other materials accompanying the Complainant's letter of 8 January 2013, and under tab 5 of the folder accompanying the Complainant's letter of 19 March 2013.

As it has been requested to do, the Board viewed the website [www.miele20years.com.au](http://www.miele20years.com.au) during its deliberations but has not re-visited the website repeatedly or checked it for changes over time. The Board notes that on the CD supplied to the Board by the Complainant entitled "*Copy of the videos of testing procedures available at [www.miele20years.com.au](http://www.miele20years.com.au)*" there is footage of a

variety of additional quality assurance tests being carried out on the products. This footage appears different to the footage actually appearing on the website at the time that the Board viewed it, however there was footage on the website of at least one additional test (namely the "chassis testing" referred to below in the description of the Website campaign).

The Board viewed the YouTube video referred to it by the Advertiser but notes as submitted by the Complainant, that the footage there does not appear to be particularly relevant to the Australian market.

The Board notes further that the brochure entitled "Our quality pledges" deals with many other Miele products besides vacuum cleaners and it has only had regard to that part of the brochure which deals with vacuum cleaners.

The Board has proceeded on the assumption that the advertisements are either currently being run, or may be run at any time as the Advertiser has declined to suspend the Advertisements.

### **Website campaign**

The website campaign as regards vacuum cleaners consists of text on the webpage [www.miele20years.com.au](http://www.miele20years.com.au) stating

#### ***"Miele vacuum cleaners***

- *Tested to operate for 780 hours\**
- *Tested over 2,000 km of different types of carpet*
- *Cables wound and unwound more than 10,000 times*

*\*based on average usage of 45 minutes per week at maximum output"*

Next to the "20 years logo" which appears lower down on the webpage the following words appear *"German engineered and tested to the equivalent of 20 years usage"*

There are also videos which were provided to the Board showing Miele vacuum cleaner floor heads being tested over 600 hours or 1,000 km of carpet, (note, not the 780 hours and 2,000 km referred to the above text) and being subjected to chassis testing ("16,500 bumps which equates to around 15 collisions per week over a period of 20 years") and to the cable testing referred to in the text above. A voiceover during part of the video states that "even the rough and tumble of everyday life is less severe than our tests".

### **Television commercial**

The television commercial opens with images of Miele vacuum cleaners being put to various uses in domestic situations and then moves to images of them being put through a variety of testing procedures with the voiceover stating their superior German engineering and testing by engineers with the message "Tested to the equivalent of 20 year's usage". The "20 years logo" is prominent on the screen for 2 seconds or so and the logo is underlined with a red banner containing the words *"tested to the equivalent of"* unfurling beneath it.

### **Print materials**

The print advertising used in the campaign to date includes the following:

- (a) Promotional brochure for Miele products entitled *"Our quality pledges"* which on the page relating to vacuum cleaners, states:

*"We subject our vacuum cleaners to a lifetime test of 780 hours.\*"*

*Our floor heads are tested over 2,000 km of different types of carpet surface in its lifetime.*

*Our electrical cables are wound and unwound more than 10,000 times in our test centres.*

*\*Based on average usage of 45 minutes per week at maximum output."*

- (b) Product Brochure for Miele vacuum cleaners entitled "*Miele Floorcare*" which states "*There's every chance their daughter will be leaving home before their Miele does*" in the heading to a family portrait of a father vacuuming in the background of a sleeping mother and young daughter. At the end of the page the "20 years" logo appears with the additional text "*German engineered and tested to the equivalent of 20 years usage*" appearing prominently next to it, and a reference is made to the website [www.miele20years.com.au](http://www.miele20years.com.au) referred to under the heading "Website campaign" above.
- (c) Print advertisement appearing in the industry publication "Appliance Retailer" with the heading "*Mention 20 years and cut your selling time in half*". The text below the heading mentions that the products are "*tested to the equivalent of 20 years usage*" and at the end of the page the "20 years" logo appears with the additional text "*German engineered and tested to the equivalent of 20 years usage*" appearing prominently next to it, together with a reference to the website [www.miele20years.com.au](http://www.miele20years.com.au), and additional subtext as follows:

*"Tested to operate for 780 hours\**

*\*Based on average usage of 45 minutes per week at maximum output."*

- (d) Online advertising which is accessible through the Sydney Morning Herald website, which the Board notes appeared after the matter had been filed with the Board and during a period of extension which had been requested by the Advertiser in order to have its consumer research completed. In this advertisement the "20 years" logo appears at the end of the advertisement with the word "*Miele*" next to it rather than the words "*German engineered and tested to the equivalent of 20 years usage*" as elsewhere in the Advertising, however the following prominent text appears at the top of the page "*Miele vacuum cleaners are tested to the equivalent of 20 years usage.\**", with the following disclaimer appearing at the end of the page "*\*based on average usage of 45 minutes per week of maximum output*".

## **The complaint**

2. The Complainant alleges that the overall effect of the Advertiser's "20 year" advertising campaign is to convey a clear representation that "*a Miele vacuum cleaner purchased today is very likely in 20 years time to perform just as well as it does today*". The Complainant also contended that the representation amounted to "*almost a guarantee that if (the consumer) were to purchase a Miele vacuum cleaner, it is very likely to perform in 20 years time just as well as it does today*" and that these representations cannot be, and have not been, substantiated.
3. The Complainant specifically submitted that the testing of the products (such as "tested to operate for 780 hours", "tested over 2,000 km of different types of carpet" and "cables wound and unwound more than 10,000 times"), whilst stringent, were not sufficient to substantiate these representations.

4. The Complainant also submitted that the representations are as to future matters and were not made with reasonable grounds on the basis that Miele is unlikely to support its products through service and spare parts during the lifecycle of the products. The Complainant pointed to advancements in bag-less technology and other matters that it considers make it unlikely that Miele would retain spare parts for 20 years.

#### **The advertiser's response to the complaint**

5. The Advertiser disputes that the Advertisements convey the representations identified by the Complainant. It submits that the relevant representation or "take out message" from the campaign as a whole is that the products have been "*German engineered and tested to the equivalent of 20 years usage*", which message is adequately substantiated by its testing regime.
6. To support this contention as to the nature of the representation, it commissioned independent consumer research on the messages conveyed by the website and the television commercial.
7. The Advertiser also submits that it fully intends to continue to provide parts and future support to products over their life and for up to 20 years.

#### **The Board's role and jurisdiction**

8. The role of the Board is to determine whether the Advertisements contravene sections 1.1 and 1.2 of the AANA Code. The relevant sections provide:  
  
*1.1 Advertisements shall comply with the 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.*
9. The Board accepts the submission of the Complainant as to the appropriate approach to be taken by the Board in relation to the current determination as set out in paragraphs 17-25 of the submissions in support of the Complaint appearing at tab 1 of the folder of documents and other materials accompanying the Complainant's letter of 8 January 2013.
10. In particular, the Board adopts the view that the question of whether section 1.2 of the Code has been breached must be answered by reference to the case law as to conduct prohibited by section 52 of the former *Trade Practices Act 1974* (Cth) (now section 18 of the Australian Consumer Law) and equivalent provisions of the State and Territory Fair Trading legislation laws in the context of advertising.
11. The Board notes that the complaint does not involve trivial issues, highly technical matters or packaging claims, and the complaint is not the subject of litigation.
12. The Advertisements satisfy the Code's definition of an "Advertising or Marketing Communication".
13. The Complaint does not fall under the "Matters not considered by the Claims Board" in section 1.6 of the Advertising Claims Board Procedural Guidelines for Participants.
14. The Advertiser expressed concerns in its early correspondence to the Board about the "scope mandate and function of the Board as an arbitrary body with respect to such competitor complaints" and asserted that the Board protocols were "manifestly inappropriate and inherently conflicted" and that "significant questions regarding procedural adequacy and fairness also arise in terms of the Board's approach to such matters". The Advertiser sought assurances from the Board "regarding the

confidentiality of the adjudicatory process and as the independence of the members of the Board". In later correspondence no mention is made by the Advertiser of these concerns and the Board assumes that they have been withdrawn.

15. Accordingly, the members of the Board comprising Andrew Christopher (Chair), Webb Henderson, Catherine Logan, Hunt & Hunt and Alistair Little, TressCox, have carefully considered:
- (a) The Advertisements;
  - (b) The Complainant's initial complaint letter dated 8 January 2013 (including folder of documents);
  - (c) The Advertiser's response comprised in the letters dated 31 January 2013 and 1 March 2013 and in the consumer research report;
  - (d) The Complainant's letter of reply to the Advertiser's response dated 19 March 2013 (including folder of documents)
  - (e) The Advertiser's letter of response to the Complainant's letter of reply dated 3 April 2013 (including accompanying documents),

together with the websites and judicial precedents referred to therein.

### **Summary of determination**

16. The Board does not agree that the overall effect of the Advertising is to "convey a clear representation that a Miele vacuum cleaner purchased today is very likely in 20 years time to perform just as well as it does today", as the Complainant asserts. As such the question of whether such a representation can be or is substantiated by the testing carried out by the Advertiser does not arise for determination by the Board.
17. There are a number of express representations made in the advertising which the Board considers have been substantiated.
18. The Board considers the video of the vacuum cleaners operating accompanied by graphics of passing years is potentially misleading and should be modified or removed.

### **The board's reasons for its determination**

#### **Overview and consideration of the complainant's contentions**

19. The Complainant contends that the representations are that "*a Miele vacuum cleaner purchased today is very likely in 20 years time to perform just as well as it does today*" and amounted to "*almost a guarantee that if (the consumer) were to purchase a Miele vacuum cleaner, it is very likely to perform in 20 years time just as well as it does today*". The Complainant says these representations are not, and cannot be substantiated by the Advertiser's testing regime.
20. The alleged representations or messages are not said to be express, so necessarily must be implied. They are claimed to be conveyed through the cumulative effect of certain express representations, associated images and prominent use of the "20 year" logo.
21. The Complainant focuses heavily in its submissions on the use of the Advertiser's 20 years logo and says that consumers may be misled into believing that a Miele vacuum cleaner will work just as well in 20 years as it does today.
22. The representations are also claimed to be as to future matters and to not be based on reasonable grounds on the basis that Miele is unlikely to support its products through

service and spare parts during the lifecycle of the products. The Complainant pointed to advancements in bag-less technology and other matters that it considers make it unlikely that Miele will retain spare parts for 20 years.

23. It was also submitted that the Board should be guided in its deliberations by the decision of the Advertising Standards Authority (ASA) of Great Britain in the matter of Miele Company Ltd and that the consumer research commissioned by the Advertiser in support of its contentions is inadequate or in the alternative tends to support the Complainant's contentions.

#### **Summary of advertiser's response**

24. The Advertiser claims that the representations and messages conveyed by it are that its vacuum cleaners have been "*German engineered and tested to the equivalent of 20 years usage*" and that this contention is supported by the consumer research it has commissioned and that this representation is adequately substantiated by its testing regime.
25. The Advertiser emphasised the literal meaning of its representations in its submissions and claimed that they highlight the stringency of Miele's testing and focus on durability and reliability.

#### **Determination**

26. There are a couple of aspects of the submissions and material put to the Board that require preliminary comment, namely the consumer research and ASA decision.

#### **The consumer research**

27. The Courts have on many occasions declined to accord significant weight to survey evidence tendered in similar cases, and have suggested that it is wise that such surveys:

"be conducted on notice to the opposite side, that attempts be made to conduct surveys jointly and that the court, in appropriate cases, exercise some supervision in relation to the formulation of the questions and the manner in which the survey is to be conducted".<sup>1</sup>

28. The above guidance is particularly pertinent in the current case as the Advertiser has commissioned a consumer research survey designed by it without input from the Complainant and the Complainant strongly disputes the validity of the survey on a number of grounds.
29. For example, the relevant prompt given to the participants in the research was "guaranteed to work like new for 20 years". This is materially different to the Complainant's assertion that the overall message was that the product was "very likely in 20 years time to perform just as well as it does today".
30. There are various other limitations in the survey which impact on its relevance and in the end the Board did not find it to be of much assistance in its deliberations and does not refer any further to it in these reasons.

#### **The decision of the Advertising Standards Authority (ASA) of Great Britain in the matter of Miele Company Ltd**

31. The Complainant has urged the Board to follow this decision and the Advertiser has submitted that it is not relevant to this case.

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<sup>1</sup> per Sheppard, J in *Interlego AG v Croner Trading Pty Ltd* (1991) 102 ALR 379

32. The Board notes the ASA's decision is made in the context of English law. Further it cannot ascertain from the reasons for the decision the detail of the advertisements in that case but it appears that the advertising claims (concerning the "S7" vacuum cleaner) were quite different to the Advertisements, including not being accompanied by the same disclaimers, and that the claims were not substantiated in the same way as in the present case.
33. According to the decision, the claims it considered were: *"designed to last up to 20 years"* and *"designed and tested for 20 years average use"*.
34. From what the Board can elicit from the decision, substantiation for these claims was based on a motor test of 1,000 hours at varying power settings, and other in-house ageing process tests which were not expounded in the decision.
35. As it turned out the ASA's concerns with the English advertisements seemed to arise from the adequacy of substantiation relating to the testing of the products. As the Board has no knowledge of these matters, and in view of the other limitations on the utility of the ASA decision, it would not be appropriate to place any weight on it in determining the Complaint.

**The representations conveyed by the advertising**

36. The Board notes the Complainant's contention that the representation conveyed by the Advertising is that *"a Miele vacuum cleaner purchased today is very likely in 20 years time to perform just as well as it does today"* or that it is *"almost a guarantee that if (the consumer) were to purchase a Miele vacuum cleaner, it is very likely to perform in 20 years time just as well as it does today"*.
37. The representations identified by the Complainant carry a qualitative or performance element, namely, that the vacuum will perform just as well in 20 years as it does at the time of purchase or that the products are effectively being given a 20 year guarantee.
38. Throughout its submissions, the Complainant emphasises the "overall effect" of the campaign needs to be considered in identifying the representations. The Board agrees that it is necessary to look beyond the express representations when considering the messages conveyed by any advertising and that this approach is consistent with the judicial authorities. However in this case the Board does not consider that many of the associated images or other statements impact substantially or strongly colour the express representations actually made.
39. The Miele 20 year logo by itself conveys a broad and potentially powerful message and if viewed in an unqualified way may lead to consumers to project their own perceptions onto the message. However, the logo in every instance it is used, is accompanied by the qualifying words "tested to the equivalent of" or similar. This direct qualification could be expected to be read in conjunction with the 20 year logo by consumers and would be understood by most to mean that the vacuum cleaners are tested for an equivalent of 20 years use or perhaps that they will *last* 20 years. Although perhaps a subtle distinction, this is quite different to communicating a message that the vacuums would *perform just as well as new* in 20 years time from the time of purchase.
40. The Board notes that there are several express representations that are made in the Advertising, including:
  - (a) "tested to last 20 years"
  - (b) "tested to the equivalent of 20 years";
  - (c) "tested to the equivalent of 20 years usage",

- (d) "20 years – tested to the equivalent of"
  - (e) "20 years – tested to last"
  - (f) "Miele vacuum cleaners are tested to the equivalent of 20 years usage";
  - (g) "German engineered"
  - (h) the various statements outlined on page 4 of the Complainant's 8 January submission
41. The Complainant considers that these representations contribute to the overall impression that the vacuums will perform just as well in 20 years time as when new. The Board does not agree. Additionally, the vague and general claims summarised on page 4 of the Complainant's submission dated 8 January are more in the nature of puffs and in most cases do not relate specifically to the longevity of the products but to their claimed quality, reliability and durability.
42. The product brochure which states "There's every chance their daughter will be leaving home before their Miele does" with the family portrait of a father vacuuming in the background of a sleeping mother and young daughter is similarly a general puff and does not, in the Board's view, communicate the representations complained of.
43. The exception to this is the video of the Advertiser's vacuum cleaners operating accompanied by images of the years ticking by (as illustrated on page 3 of the submissions in support of the Complaint appearing at tab 1 of the folder of documents and other materials accompanying the Complainant's letter of 8 January 2013). This conveys an implied representation, in the view of the Board, that the vacuum cleaners are capable of running continuously for a twenty year period. In the absence of adequate substantiation or further qualification or explanation this should be discontinued as it is potentially misleading.

#### Relevance of testing

44. Most of the Advertising contains reference to the 3 tests below:

- *Tested to operate for 780 hours\**
- *Tested over 2,000 km of different types of carpet*
- *Cables wound and unwound more than 10,000 times*

*\*based on average usage of 45 minutes per week at maximum output*

45. The Board notes that neither the Complainant nor the Advertiser have sought to put independent expert evidence before the Board in support of their respective contentions as to the adequacy of these tests to substantiate the claims in this matter as they have respectively interpreted them.
46. The Complainant has not challenged the stringency of the tests or contended that the testing undertaken is otherwise than as described by the Advertiser. In its submissions the Complainant "[does] not say that (the Advertiser) has not engaged in substantial testing of its vacuum cleaner products, and does not, in the present complaint, contest its specific testing claims (such as "tested to operate for 780 hours", "tested over 2,000km of different types of carpet" and "cables wound and unwound more than 10,000 times")". (Refer to paragraphs 3 and 15 of the submissions in support of the Complaint appearing at tab 1 of the folder of documents and other materials accompanying the Complainant's letter of 8 January 2013).

47. The Advertiser has, in its letter to the Board's solicitor dated 31 January 2013, described a total of 11 quality assurance tests in substantiation of its claims.
48. The Board has been able to reach a determination in this case without seeking further assistance in relation to the testing and substantiation as it does not accept the representations identified by the Complainant have been made.
49. The Board notes the Complainant's submissions as to the potential lack of availability of replacement parts and consumables such as dust bags for the products in the future, but does not consider that this uncertainty sufficiently detracts from the reasonableness of this representation as to future matters to render it misleading, and accepts the Advertiser's submissions as to its history of commitment to the support of its products and as to its intentions in the future in this regard.
50. In any case the overwhelming majority of the express representations are not as to future matters.

### **The Board's determination**

51. In the circumstances and on the basis of the evidence before the Board, the Board:
  - (a) Disagrees with the Complainant's characterisation of the representations. Specifically it does not agree that the Advertiser has represented through the Advertisements that *"a Miele vacuum cleaner purchased today is very likely in 20 years time to perform just as well as it does today"*
  - (b) Considers that with the exception of the video referred to in paragraph 43, the representations made by the Advertiser have been adequately substantiated and are not misleading; and
  - (c) Requires that the Advertiser remove from the Advertisements all images of the years ticking by, in order to remove the misleading representation thereby conveyed.

**17 April 2013**

### **Advertiser Statement**

On 19 April 2013, the Advertiser was provided with a copy of the panel's determination. In accordance with the Advertising Claims Board Procedural Guidelines for Participants and on the basis of the panel's determination, the Advertiser was requested to provide an Advertiser Statement indicating whether it would modify or discontinue the Advertisements to remove all images of the years ticking by.

On 19 April 2013, the Advertiser provided its Advertiser Statement. The Advertiser's response is as follows:

"We write with relevance to the determination by the Advertising Claims Board ("the Board") dated 17 April 2013 with relevance to the complaint by Dyson Appliances (Aust) Pty Limited ("Dyson") in relation to Miele Australia Pty Ltd ("Miele") 20 Year Advertising Campaign.

Miele does not consider that it engaged in any conduct or activity of a deceptive or misleading nature, we have modified our promotional material in accordance with the Board's request to ensure that the Boards concern is appropriately addressed.

Miele thanks the Board for its consideration on this matter."