

Case Report

1	Case Reference	14 ACB 3
2	Advertiser	Dyson Appliances (Aust) Pty Limited
3	Complainant	Samsung Electronics Australia Pty Ltd
4	Product	Dyson DC54 vacuum
5	Type of Advertisement/Media	Various: television, online (website and social media) and print (in store)
6	Board Members	Catherine Chant, Thomson Geer (Chair) Andrew Sutherland, Russells John Fairbairn, Minter Ellison
7	Date of Determination	25 September 2014
8	Determination	Complaints upheld as to breaches of sections 1.1 and 1.2 of the Code in relation to a number of advertisements as identified in the Determination below. The Board was not satisfied that section 1.3 of the Code was breached.

Introduction

A complaint was lodged on 18 June 2014 (the **Complaint**) with the Advertising Claims Board (**Board**) by Samsung Electronics Australia Pty Ltd (**Complainant**) against Dyson Appliances (Aust) Pty Limited (**Advertiser**) regarding the Advertiser's advertising of its Dyson Cinetic DC54 range of vacuum cleaners (the **Product**). A Board was convened to undertake the work of the Board in considering this complaint in accordance with the Board's procedural guidelines (**Guidelines**).

The Complainant and the Advertiser were given an opportunity to make submissions in accordance with the Guidelines. A summary of these submissions and the Board's determination are detailed below.

Issues raised by Complaint

The Complaint raises issues under Sections 1.1, 1.2 and 1.3 of the AANA Code of Ethics (Code), which provide:

- 1.1 *Advertising or Marketing Communications shall comply with Commonwealth law and the law of the relevant State or Territory.*
- 1.2 *Advertising or Marketing Communications shall not be misleading or deceptive or be likely to mislead or deceive.*

1.3 *Advertising or Marketing Communications shall not contain a misrepresentation, which is likely to cause damage to the business or goodwill of a competitor.*

Description of advertising or marketing communication

The material which is the subject of the Complaint comprises:

- (a) a television commercial;
- (b) online advertising on the official Dyson website;
- (c) online advertising on the official Dyson AU YouTube Channel;
- (d) online advertising on a third party retailer's YouTube Channel;
- (e) online advertising on a third party online retailer's YouTube Channel;
- (f) print advertising in the form of in-store promotional material; and
- (g) product packaging.

The Complainant submitted that the advertising or marketing communications listed above formed part of a single campaign and therefore warranted consideration by the Claims Board as a single complaint.

The Advertiser disputed the characterisation by the Complainant of the product packaging and two videos produced and published by third-party retailers as "Advertising or Marketing Communications" of the Advertiser. This was on the basis that labels or packaging for products is specifically excluded from the Code as "Excluded Advertising or Marketing Communications" and the Advertiser does not have a "reasonable degree of control" over material published by third party retailers, as required under the Code's definition of "Advertising or Marketing Communications".

The Complainant disagreed, arguing that the material attached to the Product was not a mere label, but intended to promote the Product, and that the Advertiser had accepted general responsibility for the material published on third party retailers' websites because the Advertiser was aware of the material being published, was likely to have had power to remove the material and had failed to take any steps to do so.

Complainant submissions

The Complainant submitted that the advertising materials breach sections 18 and 29(1)(a) and (g) of the Australian Consumer Law (ACL) and therefore Sections 1.1, 1.2 and 1.3 of the Code, alleging that:

- the advertising makes numerous performance and comparative claims in various media that are misleading and deceptive or likely to mislead and deceive, and are false or misleading; and
- an ordinary consumer would likely rely on these misrepresentations in his or her purchasing decisions, which will cause damage to the businesses of the Advertiser's competitors, including the Complainant.

There are numerous statements made in the advertising that form the basis of the complaint, including:

- (1) Representations made and impressions conveyed regarding **maintenance**, including:
- *“The only vacuum cleaner with no maintenance of filters, no bags to buy and no loss of suction”;*
 - *“All other vacuums lose suction without maintenance”;*
 - *“The only vacuum cleaner with no maintenance of filters”;*
 - *“No filter maintenance is required – meaning no loss of suction”;*
 - *“The Dyson DC54 is tested to deliver constant suction using the equivalent of 10 years’ worth of test dust, with no maintenance of filters”;*
 - *“DC54 maintains constant suction after sucking up 10 years’ worth of dust without any filter maintenance”;*
 - *“There is nothing a customer has to do to maintain the efficiency of the Dyson Cinetic”;*
 - *“Doesn’t need any maintenance concerning the filter”;*
 - *“You don’t need to clean the filters”;* and
 - *“It will work for 10 years without cleaning the filters [and] just emptying the bin.”*
- (2) Representations made and impressions conveyed regarding **loss of suction**:
- *“In its lifetime, it never loses suction”;*
 - *“All others lose suction. In its lifetime, this one never will”;*
 - *“Dyson have invented the only vacuum cleaner that never loses suction”;*
 - *“DC54 will never lose suction in its lifetime”;* and
 - *“The only vacuum that never loses suction.”*
- (3) Representations made and impressions conveyed regarding **“no bags to buy”**:
- *“The only vacuum cleaner with no maintenance of filters, no bags to buy and no loss of suction”.*
- (4) Representations made and impressions conveyed regarding **bin capacity**:
- *“All DC54 vacuums have: ... Large bin capacity”;* and
 - *“DC54 has a large bin – so you don’t have to empty it as often”.*

The Complainant claims that the statements represent that the Product:

- eliminates any need to maintain or clean any filter;
- does not require any maintenance or cleaning of the unit other than simply emptying the bin when it is filled;
- will not lose suction, even where no maintenance of any filter is undertaken;
- does not require a customer to do anything to maintain the efficiency of the Product;
- compared to other competing vacuum cleaners, offers superior suction;
- is unique and superior to other competing vacuum cleaners by reason of its bagless feature; and
- offers a large bin capacity, reducing the need to empty the bin as often;

and that these representations are false.

The Complainant alleges that their independent testing demonstrates that the Product:

- experiences significant loss of suction where maintenance is not undertaken on the unit;
- contains a steel mesh device (the *shroud*) which performs all the functions of an ordinary pre-motor filter, requiring users to undertake constant maintenance by scraping the steel mesh – or filter – in order to achieve acceptable levels of suction;
- experiences significant loss of suction as the bin canister is filled with dust; and
- offers bin capacity that is diminutive, requiring constant emptying of the canister.

The Complainant made reference to a recent decision of a German court in regard to its submissions regarding the filter maintenance claims.

Advertiser submissions

The Advertiser denies that any of the advertising referred to in the complaint is false, misleading or deceptive, or is likely to mislead or deceive.

The Advertiser rejects the Complainant's assertions, arguing that:

- (1) The fixed metal shroud within the dust bin is not a "filter" and scraping the shroud is not "filter maintenance". Rather, the shroud "is a fixed element of the vacuum cleaner's construction, unlike common filters which are removable elements that are independently washed and replaced";
- (2) The claim of "no loss of suction" has been substantiated by extensive testing and, in fact, the test data provided by the Complainant further supported this claim;
- (3) Construing the claim "[t]he only vacuum cleaner with no maintenance of filters, no bags to buy and no loss of suction" as referring to each of the three elements separately from the other two is contrary to the ordinary rules of English; and
- (4) When considered in context, the claim that the Product has a "large bin capacity" would not be regarded by consumers as a comparison between the Product and other manufacturers' vacuum cleaners, but a comparison between the Product and other ranges of the Advertiser.

The Advertiser also submits that the Complainant's references to the decision of a German court were not relevant to whether the Advertiser's advertising in Australia breaches the Code.

Determination

Excluded Materials

Product Packaging

Each of the advertisements complained of must satisfy the definition of "Advertising or Marketing Communications" for the purposes of the Code. That definition is as follows:

Advertising or Marketing Communications means any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, and

- over which the advertiser or marketer has a reasonable degree of control, and
- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct,

but does not include Excluded Advertising or Marketing Communications.

Excluded Advertising or Marketing Communications means labels or packaging for products, public relations communications (corporate or consumer) and related activities and, in the case of broadcast media, any material which promotes a program or programs to be broadcast on that same channel or station.

In respect of the product packaging referred to at (g) above, containing the representation "all others lose suction. In its lifetime, this one never will", the Board notes the determination in ACB Case 14 ACB 1, involving the same parties to this complaint, that "whether a tag is a label or not, within the meaning of "Excluded Marketing or Advertising Material", needs to be considered on a case by case basis¹. However, the Board considers that the product packaging referred to at (g) comes within the definition of Excluded Advertising or Marketing Communication since it consists of a label or product packaging. Also, it appears that the product packaging is not able to be seen by the consumer until after product purchase and no evidence has been tendered by the Complainant to show that it "draws the attention of the public in a manner calculated to promote" the Product prior to sale.

Online advertising on third party retailers' YouTube Channels

The online advertising referred to at (d) and (e) above appeared on YouTube channels of third party retailers, being Bing Lee and Appliances Online, and contained the representations "there is nothing a customer has to do to maintain the efficiency of the new Dyson Cinetic", "doesn't need any maintenance concerning the filter", "you don't need a filter", "you don't have to clean the filters" and "it will work for 10 years without cleaning the filters [and] just emptying the bin".

In respect of this online advertising, the Board is not satisfied that the Advertiser has a reasonable degree of control over it. The respective YouTube accounts are operated by third parties and the circumstances are distinguishable from those in *Australian Competition and Consumer Commission – v- Allergy Pathway Pty Ltd*², referred to by the Complainant, where the misleading statements were included on, among other things, the first respondent's Facebook and Twitter pages and Facebook wall and could have been readily removed by the first Respondent. In this case, while related entities of the respondent appear to have supplied material used in the videos, the Board was not satisfied that the Complainant had demonstrated that the Advertiser had the power to remove the advertising materials without the input of third parties.

In light of the above, the Board did not consider as part of the Complaint the product packaging or online advertising on third party retailers' YouTube Channels.

¹ at page 7

² [2011] FCA 74

Other Materials

The Board considers that the remaining materials the subject of the complaint, being:

- (1) a television commercial;
- (2) online advertising on the official Dyson website;
- (3) online advertising on the official Dyson AU YouTube Channel; and
- (4) print advertising in the form of in-store promotional material

are Advertising or Marketing Communications within the meaning of the Code. Each of these are separately considered below.

(1) Television Commercial

The television commercial the subject of the Complaint (**TVC**) makes the representation about the Product that "in its lifetime, it never loses suction", which is impugned by the Complainant.

The Board believes that the ordinary consumer is likely to interpret this representation in the context of the Product being used in accordance with the manufacturer's instructions. These include emptying the "clear bin" when dirt reaches the level of the MAX mark on the bin as well cleaning the clear bin, including the shroud.

The Board notes that the Advertiser has not tendered any evidence to support the claim that "in its lifetime, it never loses suction". However, the onus is on the Complainant to establish and substantiate its claim³.

The Complainant engaged a testing laboratory to conduct a test in respect of the Product alone (**SLG Test 1**) and a second test in respect of both the Product and the Complainant's Samsung Motion Sync vacuum cleaner (**SLG Test 2**).

SLG Test 1 involving testing the Product across repeated usages to measure suction performance under conditions where the shroud was not maintained in accordance with the manufacturer's instructions between each usage, that is, it was not cleaned to remove lint and dust. While there was ultimately a decline in suction shown, the Board is of the view that because SLG Test 1 was not conducted in accordance with the instructions for use of the Product, the Complainant has not substantiated its claim through that test.

SLG Test 2 involved testing each of the Product and the Samsung Motion Sync vacuum cleaner to measure suction performance as they were each loaded with dust across a single usage up to and well beyond the bin full mark for each machine. In respect of the Product, the results did not show any loss of suction between 0g and 60g dust load - 60g being the point at which the bin full mark was reached. Results with a dust load of over 60g are not relevant in the view of the Board because they do not involve use of the Product in accordance with manufacturer's instructions. The Board therefore, is of the view that the Complainant has not substantiated its claim through the SLG Test 2.

³ Paragraph 5.6 of the Guidelines

Consequently, the Board is of the view the Complainant has not established breaches of sections 1.1, 1.2 or 1.3 of the Code in relation to the representation "in its lifetime, it never loses suction" in the TVC.

The Complainant also alleged that the TVC makes the representation "the only vacuum cleaner with no maintenance of filters, no bags to buy and no loss of suction". However, the Board found that this particular representation was not made in the TVC and did not consider it.

(2) Online advertising on the official Dyson website at

<http://www.dyson.com.au/vacuums/barrel/dc54>

The following representations have been made on the official Dyson website which are impugned by the Complainant:

- (a) Dyson have invented the only vacuum that never loses suction;
- (b) DC54 will never lose suction in its lifetime;
- (c) DC54 maintains constant suction after sucking up 10 years' worth of dust without any filter maintenance;
- (d) The only vacuum with no maintenance of filters, no bags to buy and no loss of suction;
- (e) All other vacuums lose suction without maintenance;
- (f) No filter maintenance is required – meaning no loss of suction;
- (g) DC54 has a large bin – so you don't have to empty it as often; and
- (h) All DC54 vacuums have: ...Large bin capacity.

The Board unanimously agrees that the Complainant has not established breaches of sections 1.1, 1.2 or 1.3 of the Code in relation to the representations (a) and (b), for the reasons discussed at 1 above.

In relation to the representation (c), the Board notes that:

- The manufacturer's instructions require that the shroud is cleaned "with a dry cloth or dry brush to remove lint and dust"; and
- The Advertiser states in its response to the Complaint that "the shroud therefore prevents the larger dust, fluff and debris from entering the cyclones in a manner that does not prevent the necessary airflow from circulating."

The Board believes that the ordinary consumer is likely to understand that the shroud is, and/or performs the function of, a filter. The shroud clearly needs to be maintained as admitted by the Advertiser. and the results of Test SLG 1 show that when the shroud is not maintained, the DC54 vacuum cleaner loses suction. The Board therefore unanimously agrees that representation (c) is misleading and deceptive or likely to mislead and deceive in breach s18 of the ACL, constitutes a false representation as to performance characteristics and benefits of the Product in breach of s29 (g) of the ACL and therefore, contravenes clauses 1.1 and 1.2 of the Code.

For the same reasons, the Board unanimously agrees that representations (e) and (f), which represent that the DC54 vacuum cleaner does not require maintenance/filter maintenance and does

not lose suction without it, is misleading and deceptive or likely to mislead and deceive in breach s18 of the ACL, constitutes a false representation as to performance characteristics and benefits of the Product in breach of s29 (g) of the ACL and therefore, contravenes clauses 1.1 and 1.2 of the Code.

In relation to the representation (d), the Board does not believe that the ordinary consumer would understand the representation to suggest that the Product is the only vacuum cleaner that requires no maintenance of filters, the only vacuum cleaner that require no bags and the only vacuum cleaner which has no loss of suction, as suggested by the Complainant. The Board believes that representation (d) is likely to be construed conjunctively by ordinary consumers. Accordingly, the Board does not accept the Complainant's submission that there is a separate representation made by the Advertiser that the Product is "the only vacuum cleaner with ... no bags to buy".

On the other hand, for the reasons referred to in connection with representation (c), the Board believes that as representation (d) describes the Product as the only vacuum cleaner with no maintenance of filters, it is misleading and deceptive or likely to mislead and deceive in breach s18 of the ACL, constitutes a false representation as to performance characteristics and benefits of the Product in breach of s29 (g) of the ACL and therefore, contravenes clauses 1.1 and 1.2 of the Code.

In relation to the Complainant's claim that the advertising containing representations (c), (d), (e) and (f) breaches section 1.3 of the Code, the Board is not satisfied of this. For such a breach to occur, the misrepresentation must be shown to be "likely to cause damage to the business or goodwill of a competitor". However, the Complainant has not provided the Board with evidence to show a likelihood of damage to the Complainant or another competitor of the Advertiser. Therefore, the Board is unable to determine that any breach of section 1.3 of the Code has occurred.

In relation to the representation (g), a majority of the Board was of the view that the representation was not misleading or deceptive or likely to mislead or deceive because the representation fails to specify or even hint at the identity of a comparator, prompting the ordinary consumer to respond: larger than what? While the representation is potentially uninformative, on the evidence available, the majority of the Board was not satisfied that it would lead a consumer into error. However, one member of the Board considered that representation (g) suggested a benefit that did not exist since irrespective of the volume of the bin (by reference to which, the Advertiser claims, bin capacity is generally measured), it must be emptied when dust reaches the "max" mark, which based on the SLG Test 1, was reached with only 60g of dust.

In relation to the representation (h), while the Complainant supplied details of vacuum cleaners with bin capacities up to 9L (versus 2L for the Product), the Advertiser maintained that the range of bin capacity for bagless vacuum cleaners (as opposed to "bagged" machines which do not have bins) was between .58L and 3L. Without further evidence on the subject, the Board was not satisfied that the Complainant had demonstrated that the bin capacity of the Product was not large.

(3) Online advertising on the official Dyson AU YouTube Channel

The following representations have been made on the official Dyson AU YouTube channel which are impugned by the Complainant:

- (a) In its lifetime it never loses suction
<http://www.youtube.com/watch?v=mSpX8FwAQr0> and
http://www.youtube.com/watch?v=5UYsja7_A8
- (b) The Dyson DC54 is tested to deliver constant suction using the equivalent of 10 years' worth of dust, well beyond the industry standard, with no maintenance of filters <http://www.youtube.com/watch?v=qxjiLmKCSAA>;
- (c) The only vacuum cleaner with no maintenance of filters, no bags to buy and no loss of suction <http://www.youtube.com/watch?v=qxjiLmKCSAA> and
<http://www.youtube.com/watch?v=oO1ugcfZFr8&list=PLnTP9a1c5-fFN9ULprGJB88YqK6JKwUr>.

In relation to representation (a), for the reasons detailed at 1 in relation to the TVC, the Board is of the view that the Complainant has not established breaches of sections 1.1, 1.2 or 1.3 of the Code.

For the reasons detailed at 2 in connection with representation (c) of the online advertising on the official Dyson website, the Board unanimously agrees that representation (b) above, which suggests, among other things, that the Product does not require filter maintenance, is misleading and deceptive or likely to mislead and deceive in breach s18 of the ACL, constitutes a false representation as to performance characteristics and benefits of the Product in breach of s29 (g) of the ACL and therefore, contravenes clauses 1.1 and 1.2 of the Code.

In relation to representation (c), and as discussed at 2, the Board believes that the representation is likely to be construed conjunctively and does not contain a separate representation that the Product is "the only vacuum cleaner with ... no bags to buy".

However, for the reasons detailed at 2 in connection with representation (c) of the online advertising on the official Dyson website, the Board believes that as representation (c) above describes the Product as the only vacuum cleaner with no maintenance of filters, it is misleading and deceptive or likely to mislead and deceive in breach s18 of the ACL, constitutes a false representation as to performance characteristics and benefits of the Product in breach of s29 (g) of the ACL and therefore, contravenes clauses 1.1 and 1.2 of the Code.

In relation to the Complainant's claim that the advertising containing representations (b) and (c) breaches section 1.3 of the Code, for the reasons discussed at 2 above the Board is unable to determine that any such breach has occurred.

(4) In store promotional material

The in-store promotional material contains the representation "All others lose suction. In its lifetime, this one never will".

In relation to the comparative and superiority claim that "all others lose suction", the Board is of the view that to demonstrate that this is not correct, the Complainant must show that at least one

vacuum cleaner on the market other than the Product does not lose suction. The Complainant supplied evidence of the results of SLG Test 2 which, as noted at 1, tested both the Product and the Complainant's Samsung Motion Sync vacuum cleaner to measure suction performance. However, while the Complainant maintained that the test results showed that the suction power of the Samsung Motion Sync was greater at any given dust load, the results showed loss of suction at various points between 0g dust load and 175g dust load (175g being the point at which the bin full mark was reached) in relation to the Samsung Motion Sync. As noted at 1, the results of SLG Test 2 did not show any loss of suction in respect of the Product between 0g and 60g dust load (60g being the point at which the bin full mark was reached.) The Board unanimously agrees that the Complainant has not demonstrated that the claim "all others lose suction" is incorrect.

In relation to the claim that "In its lifetime, this one never will" (lose suction) in respect of the Product, for the reasons given at 1, the Board unanimously agrees that the Complainant has not substantiated its claim through either SLG Test1 or SLG Test 2.

The Board unanimously agrees that the Complainant has not proven breaches of 1.1, 1.2 or 1.3 of the Code in relation the in-store promotional material.

Conclusion

The Board finds that the following advertising the subject of the Complaint breaches sections 1.1 and 1.2 of the Code by conveying one or more representations which are misleading or deceptive or likely to mislead or deceive:

- (1) Online advertising on the official Dyson website containing the representations:
 - (a) DC54 maintains constant suction after sucking up 10 years' worth of dust without any filter maintenance;
 - (b) The only vacuum with no maintenance of filters, no bags to buy and no loss of suction;
 - (c) All other vacuums lose suction without maintenance; and
 - (d) No filter maintenance is required – meaning no loss of suction.

- (2) Online advertising on the official Dyson AU YouTube Channel containing the representations:
 - (a) The Dyson DC54 is tested to deliver constant suction using the equivalent of 10 years' worth of dust, well beyond the industry standard, with no maintenance of filters; and
 - (b) The only vacuum cleaner with no maintenance of filters, no bags to buy and no loss of suction.

The Board is unable to determine that any breach of section 1.3 of the Code has occurred.

The Board has determined that the Complaint should not be upheld in relation to the other materials the subject of the Complaint.

Advertiser Statement

On 26 September 2014, the Advertiser was provided with a copy of the Board's determination. In accordance with the Guidelines and on the basis of the Board's determination, the Advertiser was requested to provide an Advertiser Statement indicating whether it would modify or discontinue the Advertisement.

On 2 October, the Advertiser provided the following response:

"Without accepting the correctness of the Board's determination of the complaint, Dyson will modify its advertising in accordance with the Board's decision."