



Case Report

1	Case Reference	14 ACB 1
2	Advertiser	Samsung Electronics Australia Pty Ltd
3	Complainant	Dyson Appliances (Aust) Pty Limited
4	Product	Samsung Motion Sync Vacuum Cleaner
5	Type of Advertisement/Media	Various: Website, Television, Point of Sale Display
6	Board Members	Ian Robertson, Holding Redlich (Chair) Peter Le Guay, Thomson Geer Jennifer Huby, TressCox
7	Date of Determination	16 June 2014
8	Determination	Complaint Dismissed – no breach of sections 1.1 or 1.2 of the AANA Code of Ethics

Introduction

A complaint was lodged on 2 April 2014 (**Complaint**) with the Advertising Claims Board (**Board**) by Dyson Appliances (Aust) Pty Limited (**Complainant**) against Samsung Electronics Australia Pty Ltd (**Advertiser**) regarding the Advertiser's advertising for the Samsung Motion Sync Vacuum Cleaner (**Product**). A panel 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 the Complaint

The Complaint raises issues under sections 1.1 and 1.2 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.*

Description of advertising or marketing communication

The material which is the subject of the Complaint comprises:

- (a) a webpage on the Samsung website relating to the Product;
- (b) a television commercial for the Product that has been broadcast on television and hosted on YouTube;
- (c) in-store displays at retail outlets promoting the Product; and
- (d) a swing tag attached to the Product on display in retail outlets.

The Advertiser contends that the swing tags cannot form part of the Complaint because they are "Excluded Advertising or Marketing Communications" under that definition in the Code. The Code specifically identifies "labels or packaging for products" as being excluded from the definition of

“Advertising or Marketing Communications” and therefore outside the scope of the Code. The Complainant disagrees with the characterisation of the swing tags as a “label” and therefore disagrees that it is an “Excluded Advertising or Marketing Communication”.

Complainant submissions

The Complainant submits that the advertising materials breach sections 1.1 and 1.2 of the Code, and alleges that the claims made in the advertising:

- (a) are misleading or deceptive or likely to mislead or deceive, in breach of section 18 of the *Australian Consumer Law (ACL)*, and therefore in breach of sections 1.1 and 1.2 of the Code; and
- (b) are false or misleading representations that the Product has certain performance characteristics and/or benefits, in breach of section 29(1)(g) of the ACL, and therefore in breach of section 1.1 of the Code.

There are two aspects of the Complaint.

First, the Complainant contends that the statement, “*powerful suction that lasts*”, which is used in each of the materials identified above (**Suction Claim**), is not substantiated and is therefore misleading because the suction power of the Product “*declines both immediately and significantly during use*”. The Complainant submits that test results provided by both parties in this matter show that the Suction Claim is not substantiated because there is a small but significant decline in suction power during the period of use of the Product from bin empty to bin full.

The second aspect of the Complaint relates to claims about the Dust Sensor feature of the Product on the Advertiser’s webpage, being “*As soon as the area is completely cleaned the light changes to green*” (**Dust Sensor Claim**). The substance of the Complaint is that the Dust Sensor is promoted as a feature of the Product that indicates whether a surface is clean, while the user manual states that it functions only as a rough indicator of dust removal. The Complainant submits that claims that the Dust Sensor indicates when an area is completely cleaned are false, misleading or deceptive.

In the Advertiser’s response to the Complaint, the Advertiser states that it has revised its advertising relating to the Dust Sensor function of the Product, to read “*The light changes to green when a large amount of dust has been picked up*” (**Revised Dust Sensor Claim**). In the Complainant’s further submissions, the Complainant submits that the Revised Dust Sensor Claim is also misleading because it is inconsistent with the stated function of the Dust Sensor in the Product’s user manual.

Advertiser submissions

The Advertiser disputes the Complainant’s characterisation of the Suction Claim. It submits that an ordinary consumer would construe the statement “*powerful suction that lasts*” as conveying a continued high level of suction, and that the statement does not suggest that suction power will never drop. The Advertiser argues that the usage of the term “lasts” does not convey that performance will remain precisely the same for an indefinite period of time. Rather, an ordinary consumer would understand the term as meaning that suction will remain powerful over time.

The Advertiser submits that the Complainant’s test results do not establish that the Product’s suction is not powerful or that it is not lasting, and the Advertiser provides its own independent test results to support the Suction Claim.

In regard to the Dust Sensor Claim, the Advertiser rejects the allegations that the statements used to describe this feature of the Product are false, misleading or deceptive, and submits that the Complainant fails to substantiate those allegations.

The Advertiser submits that the variation in the wording between the marketing materials and Product user manual do not suggest an inconsistency in the representations made to customers, and that customers would expect to see a difference in wording between advertising and instructional materials.

Notwithstanding the fact that the Advertiser refutes that the Dust Sensor Claim is false, misleading or deceptive, after receiving the Complaint the Advertiser replaced the Dust Sensor Claim with the Revised Dust Sensor Claim. In its submissions the Advertiser states that it did so to reflect “*Samsung’s continuous marketing improvement and in the interests of providing its customers with the clearest possible explanations*”.

Following the Complainant’s reply alleging that the Revised Dust Sensor Claim was also misleading, the Advertiser submits that the Complainant has failed to support its allegations that the advertising material is false and/or misleading. The Advertiser notes although the language of the Revised Dust Sensor Claim is not identical to the language contained in the user manual, it is of the view that both descriptions accurately convey that a large amount of dust must be vacuumed before the sensor light turns green. As such, the Advertiser submits that the language in the Revised Dust Sensor Claim and that used in the user manual are consistent with one another.

SUMMARY OF DETERMINATION

The Board is unanimously of the view that:

- (a) the Suction Claim is not:
 - (i) misleading or deceptive, or likely to mislead or deceive, in breach of section 18 of the ACL, and therefore the Suction Claim is not in breach of sections 1.1 and 1.2 of the Code; or
 - (ii) a false or misleading representation that the Product has certain performance characteristics and/or benefits, in breach of section 29(1)(g) of the ACL, and therefore the Suction Claim is not in breach of section 1.1 of the Code; and
- (b) the Revised Dust Sensor Claim, although not completely accurate when compared to the description of the function of the Dust Sensor in the instruction manual for the Product, is not:
 - (i) misleading or deceptive, or likely to mislead or deceive, in breach of section 18 of the ACL, and therefore the Revised Dust Sensor Claim is not in breach of sections 1.1 and 1.2 of the Code; or
 - (ii) a false or misleading representation that the Product has certain performance characteristics and/or benefits, in breach of section 29(1)(g) of the ACL, and therefore Revised Dust Sensor Claim is not in breach of section 1.1 of the Code.

THE BOARD’S REASONS FOR ITS DETERMINATION

1. MATTERS TO BE TAKEN INTO CONSIDERATION

There are several aspects of the submissions and the material submitted to the Board that require preliminary comment, specifically in relation to the independent test results submitted by each party and the relevance of several aspects of the Advertiser’s submissions.

1.1 Relevance of the independent test results

The Board discussed the independent test results provided by the Complainant and the

Advertiser, and the fact that the parties have submitted test results using different methodologies and with varying outcomes. The Board also discussed the fact that the Advertiser submits that the Complainant's test results are "*flawed and inconsistent with well-established testing standards*" and that the "*measurements relied on by [the Complainant] are not valid to measure suction power.*"

The Board has the discretion to decide the weight it will give to test evidence tendered in complaints. The Board considers that although the Product was tested separately by the Complainant and the Advertiser, not using exactly the same methods, which in turn resulted in differing outcomes, the tests have a common ground in that both tests show that the suction power of the Product declined to some extent during the period of usage from bin empty to bin full. The test results commissioned by the parties in relation to suction power range from:

- (a) a 7.1% decrease in suction power (measured in air watts) from bin empty to bin full (according to the tests commissioned by the Advertiser); to
- (b) a 13% decrease in suction power (measured in air watts) from bin empty to bin full (according to the tests commissioned by the Complainant).

The Board notes that although there is some dispute as to the way in which the suction power of a vacuum should be measured, including the size of the orifice plate that should be used in testing such suction power, it is useful to consider whether the representation "*powerful suction that lasts*" is misleading or deceptive in light of the test results. In the Board's opinion, the two test results each show some decline in suction power from bin empty to bin full and the rate of suction loss is similar. Accordingly, the Board notes that it makes little difference as to which party's similar test results are used to examine the validity of the Suction Claim.

1.2 Points of the Advertiser's submissions not requiring consideration by the Board

In its submissions, the Advertiser also makes the following points, which the Board considers to be irrelevant to this dispute and to the Board's decision, for the following reasons:

- (a) The Advertiser provides that its independent test results reveal that the Product offers superior suction power when compared with the Complainant's Dyson DC54 vacuum cleaner (Dyson Vacuum). The Board notes that the Suction Claim is not a comparative claim which compares the Product against the Dyson Vacuum. Accordingly, the performance of the Dyson Vacuum does not require the Board's consideration.
- (b) The Advertiser submits that the qualitative and relative character of the Suction Claim can be contrasted with the absolute character of claims contained in the Complainant's own advertising regarding the Dyson Vacuum. Again, the Board notes that because the Suction Claim is not comparative, it is not relevant or necessary for it to consider the Suction Claim in light of claims contained in the Complainant's advertisements.
- (c) The Advertiser submits in some detail that the Complainant's submissions to the Board reflect "*habitual tactics*" of the Complainant attempting to restrict the activities of its competitors. The Board notes that this aspect of the Advertiser's submission does not require the Board's consideration because it is irrelevant to the Board's consideration of whether the Suction Claim and the Revised Dust Sensor Claim breach sections 1.1 and 1.2 of the Code.

2. IS THE SUCTION CLAIM MISLEADING AND DECEPTIVE?

The Complainant contends that the Suction Claim is not substantiated and therefore misleading because the suction power of the Product “*declines both immediately and significantly during use*”. The Complainant also submits that the test results provided by both parties in this matter show that the claim is not substantiated because there is a small but significant decline in suction power during the period of use of the Product from bin empty to bin full.

In making its decision that the Suction Claim is not misleading or deceptive or likely to mislead and deceive, the Board notes the following:

2.1 The representations conveyed by the Suction Claim

In determining whether a representation is misleading or deceptive or likely to mislead or deceive, the representation must be considered by reference to the class of consumers likely to be affected by the representation (*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191). The Board accordingly considered how an ordinary consumer, bringing to bear his or her real world experience, would interpret the representation “*powerful suction that lasts*”.

The Board considers that it is unlikely that an ordinary consumer would consider the Suction Claim to mean that the Product will stay at peak suction power at all times during usage until the point of bin full. Rather, it may be reasonable to expect that the suction power would decrease, to some extent, as the Product approaches bin full (meaning that the bin of the Product would then contain approximately 383g, which is bin full according to the Dyson test results).

2.2 Application of the test results

In considering what might constitute a “*significant decline*” in suction power in the mind of an ordinary consumer, the Board applied the most significant decline of the two test results. Specifically, the Board considered whether an ordinary consumer would consider a 13% drop in suction power after the ingestion of 383g of dust into the Product, to be a significant decline in suction power. The Board considers that an ordinary consumer who uses a vacuum cleaner would not consider this to be such a significant decline that they would be misled or deceived by the Suction Claim.

The Board therefore agrees with the Advertiser’s submissions that the 13% drop measured by the Complainant does not mean that the Product does not remain relatively powerful.

3. IS THE REVISED DUST SENSOR CLAIM MISLEADING OR DECEPTIVE?

The Board has also considered the second aspect of the Complaint, relating to the Dust Sensor Claim and the Revised Dust Sensor Claim. As mentioned above, in the Complaint the Complainant submitted that “*the Dust Sensor does not reliably indicate whether an area is clean, as claimed in the advertising; rather, it functions only as a rough indicator of dust removal*”. The Complainant therefore submits that Dust Sensor Claim is false, misleading or deceptive.

After receiving the Complainant’s submissions, so as to reflect “*Samsung’s continuous marketing improvement and in the interests of providing its customers with the clearest possible explanations*” the Advertiser revised the wording of the advertisement relating to the Dust Sensor on its website, to read (amendments in **bold**):

*“The Samsung vacuum cleaner features a Dust Sensor that signals a red light if it detects a dusty spot. **The light changes to green when a large amount of dust has been picked up, so you can quickly move on to clean the next spot.**”*

The Complainant submits that the Revised Dust Sensor Claim is also misleading, because whether or not the light changes to green after a *“large amount of dust has been picked up”* depends on how much dust is present in the first place, and that the light may change to green even when only a small amount of dust is picked up.

3.1 Is the Dust Sensor Claim misleading or deceptive?

The Board is of the view that the Dust Sensor Claim was most likely misleading or deceptive.

The Board discussed the fact that the Product’s user manual provides that a green light on the Dust Sensor indicates *“when the amount of sucked in dust is small”* and the red light on the Dust Sensor indicates *“when the amount of sucked in dust is large”*. The Board considers that the description in the user manual does not sit alongside the Dust Sensor Claim that the light will change to green when the area is *“completely clean”*.

The *Macquarie Dictionary* (online edition) defines “complete” as:

*“2. finished; ended; concluded; and
5. to make perfect.”*

The Board is of the view that, taking into account this ordinary definition, to say that the Product’s Dust Sensor will indicate when something is *“completely clean”* may be construed as misleading or deceptive, because, as the name suggests, the Product’s Dust Sensor simply measures approximate dust quantities that are sucked up. Accordingly, the Board considers that a reasonable consumer may be misled by relying on the fact that the Dust Sensor works to detect cleanliness, especially complete cleanliness, when in actual fact the Product’s Dust Sensor detects whether a certain amount of dust has been collected.

However, given that the Dust Sensor Claim has been amended and is no longer published, the Board does not need to make any final determination as to whether the Dust Sensor Claim was misleading or deceptive.

3.2 Is the Revised Dust Sensor Claim misleading or deceptive?

In its consideration of whether the Revised Dust Sensor Claim is misleading or deceptive, the Board considered that it may not be entirely accurate to state that *“the light changes to green when a large amount of dust has been picked up”*, because, as submitted by the Complainant, the accuracy of this statement will depend on how much dust was present in the first place. However, confusion or uncertainty as to exactly how the Dust Sensor System works will likely not be enough to establish misleading or deceptive conduct (*McDonalds System of Australia Pty Ltd v McWilliams Wines Pty Ltd (No 2)* (1979) 28 ALR 236).

The Board is of the view that the Revised Dust Sensor Claim more correctly reflects the Dust Sensor’s functionality than the Dust Sensor Claim, being that it roughly measures quantities of dust. The Board also notes that the level of generality in the representation of the Revised Dust Sensor Claim means that it is likely that a reasonable consumer would expect the Product’s Dust Sensor to only be roughly accurate in its measurement of what constitutes a “large” amount of dust. Further, the principal functionality of the Dust Sensor for a consumer is the ability to know when only a small amount of dust is being ingested into the Product meaning, presumably, that the consumer can then cease vacuuming that area. The Revised Dust Sensor Claim is not inconsistent with this consumer expectation.

Accordingly, the Board does not consider the Revised Dust Sensor Claim to be false, misleading or deceptive as contemplated by the ACL.

4. IS THE SWING TAG AN ADVERTISEMENT?

As noted above, the validity of the Product swing tag to form part of the Complaint is contested by the Advertiser.

Although the Board has determined that the advertisements are not misleading or deceptive, it notes that, for completeness, it is relevant to consider the Advertiser's submission that the point of sale swing tag attached to the Product:

"does not constitute "Advertising or Marketing Communications" as defined under the [Code]. The [Code] specially excludes (among others) "labels for products" from the definition of "Advertising or Marketing Communications". "

The Advertiser therefore submits that, in accordance with clause 1.3 of the Guidelines, the Board should dismiss the swing tag component of the Complaint.

However, the Board considers that the swing tag attached to the Product does constitute "Advertising or Marketing Communications" within the meaning of the Code, and therefore should be considered with the other advertising materials.

The Board considers that whether a tag is a label or not, within the meaning of "Excluded Marketing or Advertising", needs to be considered on a case-by-case basis. However, applying the facts of this Complaint, the Board is of the view that a tag which is clearly intended:

- (a) to promote the product and to encourage the purchase of the product; and
- (b) to be removed from the product prior to its use,

is much less likely to be considered a label than a tag which is intended to remain on a product and to convey important information about the Product on an on-going basis.

The Board accordingly considers that the swing tag used here by the Advertiser is material that *"draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product"*, as is contemplated by the definition of "Advertising or Marketing Communications" under the Code.

16 June 2014