

# Case Report

1	<b>Case Reference</b>	17 ACB 2
2	<b>Advertiser</b>	Samsung Electronics Australia Pty Ltd
3	<b>Complainant</b>	LG Electronics Australia Pty Ltd
4	<b>Product</b>	Television and television wall mounting device
5	<b>Type of Advertisement/Media</b>	Various
6	<b>Advertising Claims Board Panel Members</b>	Paul Holm, Andrews & Holm (Chair) Karen Anne Hayne, Addisons Michele Laidlaw, Johnson Winter & Slattery
7	<b>Date of Determination</b>	26 October 2017
8	<b>DETERMINATION</b>	<b>Advertisement modified or discontinued</b> <b>Complaints upheld</b> in relation to a number of advertisements under sections 1.1 and 1.2 of the Code as identified in the Determination below. <b>Complaint dismissed</b> in relation to a number of advertisements under sections 1.1, 1.2 and 1.3 of the Code as identified in the Determination below.

## 1. Introduction

- 1.1 A complaint was lodged on 28 July 2017 (**the Complaint**) with the Advertising Claims Board (**Claims Board**) by LG Electronics Australia Pty Ltd (**Complainant**) against Samsung Electronics Pty Ltd (**Advertiser**) regarding the Advertiser's advertising of certain televisions and television wall mounting devices. A panel of legal practitioners was convened to consider the complaint in accordance with the Claims Board's procedural guidelines (**Guidelines**).
- 1.2 The Complainant and the Advertiser were given an opportunity to make submissions in accordance with the Guidelines. These submissions and the Claims Board's determination are detailed below.

## 2. Description of advertising or marketing communication

- 2.1 The material which is the subject of the Complaint comprises the advertisements described as Samsung's Advertising and Marketing Communications in relation to the Samsung Q Series Television Models (specifically the Q7, Q8 and Q9) (**collectively the Advertiser's Products**) as set out in Annexures A, B, C and D of this Complaint (**collectively the Advertising Material**).

## 3. Issues raised by Complainant

- 3.1 The Complaint raises issues under Sections 1.1, 1.2 and 1.3 of the Australian Association of National Advertisers Code of Ethics (**Code**), which provides:

- 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; and*
- 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.*
- 3.2 The Complainant submitted that the Advertising Material was calculated to draw the attention of the public to favourably promote the Samsung Q Series Models and undermine the genuine innovativeness and key selling features of the LG OLED televisions generally. The Complainant made no further submissions in relation to this general contention, but instead raises four specific matters, dealt with below.
- 3.3 The Complainant specifically referenced the following representations in the Advertising Material:
- (a) Use of the descriptor “QLED TV” or “QLED” on its own or with the phrases “The Next Innovation in TV” and “Discover the Next Innovation in TV” (**QLED TV Representations**) as shown in Annexure A to the Complaint;
  - (b) Use of “100% colour volume” and “Perfect Colour” (**Colour Performance Representations**) as shown in Annexure B to the Complaint;
  - (c) Use of “HDR1500” and “HDR2000” (**HDR Representations**) as shown in Annexure C to the Complaint; and
  - (d) Use of “No Gap Wall-Mount” (**No Gap Representation**) as shown in Annexure D to the Complaint;
- (collectively the **QLED Campaign Representations**).
- 3.4 The Complainant submitted that each of the QLED Campaign Representations is misleading and deceptive or likely to mislead or deceive consumers of televisions, for the reasons set out specifically in respect of each of the QLED Campaign Representations dealt with in detail below.

#### **4. Advertiser’s response**

- 4.1 The Advertiser’s specific responses to the Complaint are considered in more detail below in respect of each of the four QLED Campaign Representations raised by the Complainant. The Advertiser generally submitted that the matters raised in the Complaint were without merit or sound basis and contended the Complaint was aimed at restricting and preventing the Advertiser from truthfully marketing its QLED television, in which it had invested significant resources in developing for the benefit of consumers.

#### **5. DETERMINATION**

- 5.1 To the extent that the Board has determined breaches of section 1.1 and 1.2 of the Code, this is on the basis that the conduct identified is misleading or deceptive or likely to mislead or deceive pursuant to section 18 and (in some cases) also sections 29(1)(a) and (g) and/or

section 33 of the *Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010)*.

- 5.2 To determine the matters raised in the Complaint, the Board has considered the material provided by the Advertiser and Complainant and notes that it has reviewed the Advertising Material provided consistent with the approach adopted by the High Court in *ACCC v TPG Internet Pty Ltd* [2013] HCA 54 (*ACCC v TPG*).
- 5.3 Particularly, the Board notes the High Court's assessment in *ACCC v TPG* that the dominant message test is central to the assessment of whether advertisements are misleading or deceptive. Further, the Advertising Material considered in respect of this Complaint referred to a number of disclaimers or qualifying statements. The High Court also noted that, if qualifying statements are to be used, they need to be clear and prominent to successfully offset any argument that the dominant messaging is misleading or deceptive. The Board considers the approach of the High Court in relation to qualifying or limiting language should be adopted in consideration of the relevant Advertising Material submitted in respect of this Complaint.
- 5.4 Consistent with *Parkdale Custom Built Furniture Pty Limited v Puxu Pty Limited* (1989) 149 CLR 191 (particularly Gibbs CJ at 199) and the approach taken in that case, the Board has also considered the relevant Advertising Material in terms of its overall content and context. While individual words, or images in the relevant Advertising Material have been considered, the Board's view is that this should not be done in isolation, but within the totality of the relevant advertisement. The Board considers this is consistent with the *Parkdale* case and other similar authorities (see for example Shephard J in *Tobacco Institute of Australia v AFCO* (1993) ATPR 41-199 at 40, 759).
- 5.5 Further, the Board has proceeded on the basis that its determination of whether conduct is misleading or deceptive, or likely to mislead or deceive, must be objectively assessed by reference to the class of consumers likely to be effected by the conduct. Consistent with *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 112, this includes a consideration of the effect of the conduct on the range of persons that fall within that class, including (but not limited to) ordinary and reasonable members of that class.
- 5.6 In the present instance the Board agrees with the Complainant's submission that the relevant class is 'consumers for televisions' or persons looking to purchase a television either as a replacement for an existing television or for the first time. The Board considers that most of this class will not necessarily be technologically sophisticated, but will be seeking to utilise the representations made by the Advertiser to inform a relatively significant purchasing choice.
- 5.7 Our approach to the question of whether or not a representation is misleading or deceptive is therefore is to ask, first, what the QLED Campaign Representations would mean to consumers for televisions and then to assess whether that understanding is objectively accurate.
- 5.8 We also note that under the Code it is the Advertiser's responsibility to show it has a reasonable basis for making its advertising claims. In relation to the question as to whether or not a representation is false we have proceeded on the basis of reviewing the substantiation provided by the Advertiser and assessing whether or not that material objectively provides a 'reasonable basis' for the claim made.

## 6. The QLED TV Representations

### The Complainant's Submissions

6.1 By way of background the Complainant asserted:

(a) The term "QLED" refers to Quantum Light Emitting Diode technology (see 4.4 of Complainant's Original Submissions) which uses electroluminescent nanoparticles, meaning light can be supplied directly to a display, instead of via a Light Emitting Diode (**LED**) backlight. This technology is still in development and independent experts have predicted it could be 3-5 years before "genuine" QLED televisions are commercialised;

(b) The Complainant provides televisions using "OLED" technology, which it described as relatively new and refers to Organic Light Emitting Diode technology, described at page 43 of Annexure E in the following terms:

*"Televisions based on Organic Light Emitting Diode display technology are fundamentally different from LCD TVs. The most basic difference is not that each pixel provides its own illumination, while all of the pixels in an LCD TV are illuminated by an LED backlight";*

(c) Both genuine QLED and OLED televisions natively produce the light emitted by individual pixels, rather than requiring an LCD screen with separate backlight to provide illumination;

(d) The Advertiser's "Q" ranges of televisions are not true LED televisions, but rather are: "only Liquid Crystal Display (LCD) televisions with LED backlighting. That is, they are not LED televisions like OLED or 'true' QLED TVs".

6.2 Given the above referenced background, the Complainant contends that the QLED TV Representations:

(a) *"reinforces an impression that Samsung QLED televisions are a different type or category of television display technology distinct from other Samsung LED/LCD televisions when they are not" and that consumers will be misled or deceived into believing that the Advertiser's Products are "true Quantum Dot Light Emitting Diode television or they are a new category or innovation in television display technology like OLED or genuine QLED televisions";*

(b) suggest a connection with the Complainant and its range of OLED televisions, or that QLED is more advanced than OLED, when the display technology of the Complainant's OLED televisions are *"much more advanced and inherently different to Samsung QLED TV."* Specifically the Complainant contended consumers may be misled that:

(i) the QLED is the Complainant's products, particularly when QLED references are advertised absent reference to the Advertiser (see for example page 62 of Annexure K of the Complaint) and consumers may misread "O" and "Q" in "OLED" or "QLED"; and/or

- (ii) that the “QLED” is the next advance on “OLED” technology, as Q comes after O in the alphabet.

6.3 In support of the above contentions, the Complainant provided various materials which discussed the relevant technologies, including references to the Advertiser’s Products. That material consisted of various third party reviews, articles and commentary on the relevant technologies and, in some cases, the Complainant’s relevant products and Advertiser’s Products.

### The Advertiser’s Submissions

6.4 In summary, the Advertiser responded, in respect of the QLED TV Representations, that:

- (a) It strongly disagreed that any claim the QLED TV Representations were misleading or deceptive as claimed in the Complaint;
- (b) The Advertiser’s Products:
  - (i) are built upon existing LED-LCD technology with Quantum Dot technology, the use of QLED in that respect is a logical and accurate name and that the addition of such technology is a significant enhancement on prior technology;
  - (ii) use Quantum Dots which are nanocrystals that can absorb light and re-emit light at different wavelengths, with greater spectral precision and efficiency, to achieve richer and more accurate colours; and
  - (iii) consist of technology which represents a significant and meaningful innovation in television technology and performance, including to the overall picture quality compared to other LED-LCD models and OLED technology;
- (c) There is no agreed industry definition of “QLED”. Instead there are a number of accepted uses for the term “QLED” which include the manner used by the Advertiser in respect of the Advertiser’s Products;
- (d) Consumers are readily able to distinguish letters in the alphabet and would not be misled by the use of “Q” and “O” as contended for by the Complainant; and
- (e) The material upon which the Complainant relied to support its Complaint in respect of these matters was selective and skewed, in relation to how QLED is regarded by third-party reviewers, compared with the large number of reviewers who have concluded that QLED represents a significant development in colour performance and brightness.

6.5 Further, the Advertiser contended that:

- (a) Should the Complaint be upheld in this regard, it would prevent companies such as the Advertiser from referring to their technological advancements which improve performance as innovations, and discourage investment and product development for consumer benefit; and
- (b) It had more than a reasonable basis for advertising QLED as “*the next innovation in TV*” and advertising those benefits where “*its innovation Quantum Dot technology*”

*gives QLED the edge over its competitors in key aspects of TV performance, most particularly, in the areas of display brightness and colour.”*

### QLED TV Determination

- 6.6 There was no issue raised by the Advertiser that any of the QLED TV Representations had not been made as referred to in the Complaint.
- 6.7 The particular issues of complaint by the Complainant in relation to the QLED TV Representations appeared to the Board to be the following matters, each of which is also addressed below, namely that one or more of the QLED TV Representations:
- (a) *Were likely to represent to consumers that the Advertiser’s Products were in fact ‘genuine’ QLED televisions, which they were not:*

The Board considered that, for this argument to succeed, there needed to be a clear and accepted definition of the term ‘QLED’ when it is used in relation to televisions.

Based upon the material provided by the Complainant and the Advertiser, the Board notes that at an expert technical level it appears accepted that there is a distinction between ‘photo-luminescence quantum dot technology’ which is applied to LCD/LED televisions to improve colour reproduction and ‘electro-luminescence quantum dot technology’ that is a display technology that is not reliant upon an LED backlight and remains under development.

The Complainant’s contention is that the term ‘QLED’ applies only to ‘electro-luminescence quantum dot technology’ and does not extend to the ‘photo-luminescence quantum dot technology’ used with the Advertiser’s LCD/LED televisions.

Each of the Complainant and Advertiser provided various third party materials which considered and attempted to explain the term QLED. In the Board’s view this material merely acted to show that QLED is not a term of art and its accepted meaning at a technical level remains somewhat fluid. On balance however the Board concluded that at the present time the term QLED is not strictly limited to ‘electro-luminescence quantum dot technology’ and is also being used as an umbrella term for both photo-luminescent and electro-luminescent types of quantum dot displays.

Further, the Board considers that television consumers were unlikely to attribute any precise technical meaning to the term QLED and are unlikely to be aware of the distinction between photo-luminescent and electro-luminescent types of quantum dot displays. This being the case, on balance, the consumer is unlikely to be misled by the Advertiser’s use of the QLED representations.

A sophisticated or well informed consumer, who did understand the reference to QLED in technology based terms, would also be sufficiently knowledgeable (or would access online reviews) to understand that the Advertiser was using the term to reference quantum dot technology with an LCD/LED display and therefore would similarly be unlikely to be misled or deceived by the QLED TV Representations.

- (b) *Reinforced an impression that the Advertiser's Products were a different type or category of television display technology distinct from other of the Advertiser's LED/LCD televisions when they were not:*

Based on the material provided by the parties, the Board accepts that the Complainant's OLED televisions are a distinct type of emissive display technology that is clearly distinguishable from the Advertiser's 'Q' range televisions and other LED/LCD displays.

However the Board is not convinced that the target consumer would understand from the QLED TV Representations that the Advertiser's 'Q' range of televisions were also a radically different type of display to existing LED/LCD televisions and rather would merely understand that this range of televisions utilises some new (innovative) technology that provides an improved picture.

The Board considers that the submissions provided support for the contention that the Advertiser's 'Q' range of televisions does use 'quantum dot technology' in a manner that appreciably enhances their performance when contrasted with earlier LED/LCD televisions. While this may not be as significant an innovation as OLED, it is therefore an innovation and, as it is recent and post-dates the Complainant's introduction of OLED televisions, in the Board's opinion it can be said to be 'the next innovation'. Further, the Board considers that a claim of being the 'next' innovation in TV is not the same as a claim of being the 'best' innovation.

- (c) *Were likely to mislead or deceive consumers into believing that:*

- (i) *the Advertiser's Products were true Quantum Dot Light Emitting Diode television or they were a new category or innovation in television display technology like OLED or genuine QLED televisions:*

The Board refers to its responses in 6.7(a) and (b) above and for those reasons does not agree with the Complainant in relation to this issue.

- (ii) *given the use of QLED by the Advertiser, there was a connection with the Complainant and its range of OLED televisions:*

While the Board accepts that the terms OLED and QLED are similar, it considers that they are most commonly used with reference to each of the parties distinctly branded products. Both the Complainant and Advertiser have well known and distinct brands in the television market. The Board therefore considers it unlikely that the use of these similar terms will mislead or deceive consumers into thinking that LG and Samsung are connected.

Further, to the extent that any consumer considered any association may exist, purely because of the similarity of these terms, (which the Board considered very unlikely) this would be short lived and likely to be swiftly rectified. This is particularly the case given that both the Complainant's and Advertiser's Products are significant purchases and it is unlikely that any consumer would make such a purchase without identifying and knowing the manufacturer of the product and/or whether it was an OLED or QLED product.

(iii) *the Advertiser's Products were the Complainant's products:*

The Board refers to its response in relation to 6.7(c)(ii) above and repeats the matters raised and does not accept this contention.

(iv) *the Advertiser's Products incorporating QLED is the next better technology to the Complainant's products incorporating OLED:*

The basis of this contention by the Complainant arises again from the placement of the letters "O" and "Q" in the alphabet. And as such, that consumers would consider a product with an "O" before LED lesser than the product with the "Q". The Board does not agree and refers to the matters raised in 6.7(a), (b) and (c) above.

(v) *QLED is more advanced than OLED, when the display technology of the Complainant's OLED televisions are much more advanced and inherently different to Samsung QLED TV:*

The Board does not agree and refers to the matters raised in 6.7(a), (b) and (c) above.

6.8 Based on the matters set out in paragraphs 6.1 to 6.7 above, the Board determines that the QLED TV Representations, or any of them, are not false, misleading and deceptive or likely to mislead or deceive consumers for televisions. Accordingly the Board does not consider that there has been any breach in this regard by the Advertiser in relation to sections 1.1, 1.2 or 1.3 of the Code.

## 7. The Colour Performance Representations

### The Complainant's Submissions

7.1 In summary, the Complainant contended in respect of the Colour Performance Representations that:

- (a) The part of the Advertising Material comprising Annexure B showed use by the Advertiser of the claims:
  - (i) "100% Colour Volume" and "Certified 100% Colour Volume" in prominent text on their own, or in conjunction with the phrases such as "QLED Quantum Dot Technology", "All The Action In..." or "Immerse Yourself In..."; and
  - (ii) "Perfect Colour" in prominent text in conjunction with the following: "Certified 100% colour volume and more than a billion shades from Quantum Dot technology for images with perfect colour and mesmerising realism";
- (b) Some of the relevant Advertising Material included a disclaimer, which the Complainant contended in some instances was barely visible, in the following or similar terms:



*"Available on HDR content only. Colour volume tested by Samsung using the IDMS 1.03b standard and DCI-P3 colour space. Brightness tested at maximum luminance with 10% White Window in HDR. Testing verified by independent third party" (the Colour Performance Disclaimer);*

- (c) The amount of HDR (or high dynamic range) content in Australia is extremely limited. It is not available on free-to-air television, cable television broadcasts or used for any sports broadcast in Australia. Accordingly, the "100% Colour Volume" claim was not likely to be accurate in many cases and when used in conjunction with "Sport to the Power of Q. All the Action in 100% Colour Volume" would *"mislead a consumer to believe that they would be able to watch all the action/sporting content 'in 100% colour volume' when in fact they cannot"*;
- (d) The Colour Performance Disclaimer, when used by the Advertiser, was not clear or effective, and was not used proportionately to the other parts of the Advertising Material (in particular the Colour Performance Representations) in order to neutralise or correct this position;
- (e) The Advertiser substantiated its "Certified 100% Colour Volume" and "100% Colour Volume" claims by reference to independent testing by the *Verband Deutscher Elektrotechniker (VDE)*<sup>1</sup> in accordance with a standardised test known as the Information Display Measurements Standard 1.03b (the **IDMS Test**) produced by the International Committee for Display Metrology (**ICDM**). The IDMS Test, as applied by VDE, was not an adequate basis to substantiate the Advertiser's colour volume claims for reasons that include:
  - (i) The IDMS Test is not appropriate for HDR televisions *"because the test was implicitly developed for SDR TV and people who work in this field can deduce that the test measurement procedures do not explain how to apply the test to a HDR TV"*;
  - (ii) Alternative independent reports prepared by Rtings.com indicated colour volume for the Advertiser's Products was well below 100%;
  - (iii) The Advertiser misapplies the term "colour volume" in its Colour Performance Representations and incorrectly equates colour volume with colour gamut;
  - (iv) The VDE testing does not accurately reflect a typical consumer experience with an "off the shelf" 'Q' television from the Advertiser, as specific calibration was necessary to meet the verified standards.
- (f) In a YouTube video (Annexure B, Item 4(j)) on the Samsung website there is a colour volume comparison between a "Samsung OLED" with a cylinder that is 80% full and a "QLED TV" with a cylinder that is 100% full. As the Advertiser does not produce an OLED television, there is no reasonable basis for this comparison;
- (g) The "100% Colour Volume" claim was likely to falsely represent to consumers that *"100% is a 'perfect score' for colour performance but scores greater than 100% are possible under the IDMS Test"*; and

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<sup>1</sup> The Association of German Engineers

- (h) While phrases such as “perfect colour” may be considered puffery when used in isolation, the Advertiser’s claim of “Perfect Colour” was combined with certain specific performance claims, namely “certified 100% Colour Volume” and “more than a billion shades from Quantum Dot technology”. In these circumstances, consumers would be misled or deceived into treating the Advertiser’s “Perfect Colour” claim as “*a representation capable of actual assessment and quantification*” and were therefore likely to be misled into believing the Advertiser’s Products had colour performance that “*is flawless and unsurpassed or can produce all shades of the colour spectrum*”.

7.2 In support of the above contentions, the Complainant provided third party reviews by Rtings.com in relation to the Advertiser’s Products and an article on sports broadcasting in Australia.

### The Advertiser’s Submissions

7.3 In summary, the Advertiser responded, in respect of the Colour Performance Representations, that:

- (a) It strongly disagreed with any claim the Colour Performance Representations were misleading or deceptive, as set out in the Complaint;
- (b) The “100% Colour Volume” and “Certified 100% Colour Volume” claims were:
- (i) verified by independent testing by VDE, an internationally recognised body with 36,000 members that conducts independent product testing in a wide range of technical fields, and
  - (ii) the independent testing was conducted in accordance with a standardised testing method (the IDMS Test) produced by the ICDM, a committee within the Society for Information Display, the display industry’s premier professional organisation;
- (c) The Complainant’s attempts to discredit the VDE test results were inaccurate as:
- (i) The IDMS Test provided an adequate basis to test colour volume on a HDR television because the IDMS Test applies to all forms of television display;
  - (ii) The testing conducted by Rtings.com and LG’s reliance on this testing was problematic;
  - (iii) The Advertiser did not misconstrue colour volume and colour gamut; the VDE testing calculated colour volume for each of the Advertiser’s Products “*to determine that the colour volume for each of [the] displays is slightly more than 100% of the total*”; and
  - (iv) The claim that the Advertiser’s Products were tested on “Expert Settings” or were otherwise optimised or calibrated was unsubstantiated and inaccurate. The testing by VDE was conducted on the Advertiser’s Products “out of the box” adjusted to Movie mode (one of four picture modes a consumer can easily configure);

- (d) The “100% Colour Volume” claim was a technical one and was unlikely to mislead consumers into concluding the Advertiser’s Products obtained a ‘perfect score’ for colour performance, where *“consumer have access to resources to learn more about technical measures of performance of televisions”*;
- (e) The phrase “perfect colour” was puffery and when combined with the Advertiser’s claims of “certified 100% Colour Volume” and “more than a billion shades from Quantum Dot technology”, did not detract from the accuracy of these technical claims; and
- (f) The amount of HDR content in Australia was not low and is increasing, with more content (including sports) being filmed in HDR. Moreover, *“as the colour volume of HDR content is wider than that of SDR content, [the Advertiser’s Products] can also produce 100% colour volume on SDR content”*. In any event, the Colour Performance Disclaimer was not too small and was clearly drawn to the consumer’s attention.

7.4 In support of its response, the Advertiser provided the Product Data Sheet, VDE Certificate and VDE Test Report in relation to VDE’s testing and certification of the Advertiser’s Products. The Advertiser submitted these materials *“speak for themselves”* in substantiating its “100% Colour Volume” and “Certified 100% Colour Volume” claims.

#### **Colour Performance Determination**

7.5 There was no issue raised by the Advertiser that any of the Colour Performance Representations had not been made as referred to in the Complaint.

7.6 The particular issues of complaint by the Complainant in relation to the Colour Performance Representations appeared to the Board to be the following matters:

- (a) *The testing and certification by VDE was not a credible basis upon which the Advertiser could rely to substantiate its Colour Performance Representations:*

The Colour Performance Representations in question were the claims that the Advertiser’s Products offer “100% Colour Volume” and “Certified 100% Colour Volume”. The Board considered that for the Complainant’s argument to succeed there needed to be a clear and identifiable inaccuracy in the Advertiser’s independent testing and certification.

Each of the Complainant and Advertiser provided third party materials that sought to calculate the colour volume of the Advertiser’s Products and produced different results. In particular, the Advertiser tendered materials in the form of independent testing by VDE conducted in accordance with a recognised industry test method (the IDMS Test). Further, each of the Complainant and Advertiser made reference to technical arguments in support of its own position.

The Board notes that it is not for it to assess or second guess the approach to testing used by different recognised rating agencies. From a perspective of assessing whether conduct is false, misleading or deceptive the Board considered that the Advertiser needed to be able to substantiate claims by reference to testing by a credible third party and to then accurately reference those test results.

The Board therefore does not agree with the Complainant that the testing and certification by VDE does not provide credible basis for the Colour Performance Representations.

- (b) *One or more of the Colour Performance Representations were likely to mislead or deceive consumers into believing that:*
- (i) *the Advertiser's Products had colour performance that was flawless and unsurpassed or could produce all shades of the colour spectrum:*

The Board considers that the combination of claims that the Advertiser's Products offer: "100% Colour Volume", "Certified 100% Colour Volume" and "Perfect Colour" amount to a powerful and absolute headline claim. Use of the terms "100%" and "perfect" conveys a strong message to television consumers that the colour performance of the Advertiser's Products was flawless and unsurpassed, or "as good as it gets".

In the Board's view the target consumer would be unlikely to understand and appreciate that the IDMS Test allows for colour performance scores that **are greater than** 100%. The Board notes that the Advertiser does not dispute that the IDMS Test allows for performance scores that are greater than 100% because the score falls within a range of measurement as that relates to DCI-P3 colour space. Indeed, the Advertiser acknowledges that the VDE testing produces colour volume for the Products that are "*slightly more than 100% of the total*" and instead argues that the Colour Performance Representations will not mislead because "*consumers have access to resources to learn more about technical measures of performance of television*".

The Board however notes that the VDE testing supplied to it gives results for all of the 'Q' range televisions that are not insignificantly in excess of 100% of DCI-P3 and that the Advertiser, rather than using these actual percentage results, elected to use the statements: "100% Colour Volume" and "Certified 100% Colour Volume" in association with the statement "Perfect Colour". The Board considers that this is likely to be understood by the consumer as being a statement that the colour offered by the "Q" range televisions is as good as it can get (perfection) and that this has been verified by third party testing. The reference to 'certified' takes these claims outside of the ambit of mere 'puffery'.<sup>2</sup>

Given the Board's view, it is necessary to consider whether the Colour Performance Disclaimer is sufficient to correct this otherwise misleading impression. The text of the Colour Performance Disclaimer refers consumers to the IDMS Test and DCI-P3 colour space. The Board however agrees with the Complainant that few consumers would be able to grasp the full import

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<sup>2</sup> While the phrase 'perfect colour' can amount to puffery on its own, in this context the Advertiser's claim of "Perfect Colour" was combined with other claims, namely "certified 100% Colour Volume" and "more than a billion shades from Quantum Dot technology". In these circumstances, the Board agrees with the Complainant that consumers could be misled or deceived into treating the Advertiser's "Perfect Colour" claim as "*a representation capable of actual assessment and quantification*".

of that reference; including that 100% is not a 'perfect score' for colour performance.

The Board also notes that in some instances the Colour Performance Disclaimer was disproportionately small compared to the font size and prominence of the Colour Performance Representation. Other relevant Advertising Material did not appear to include the Colour Performance Disclaimer at all.

The Board therefore agrees with the Complainant that the Colour Performance Disclaimer was neither clear or effective and that its use in respect of the relevant Advertising Material was insufficient to correct the otherwise misleading primary message of the Colour Performance Representations.

(ii) *the Advertiser's Products would provide "100% Colour Volume" in all circumstances:*

As set out above in 7.6(b)(i), the Board determined that the average television consumer was likely to consider the Colour Performance Representations created a powerful and absolute headline claim that the colour performance of the Advertiser's Products was "as good as it gets".

However, the Colour Performance Disclaimer also includes a qualifying statement that the "100% Colour Volume" and "Certified 100% Colour Volume" claims are "available on HDR content only". While there was dispute between the Complainant and Advertiser as to amount of HDR content currently available in Australia, the Board understands that free-to-air broadcasters cannot accommodate HDR content in Australia and most sports broadcasting is currently not available in HDR. The Board therefore considers that the Advertiser's products will only provide '100% Colour Volume' in relatively limited circumstances, that being when the consumer has access to HDR enabled content.

The Board then considered whether the Colour Performance Disclaimer was sufficiently clear and prominent to offset the Colour Performance Representations when used with respect to types of broadcasting that were not commonly available in HDR.

The Board again considers that use of the Colour Performance Disclaimer was insufficient to cure the likelihood of consumers being misled or deceived in relation to the specific types of content to which the "100% Colour Volume" and "Certified 100% Colour Volume" claims applied. Some uses of the Colour Performance Disclaimer were disproportionately small compared to the font size and prominence of the Colour Performance Representation. Other relevant Advertising Material did not appear to include the Colour Performance Disclaimer at all, including an out of home (OOH) billboard that prominently claimed "Sport to the Power of Q. All the Action in 100% Colour Volume" when the sport pictured is not televised in HDR.

7.7 Based on the matters set out in paragraphs 7.1 to 7.6 above, the Board determines that the Colour Performance Representations:

- (a) are not misleading and deceptive or likely to mislead or deceive consumers for televisions insofar as the testing and certification by VDE could be used to credibly substantiate the “100% Colour Volume” and the “Certified 100% Colour Volume” claims using IDMS Test and DCI-P3 colour space; but
- (b) are misleading and deceptive or likely to mislead or deceive consumers for televisions because the Colour Performance Representations created a more powerful and absolute headline claim that the colour performance of all content delivered by the Advertiser’s Products was flawless and unsurpassed, or “as good as it gets” and (when it was present) the Colour Performance Disclaimer was not sufficiently clear and prominent to offset this powerful headline claim.

7.8 Accordingly the Board considers that there have been breaches by the Advertiser in relation to sections 1.1 and 1.2 of the Code.

7.9 In respect of any breach of section 1.3 of the Code, while the Colour Performance Representations *may* cause damage to a competitor, including the Complainant, the Board was not provided with any information or evidence on which it could properly determine whether use of the Colour Performance Representations would be likely to do so. On this basis the Board was unable to determine that any breach of section 1.3 of the Code had occurred in respect of the Colour Performance Representation.

## 8. The HDR Representations

### The Complainant’s Submissions

8.1 The Complainant contends that the advertiser statements that its ‘Q’ range televisions have:

- (a) “High Dynamic Range 1500” or “HDR 1500” for its Q7 and Q8 models; and
- (b) “High Dynamic Range 2000” or “HDR 2000” for the Q9 models

is either merely ‘a four figure number that doesn’t mean anything’ or, if it is meant as a reference to peak brightness, that the respective models reach peak brightness of 1500cd/m<sup>2</sup> or 2000 cd/m<sup>2</sup>, when they do not.

### Subsequent Submissions by the Advertiser and Complainant

8.2 The Advertiser responded by confirming that the representations were descriptions of the peak brightness of the respective QLED units and stated that these ratings are substantiated by independent testing by VDE. In addition the Advertiser referred the Board to an on-line review of the ‘Q9F’ model by Mark Henninger of the AVS forum as substantiating the representation that the Q9 model achieves over 2000 nits.

8.3 The Complainant responded by contending that VDE certification was:

- ‘not a reasonable basis’ upon which to justify the statements made
- that the VDE testing anyway only certified the ‘Q’ series televisions as being “HDR 1500”, not “HDR 2000”;
- that this brightness could only be achieved in ‘Dynamic Mode’ and not in normal viewing modes;

- that the accepted industry standard is HDR10 and should have been used by the advertiser.

8.4 The Advertiser responded stating:

- The HDR 1500 and HDR2000 representations are purely ‘a statement of the peak brightness levels of the Q7, Q8 and Q9 series QLED TVs’ and ‘have been substantiated by independent testing’;
- ‘Dynamic Mode is ‘one of a number of modes in which Samsung’s QLED TVS can be viewed by consumers.’

#### **HDR Determination**

8.5 The Board accepts that the HDR representations are meant as a statement of peak brightness and notes that this is consistent with the context in which this is presented in point of sale materials, where it commonly appears next to a stylised sun logo and statements such as: “Ultimate brightness in any room (up to 1500 nits)”.

8.6 Similarly the Board is of the opinion that the HDR representations would convey to the consumers a message of the peak brightness achievable by the respective model, even to the majority of consumers who are have not previously heard of this unit of measurement (being ‘cd/m<sup>2</sup>’ or ‘nits’).

8.7 We further are of the opinion that the target consumer would understand that such a definitive statement of peak luminescence would:

- Be achievable in their home environment; and
- Be based upon credible and independent testing.

8.8 Further, even if a consumer had no knowledge of the unit of the measurement used, they would understand from the HDR representations that the Q9 performs better than both the Q7 and Q9 models, as this is a clear representation of a sliding scale where ‘HDR 2000’ is better than ‘HDR 1500’.

8.9 While we note that the Complainant again contends that the Board should not accept VDE certification as ‘credible’ and should instead prefer that conducted by Rtings.com, we do not accept this submission and consider that, provided it is referenced accurately, the advertiser is entitled to reference VDE testing as a basis for its advertising claims.

8.10 In this regard the Board notes that the Advertiser has provided it with both a VDE “Product Data Sheet” and a confidential copy of the VDE test report. Relevantly the Product Data Sheet describes the evaluation of quality characteristics test points as ‘Maximum Luminance with 10% White Window in HDR’ and ‘Color Volume according to IDMS 1.03b and DCI-P3 (100%)’, and that each of the Q7, Q8 and Q9 models are “HDR 1500” compliant.

8.11 The other claimed basis for the representation that the Q9 provides 2000 cd/m<sup>2</sup> is the advertiser’s ‘internal testing’ (details of which have not been provided to the Board) and an on-line review of the ‘Samsung Q9F 65” QLED HDR TV’ by a Mark Henninger dated 1 April 2017, a copy of which was submitted to the Board by the Advertiser.

8.12 The Board notes that Mr Henninger’s review relevantly includes the following statements:

*“ the Q9F handily exceeds the performance required to properly render HDR, and it can render peak highlights in the 1500-2000 nit range, depending on the measurement method and picture mode.’*

*The highest peak luminescence reading I got from the TV was in Dynamic Mode. Here inside a 10% window I teased out a peak reading of 2225 nits, followed by 9 seconds of 2100-nit output, before it settled down to 1400 nits.”*

- 8.13 The Board considers that the HDR 1500 representations applied to the Q7 and Q8 models do not contravene the Code and are adequately substantiated by the VDE certification. However the ‘HDR2000’ representation applied to the Q9 model is more problematic as, while the Advertiser relies on the VDE peak luminescence results in relation to the Q7 and Q8 models, it has chosen to ignore the VDE results as they apply to the Q9 model.
- 8.14 The Board considers that the consumer is likely to understand from the HDR2000 representation that the Q9 model TV has been independently tested and this testing demonstrates that it provides:
- (a) peak luminescence of 2000 (cd/m<sup>2</sup> or nits); and
  - (b) a higher peak luminescence than either the Q7 or Q8 models.
- 8.15 The Board questions whether an on-line forum review is sufficient basis for a key message used in a national advertising campaign, particularly when that review is not consistent with the results the Advertiser had received from VDE. The Board further notes that the cited on-line forum review does not anyway give sufficient support to the representation of ‘HDR 2000’, with Mr Henninger referencing a ‘1500-2000 nit range’ for the Q9F, while merely noting a transient peak reading in excess of 2000 nits before ‘it settled down to 1400 nits’. While the review does not expressly state the period during which Mr Henninger obtained a result in excess of 2000 nits, the period appears to be measured in seconds and therefore also does not equate to normal television viewing by the consumer in the home environment.
- 8.16 The HDR2000 claim is not substantiated by the VDE Product Data Sheet otherwise relied upon by the Advertiser, which rates all three ‘Q’ models as ‘HDR 1500’. The Board was not provided with details of the in-house testing of the Advertiser, but regardless notes that any such representations are best substantiated by reputable independent testing. For these reasons the Board considers that the Advertiser did not have a reasonable basis for the HDR2000 representations it applied to the Q9 model.
- 8.17 We also note that this level of peak luminescence is only achievable in ‘Dynamic Mode’. We however note the Advertiser’s submission that this mode can be accessed by the consumer, so to that extent agree this can be equated with real world usage.
- 8.18 Based upon paragraphs 8.5 to 8.17 above the Board considers that:
- (a) the representations of “High Dynamic Range 2000” and “HDR2000” are potentially false, as well as likely to mislead or deceive, as to the peak luminescence of the Q9 model television



- (b) the representations of “High Dynamic Range 2000” and “HDR2000” are also misleading and deceptive as to the relative peak luminescence performance of the Q7, Q8 and Q9 models;
- (c) the representations “High Dynamic Range 1500” and “HDR1500” applied to the Q7 and Q8 models is justifiable by reference to the VDE certification and therefore do not contravene the Code.

8.19 Accordingly the Board considers that there have been breaches by the Advertiser in relation to sections 1.1 and 1.2 of the Code.

## 9. The No Gap Representation

### The Complainant’s Submissions

9.1 In summary, the Complainant contended in respect of the No Gap Representations, that:

- (a) The relevant Advertising Material in respect of the Advertiser's Products prominently represented that its wall mount product was a "No Gap Wall Mount", which clearly represented that the television sat flush to the wall, with no visible gap when mounted on the wall;
- (b) Some of the relevant Advertising Material included a disclaimer, which the Complainant contended was barely legible in some instances, in the following terms:  
  
*"measured from rear end of the TV, the gap may differ based on the installation, QLED model and wall type. Q9 generates 6mm gap. Wall mount included with 88 inch Q9 model otherwise sold separately" (the Disclaimer).*
- (c) The Disclaimer itself admitted that there may be a "gap" depending on the model of television and wall type and specifically, in respect of the Q9 model, a 6mm gap, contrary to the representation of "no gap" being made by the Advertiser. Accordingly, the No Gap Representation was inconsistent with the dominant theme of the Advertiser's message and was factually false, misleading and deceptive.
- (d) Further, the Disclaimer when used by the Advertiser was not clear or effective, and was not used proportionally to the other parts of the relevant Advertising Material (in particular the No Gap Representation) in order to neutralise or correct this position.
- (e) The Advertiser's Q8 model was curved, meaning that the model will never sit completely flush to the wall.
- (f) The No Gap Representation was an absolute claim and meant "no" gap, not little gap, or negligible gap, or *"negligible distance between the device and wall... when compared to the average wall bracket"* (noted in paragraph 4.3 of the Advertiser's Response).
- (g) Further, the Complainant's OLED W7 television had a true flush mounting, and the Advertiser's No Gap Representations undermined the value of the Complainant's relevant products.

## The Advertiser's Submissions

9.2 In summary, the Advertiser contended in respect of the No Gap Representation, that:

- (a) The test for misleading and deceptive conduct was whether an ordinary and reasonable member of the class of consumer, to which the conduct in question was directed, would be likely to be misled or deceived. That a reasonable consumer in this case would appreciate that it was physically impossible for a television (especially a curved television) to be completely flush against the wall when mounted and that even paintings produced a small gap when hung. Also, that the Complainant's own OLED W7 mounted television using a magnetic plate produced a gap (being the width of the magnetic plate).
- (b) The Advertiser's Q7 and Q8 televisions do sit perfectly flush with the wall at the point of mounting, so there was no gap between the wall and the rear of the television, because the wall mount did not project from the back of the television, consistently the Advertiser contends with the terms of the Disclaimer.
- (c) The use of the Disclaimer was clear and sufficiently prominent in the relevant Advertising Material.
- (d) The relevant Advertising Material made it clear, from the lens of the consumer, that the no gap wall mount produced effectively no gap (including use of pictorial aids such as a hand), such that consumers understood that there was a negligible distance between the television and wall, compared to the average wall bracket (with a gap of 30-50 mm).
- (e) The Advertiser's wall mount produced effectively no gap, and this would be the consumer's understanding, based on the relevant Advertising Material, which included at point of sale an actual demonstration as to how the television would be mounted to the wall using the No Gap Wall Mount and the provision of a sample wall mount bracket for demonstration purposes.

## No Gap Determination

9.3 There was no issue raised by the Advertiser that the No Gap Representation had not been made as referred to in the Complaint.

9.4 The Board agreed with the Complainant that the No Gap Representation was an absolute claim and that the word "No" has an absolute meaning, which would be understood by consumers in that manner. Consumers would not, in the Board's view, consider the No Gap Representation to mean *little*, *negligible*, *not visible*, *minimal* or any other qualified interpretation of the word "No".

9.5 On this basis, the Board also considered that the Advertiser's own material supported the view that use of "No Gap" was factually inaccurate and not sustainable in respect of the representations being made regarding the wall mounting of the relevant Advertiser's Products.

9.6 Given the Board's view, it turned to the use of the Disclaimer. In that regard the Board considered that use of the Disclaimer was insufficient to cure any likelihood of consumers being misled or deceived. The Board agreed with the Complainant that the Disclaimer was

not clear and that its use in respect of the relevant Advertising Material was insufficient and ineffective to rectify any consumer confusion arising from the No Gap Representation. For example, some uses of the Disclaimer were disproportionately small (and difficult to read at all) compared to the font size and prominence of the No Gap Representation. Other relevant Advertising Material did not appear to include the Disclaimer at all and instead included content which would re-inforce the No Gap Representation, for example *"fitted snug to the wall with the No Gap Wall Mount"*.

- 9.7 Based on the matters set out in paragraphs 9.1 to 9.6 above, the Board determined that the No Gap Representation was misleading and deceptive or likely to mislead or deceive consumers for televisions in breach of section 1.1 and 1.2 of the Code.
- 9.8 In respect of any breach of section 1.3 of the Code, while the No Gap Representation *may* cause damage to a competitor, including the Complainant, the Board was not provided with any information or evidence on which it could properly determine whether use of the No Gap Representation would be likely to do so. On this basis the Board was unable to determine that any breach of section 1.3 of the Code had occurred in respect of the No Gap Representation.

## Conclusion

- 9.9 The Board finds that the advertising subject of the Complaint breaches sections 1.1 and 1.2 of the Code by conveying the following representations which are misleading or deceptive or likely to mislead or deceive:
- (a) the Colour Performance Representations, including representations that the Advertiser's Q range televisions offer "Perfect Colour", "100% Colour Volume" and "Certified 100% Colour Volume";
  - (b) the HDR2000 representations that the Advertiser's Q9 model provides peak brightness levels of 2000 cd/m<sup>2</sup> or 2000 nits; and
  - (c) the No Gap Representations.
- 9.10 The Board is unable to determine that any breach of section 1.3 of the Code has occurred.
- 9.11 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 31 October 2017, the Advertiser was provided with a copy of the Claims Board's determination. In accordance with the Guidelines and on the basis of the Claims Board's determination, the Advertiser was requested to provide an Advertiser Statement indicating whether it would modify or discontinue the Advertisement.

On 7 November 2017, the Advertiser provided the following response:

*"Without accepting the accuracy of the Board's determination and without any admission that it has contravened any relevant legislation or the Code, Samsung is considering the reasonable steps required to modify its advertising, and confirms it will then take such steps,*

*to take into account the Board's comments, including by ensuring that it can adequately substantiate relevant claims.*

*In doing so, Samsung notes the Board determined (contrary to LG's assertions) that:*

- *the use of "QLED" or "QLED TV" on its own or with the phrases "The Next Innovation in TV" and "Discover the Next Innovation in TV" were not misleading or deceptive; and*
- *the testing and certification by VDE could be used to credibly substantiate colour performance claims."*