



Case Report

1	Case Reference	17 ACB 3
2	Advertiser	Koala Sleep Pty Ltd
3	Complainant	A.H. Beard Pty Ltd
4	Product	Mattresses
5	Type of Advertisement/Media	Print (Billboard); Radio
6	Advertising Claims Board Panel Members	Michele Laidlaw, Johnson Winter & Slattery (Chair) Lisa Ritson, Ashurst Peter Le Guay, Thomson Geer
7	Date of Determination	23 November 2017
8	DETERMINATION	Complaints upheld as to breaches of sections 1.1 and 1.2 of the Code as identified in the Determination below.

1. Introduction

- 1.1 A complaint was lodged on 8 September 2017 (**the Complaint**) with the Advertising Claims Board (**Claims Board**) by A.H. Beard Pty Ltd (**Complainant**) against Koala Sleep Pty Ltd (**Advertiser**). 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 two advertisements in relation to the Koala Mattress (**the Advertiser's Product**), one of which was a print billboard (**Billboard**) as set out in Annexure A of this Complaint and the second was a radio commercial (**collectively the Advertising Material**).

3. Issues raised by Complaint

- 3.1 The Complainant specifically referenced the following claims in one or both of the pieces of the Advertising Material:
 - (a) the Koala Mattress is "Australia's best-rated mattress" or "Australia's highest-rated mattress", which conveys the representation that the Koala Mattress *currently available* for sale has been rated more highly than any other Australian mattress (**Highest Rated Representation**);

- (b) the Koala Mattress is “Product Review product of the year” (**Product Review Representation**);
- (c) the Advertiser has designed “the world’s best mattress” (**World’s Best Representation**); and
- (d) the mattress industry is one in which “300% mark-ups are the norm”, which conveys a representation that almost all competitor bedding retailers significantly mark-up their products at the expense of consumers (the **Industry Representation**).

(collectively the **Koala Mattress Representations**).

- 3.2 The Complainant submits that the Koala Mattress Representations are misleading or deceptive for reasons that are outlined below. Otherwise the Complainant is not specific as to what section or sections of the Australian Association of National Advertisers Code of Ethics (**Code**) the Complaint is made under.
- 3.3 Given the terms of the Complaint, it raises issues under sections 1.1 and 1.2 of the Code, which provides:
 - 1.1 *Advertising or Marketing Communications shall comply with Commonwealth law and the law of the relevant State or Territory; and*
 - 1.2 *Advertising or Marketing Communications shall not be misleading or deceptive or be likely to mislead or deceive; and*
- 3.4 The nature of the Complaint could also possibly raise issues under section 1.3 of the Code, which provides:
 - 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.*
- 3.5 However, as damage to the Complainant’s business and goodwill was not specifically alleged in the Complaint, the Board did not consider section 1.3 of the Code.
- 3.6 The Complaint is not specific as to what provision of the Australian Consumer Law could be the basis for contravention of section 1.1. However, the relevant trigger for the operation of that section would be misleading or deceptive conduct. A number of possible provisions of the Australian Consumer Law may therefore be in question.¹
- 3.7 It is clear that in causing the Advertising Material to be published on a billboard or broadcast via radio, the Advertiser has engaged in conduct “in trade or commerce” for the purposes of the Australian Consumer Law, and therefore section 1.1 of the Code. The operative prerequisite to the Complaint in relation to any alleged breach of the Australian Consumer Law (and sections 1.1 and 1.2 of the Code) is that by publishing or broadcasting the Advertising Material, or by causing the Advertising Material to be broadcast or published, the Advertiser engaged in conduct in trade or commerce that is misleading or deceptive or that is likely to mislead or deceive.

¹ Australian Consumer Law, being Schedule 2 to the Competition and Consumer Act 2010 (Cth), ss 18, 29(1)(a) & 29(1)(g)

- 3.8 Accordingly, in the balance of this Determination the Board considers whether the Advertising Material is misleading or deceptive, as a shorthand expression to cover the two sections of the Code which are the basis for the Complaint.

4. Advertiser's response

- 4.1 The Advertiser's specific responses are considered in more detail below in the context of the relevant Koala Mattress Representations. The Advertiser generally submitted that the matters raised in the Complaint were without merit and contended the Complaint was aimed at restricting the Advertiser from truthfully marketing the Koala Mattress, which has acted as a new entrant and disruptor in the mattress industry for the benefit of consumers.
- 4.2 With respect to the World's Best Representation, the Advertiser acknowledged that the claim could be misleading. The Advertiser also indicated that it had immediately discontinued use of the World's Best Representation in its advertising. As a consequence, the World's Best Representation is not addressed in this case report.

5. Determination

- 5.1 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**). 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.
- 5.2 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).
- 5.3 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.
- 5.4 In the present instance the Board believes that the relevant class is 'consumers for mattresses' or persons looking to purchase a mattress either as a replacement for an existing mattress or for the first time. The Board considers that most of this class will be seeking to utilise the representations made by the Advertiser to inform a not insignificant purchasing choice.
- 5.5 Our approach to the question of whether or not a representation is misleading or deceptive, or is likely to mislead or deceive, is therefore to ask, first, what the Advertising Material would mean to consumers for mattresses and then to assess whether that understanding is objectively accurate. Further, in considering whether or not a representation is *likely to*

mislead or deceive, that there is a real or not remote chance or possibility of the representation being misleading or deceptive.

- 5.6 We also note that according to the Code's Practice Note 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 Highest Rated & Product Review Representations

The Complainant's Submissions

- 6.1 The Complaint contends the Advertising Materials' claim that the Koala Mattress is "Australia's best-rated mattress" or "Australia's highest-rated mattress" is misleading because while this claim conveys that the Koala Mattress currently available for sale has been rated more highly than any other Australian mattress, the product's construction was altered in the earlier part of 2017. As a result, many of the ratings relied upon to make the claim will *"relate to a different feeling mattress they no longer sell"*.
- 6.2 The Complainant also sought substantiation for the Product Review Representation, as claimed on the Billboard.

Subsequent Submissions by the Advertiser and Complainant

- 6.3 The Advertiser responded by confirming that the construction of the Koala Mattress changed in 2016 from a three-layer to a two-layer design in order to *"offer increased coolness and comfort while replicating the feeling of the original mattress"*. These design improvements were reflected in *"continued and on-going positive reviews"*.
- 6.4 The Advertiser also sought to substantiate the "Product Review product of the year" claim by reference to the 2016 ProductReview.com.au Awards Information², where the Advertiser was one of two Award Winners in the Mattresses category.
- 6.5 The Complainant responded by contending that:
- a re-constructed mattress is a different product and not *"just an upgrade or a product development"*; and
 - consequently, ratings associated with the earlier version of the Koala Mattress should not be relied upon to substantiate a "best-rated" or "highest-rated" claim.
- 6.6 The Advertiser responded stating that while the Koala Mattress product had changed, *"the reviews have maintained the level that constitutes highest rated"* and that the Advertiser had again been nominated for the Product Review Product of the Year award in 2017;

Were the Representations Made?

² <https://support.productreview.com.au/hc/en-us/articles/235859728-2016-ProductReview-com-au-Awards-Information>

- 6.7 The first question for consideration is whether the Advertising Material communicates the Highest Rated Representation and the Product Review Representation to consumers of mattresses, on any reasonable interpretation.

The Highest Rated Representation

- 6.8 On the Billboard the words “Australia’s best-rated mattress” are adjacent to the words “Product Review product of the year” on the right hand side of the Billboard. There are no asterisks or qualifying language. In the radio advertisement the phrase “Australia’s highest-rated mattress” is also used without subsequent qualifying language.
- 6.9 The Board considered a reasonable consumer would understand these claims as representing that the Koala Mattress had been rated more highly than any other comparable mattress by some rating process or system, probably by reference to consumer ratings. In the case of the Billboard, consumers might also conclude that the ratings were calculated by or involved ProductReview.com.au, given the adjacent Product Review Representation.
- 6.10 Without any qualifying information, the Board agreed with the Complainant that consumers would understand these claims as being specific to the version of the Koala Mattress available for sale at the time of the Advertising Material was released (the **Current Koala Mattress**).
- 6.11 The Board accepts that the Current Koala Mattress is the two-layer design introduced by the Advertiser in 2016. Based on the material provided by the parties, the alteration in construction from a three-layer to a two-layer design appears sufficiently significant so as to change the product being offered to consumers. In the Board’s view, the new construction was more than “*just an upgrade or product development*”. Indeed the Advertiser’s own material acknowledges that they have “*changed the product*”.
- 6.12 The Board concludes that the Highest Rated Representation has been made.

The Product Review Representation

- 6.13 There was no issue raised by the Advertiser that the Product Review Representation had not been made as referred to in the Complaint. The Advertiser sought to substantiate the claim by reference to the 2016 ProductReview.com.au Awards Information.

Are the Representations Misleading or Deceptive?

- 6.14 The Board now moves to consider whether the Highest Rated Representation and the Product Review Representation, having been found by the Board to have been made, were misleading or deceptive, or likely to mislead or deceive.

The Highest Rated Representation

- 6.15 The Advertiser’s substantive answer to the Highest Rated Representation is that while the Koala Mattress product changed in 2016, for the Current Koala Mattress “*the reviews have maintained the level that constitutes highest rated*”.
- 6.16 Though the Advertiser provided evidence of positive customer feedback on various platforms including Google, Yotpo, ProductReview.com.au and FaceBook³, with the

³ See the Advertiser’s letter of 30 October 2017

exception of ProductReview.com.au (which is addressed below), the Board concluded this material was not sufficient to provide a reasonable basis for the Highest Rated Representation for the following reasons:

- (a) high ratings on a stand-alone basis do not substantiate that the Current Koala Mattress has been rated *more highly* than any other comparable mattress by a rating process or system; and
- (b) it is not clear from these platforms which customer reviews relate to Current Koala Mattresses acquired by consumers, as opposed to reviews that relate to the previous three-layer design.

6.17 The Board has reached the same conclusion in relation to ProductReview.com.au because while the Advertiser's Product was a 2016 ProductReview.com.au Award Winner, which the Board accepts as substantiation for the general proposition that the product was rated more highly than comparable mattresses in 2016, it is still not clear from the material provided whether the customer reviews relied upon to calculate the 2016 ProductReview.com.au Award related to the Current Koala Mattress or the previous version.⁴

6.18 Finally, the Advertiser indicated it was nominated for a 2017 ProductReview.com.au Award.⁵ The Board understands these awards were subsequently announced in early November 2017. However, this information cannot be relied upon to substantiate the Highest Rated Representation as the Advertising Material in question was published at least prior to the Complaint being lodged on 8 September 2017.

6.19 It follows that the Board's determination is the Highest Rated Representation has been made and it has not been sufficiently substantiated, such that it is misleading or deceptive, or is likely to mislead or deceive, in breach of sections 1.1 and 1.2 of the Code.

The Product Review Representation

6.20 The Board considers the stand-alone claim: "Product Review product of the year", without further qualification or identification of the relevant year, is a powerful one that conveys to consumers the Advertiser's Product is either the single best product identified by ProductReview.com.au using some process or system for the current year or at least the single best product in a particular category.

6.21 As outlined above, the Advertiser substantiated this claim by reference to the 2016 ProductReview.com.au Awards Information⁶. The information explains how Award Winners are determined and states:

"There may be 1 or 2 winners per category, depending on the strength of the star scores (eg. a potential runner up would not win an award if the product or service does not completely meet the criteria."

⁴ The criteria outlined for the selection of Award Winners does not address the issue of product alteration or how this is managed in calculating Award Winners: <https://support.productreview.com.au/hc/en-us/articles/235859728-2016-ProductReview-com-au-Awards-Information>

⁵ <https://www.productreview.com.au/i/awards>

⁶ <https://support.productreview.com.au/hc/en-us/articles/235859728-2016-ProductReview-com-au-Awards-Information>

- 6.22 There is no reference in the ProductReview.com.au Awards Information to the term “Product of the Year” and the Advertiser is identified as one of two Award Winners in the Mattresses category.
- 6.23 The Board has concluded that the material provided by the Advertiser is not sufficient to provide a reasonable basis for the Product Review Representation claim. In particular, there is no reference in ProductReview.com.au to the term “Product of the Year”. Instead, the Advertiser’s product is one of two 2016 Product Review Award Winners in the Mattresses category and one of 72 products and services that were Award Winners overall.⁷
- 6.24 In these circumstances, the Board considers that the Advertising Material breaches sections 1.1 and 1.2 of the Code in respect of the Product Review Representation because it has not been sufficiently substantiated.
- 6.25 For completeness, the Board notes that the Complainant’s second submission dated 25 October 2017 recasts, or at least expands on, the request for substantiation of the Product Review Representation by calling into question the way in which the Advertiser solicits reviews. This issue is addressed separately in section 8 below.

7. The Industry Representation

The Complainant’s Submissions

- 7.1 The Complaint contends the Advertising Materials’ claim that “300% mark-ups are the norm” in the Australian mattress industry is misleading because it cannot be substantiated. The Complainant notes *“we do not know of any bedding retailers who even try to mark up their Australian made mattresses by anywhere near that level”*.

Subsequent Submissions by the Advertiser and Complainant

- 7.2 In support of its claim the Advertiser relied upon a third party article from the Sydney Morning Herald dated 19 June 2016⁸ that stated: *“Fairfax has also obtained wholesale price lists for mattresses. These reveal beds that retail for \$10,000 are being made for as little as \$1,500”* (**Herald Article**).
- 7.3 The Complainant responded by contending that:
- the Herald Article itself contained different views regarding the size of mark-ups in the Australian mattress industry; and
 - In the Complainant’s experience, the mark-ups claimed in the Herald Article *“do not reflect an accurate view of Australian made and supplied products”*.
- 7.4 The Advertiser responded that the Herald Article remained a proper source for its claim regarding mark-ups in the Australian mattress industry. In support of its claim, the Advertiser also provided other third party articles, including from Choice (a mattress industry pricing investigation) and the Daily Telegraph (an article regarding expensive Australian hand-made beds).

⁷ The Board understands from the material provided that the Advertiser’s product is now also a Product Review 2017 Award Winner: <https://www.productreview.com.au/p/koala-mattress.html?rating=1#reviews>

⁸ <http://www.smh.com.au/business/mattress-comparison-reveals-bedding-retailers-padding-costs-of-manufacturing-20160610-gpgeog.html>

Was the Representation Made?

- 7.5 There was no issue raised by the Advertiser that the Industry Representation had not been made as referred to in the Complaint. The Advertiser sought to substantiate the claim by reference to the Herald Article at first instance, and also by reference to other third party articles as outlined in paragraph 7.4.

Is the Representation Misleading or Deceptive?

- 7.6 The Board now moves to consider whether the Industry Representation, having been found by the Board to have been made, was misleading or deceptive, or likely to mislead or deceive.
- 7.7 The Board is of the opinion that the Industry Representation, with the use of the words “the norm” and in the context of the accompanying phrase “sleazy sales tactics”, would convey to consumers a message that almost all competitor bedding retailers mark-up some or all of the products they sell in Australia to around 300% over their costs, which are not limited to the wholesale cost of mattresses, and seek to manipulate their customers.
- 7.8 The Board notes that the Complainant contends the mark-ups claimed do not reflect an accurate view of “Australian made” products, but does not think the Industry Representation can be so confined. We are of the opinion that the target consumer would understand the representation as applying to all mattress products supplied in Australia, regardless of their place of manufacture.
- 7.9 Nonetheless, the Board questions whether the Herald Article and other materials provided by the Advertiser are a sufficient basis for a key message in an advertising campaign. Moreover, in the Board’s view the cited materials do not give sufficient support for a claim that 300% mark-ups over cost by retailers are so widespread in Australia as to constitute a “norm”. Indeed, the Choice article states that retailers are “able to charge mark-ups as high as 200%”.⁹
- 7.10 Accordingly the Board considers that there have been breaches by the Advertiser in relation to sections 1.1 and 1.2 of the Code.

8. Other Issue – Solicitation of Online Reviews

- 8.1 With respect to the Product Review Representation, the Complainant also raised concerns regarding the way in which the Advertiser solicits reviews and whether those reviews were unbiased. In particular, that the Advertiser:
- (a) may have offered and/or provided incentives to customers for positive reviews on ProductReview.com.au; and
 - (b) may have a commercial relationship with ProductReview.com.au, which the Board assumes, by implication, may have impacted upon the way ProductReview.com.au presented the Advertiser’s reviews.
- 8.2 In support of the above contentions, the Complainant provided various materials that consisted of certain third party articles and commentary regarding online product reviews

⁹ <https://www.choice.com.au/home-and-living/bedroom/mattresses/articles/mattress-industry-pricing-investigation>

generally and, in some cases, commentary on the Advertiser's Product and the associated online reviews at ProductReview.com.au.

8.3 The Advertiser responded stating:

- (a) between September and November 2015 the Advertiser offered all customers an incentive in the form of a \$25 Coles voucher for a review, regardless of the review outcome;
- (b) though it still seeks customer reviews from all customers, from November 2015 the Advertiser removed the incentive in order to comply with the requirements of ProductReview.com.au; and
- (c) the Advertiser does have a commercial relationship with ProductReview.com.au in that it pays ProductReview.com.au to list reviews of the Advertiser in the side panel of reviews of furniture stores. However this has no influence on the reviews uploaded by ProductReview.com.au, *"a business that states numerous times on their site that brands cannot delete reviews"*.

8.4 The Board considers that an assessment of the veracity or reliability of the reviews relied on by the Advertiser is outside the scope of this Determination, which is to assess the Advertising Material and the claims the subject of the Complaint against Code requirements.

9. Conclusion

9.1 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 Highest Rated Representation, including the claim that the Koala Mattress is "Australia's best-rated mattress" or "Australia's highest-rated mattress", which conveys the representation that the Koala Mattress available for sale at the time of the Advertising Material was released has been rated more highly than any other Australian mattress;
- (b) the Product Review Representation that the Koala Mattress is "Product Review product of the year"; and
- (c) the Industry Representation, including the claim that the mattress industry is one where "300% mark-ups are the norm", which conveys a representation that almost all competitor bedding retailers significantly mark-up their products at the expense of consumers.

10. Advertiser Statement

10.1 On 29 November 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 Advertising Materials in respect of the Koala Mattress Representations.

10.2 On 29 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, Koala has considered the reasonable steps required to modify its advertising, and confirms it will take the following steps.

- 1. We will switch highest rated mattress to highest rated mattress brand.*
- 2. We will amend all materials containing Product Review product of the year to 2016 and 2017 product review award winner*
- 3. We will amend all materials mentioning 300% markups.”*