

Case Report

1	Case Reference	17 ACB 1
2	Advertiser	Proctor & Gamble Australia Pty Limited
3	Complainant	Colgate Palmolive Pty Limited
4	Product	Oral B Pro Health Enamel Strong (toothpaste)
5	Type of Advertisement/Media	TVC/YouTube advertisement
6	Advertising Claims Board Panel Members	Kirsten Webb, Clayton Utz (Chair), Antoine Pace, Gadens Andrew Salgo, Baker & McKenzie
7	Date of Determination	13 June 2017
8	DETERMINATION	Complaints upheld as to breaches of 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 10 March 2017 (**the Complaint**) with the Advertising Claims Board (**Claims Board**) by the Complainant, Colgate Palmolive Pty Limited. The Complaint concerns two versions of an advertisement broadcast on commercial television and available on YouTube (**Advertisement**) for the advertiser's Oral B Pro Health Enamel Strong toothpaste (**Oral B**). 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. Issues raised by complaint

- 2.1 The Complaint made under each of sections 1.1, 1.2 and 1.3 of the AANA Code of Ethics (**Code**): with the Complainant's letter of complaint being in the following terms:
1. *Section 1.1 for being in breach of the Australian Consumer Law because it is misleading or deceptive.*
 2. *Section 1.2 for being misleading or deceptive;*
 3. *Section 1.3 for causing or being likely to cause, damage to the business and goodwill of Colgate by containing misrepresentations that unjustly denigrate Colgate Total toothpaste.*
- 2.2 The relevant provisions of the Code, 1.1, 1.2 and 1.3 are as follows:
- 1.1 *Advertising or Marketing Communications shall comply with Commonwealth law and the law of the relevant State or Territory.*

- 1.2 *Advertising or Marketing Communications shall not be misleading or deceptive or be likely to mislead or deceive.*
- 1.3 *Advertising or Marketing Communications shall not contain a misrepresentation, which is likely to cause damage to the business or goodwill of a competitor.*
- 2.3 The Complaint is not specific as to what provision of the Australian Consumer Law is said to be the basis for contravention of section 1.1. However, the relevant trigger for the operation of that section is said to be misleading or deceptive conduct. A number of possible provisions of the Australian Consumer Code may therefore be in question.¹
- 2.4 It is clear that in causing the Advertisement to be published on the Internet or broadcast via television, 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 Advertisement, or by causing the Advertisement 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.
- 2.5 Section 1.3 of the Code provides that Advertising or Marketing Communications shall not *contain a misrepresentation which is likely to cause damage to the business or goodwill of a competitor*. The Board has no doubt that comparative advertising, as made by the Advertisement, if it were to contain a misrepresentation of the type complained about, would be likely to cause some viewing consumers to consider purchasing the Oral B product in preference to the Complainant's Colgate Total product. Without evidence on point, the Board cannot be certain that the misrepresentation complained of would cause the damage to the Complainant's business or goodwill. The purpose of the Advertisement (including the misrepresentations alleged) is to attract consumers to Oral B, and in this case, in particular, away from Colgate Total. The Board therefore proceeds on the basis that (if established) the complaints set out at paragraph 4.1 below are likely to cause damage to the business or goodwill of the Complainant. If made out, such misrepresentations would also constitute conduct that was misleading or deceptive or likely to mislead to deceive.
- 2.6 The alternate ways of putting the Complaint do not provide additional bases for considering (and if made out, upholding) the Complaint. If the Advertiser's conduct in broadcasting or publishing the Advertisement or causing it to be broadcast or published, was misleading or deceptive or likely to mislead or deceive the Advertisement would contravene each of the Code sections 1.1, 1.2 and 1.3.²

¹ Australian Consumer Law, being schedule 2 to the *Competition and Consumer Act 2010*, SS 18, 29(1)(a), 29(1)(g) & 29(1)(l).

² The Advertisement clearly falls within the definition of an "Advertising or Marketing Communication" as defined with in the Code, and P&G has not submitted otherwise. While the Complaint as expressed in relation to section 1.2 is only for *misleading or deceptive* "conduct" and not expressed in the alternative as being "likely to mislead or deceive", in this instance there is no relevant distinction between these two ways of expressing the Complaint and P&G has not submitted otherwise.

2.7 Accordingly, in the balance of this Determination the Board considers whether the Advertisement is misleading or deceptive, as a shorthand expression to cover the three sections of the Code which are the basis for the Complaint.

3. Description of advertising or marketing communication

The material which is the subject of the Complaint comprises two versions of an advertisement for the Advertiser's product Oral B Pro Health Advanced Enamel Strong, one of 30 seconds duration and the other of 15 seconds duration. The Advertisement is currently airing on Channel 7 and Channel 9 and was published on YouTube on 25 February 2017.

4. The Complaint

4.1 The Complainant submitted in its initial complaint letter dated 21 March 2017 that the Advertisement is misleading, deceptive and or contains misrepresentations in breach of the Code and the Australian Consumer Law for the following reasons:

- *give the overarching impression to a reasonable consumer that if they use Colgate Total and not Oral B Pro Health, then their teeth will resemble the alarming image of an apple with a decaying core, (**Decaying Apple Core Representation**);*
- *misrepresent Oral B Pro Health's efficacy at treating the type and magnitude of internal decay represented by the decaying apple whilst disparaging Colgate Total's clinically proven internal strengthening efficacy, (the **Oral B Treatment Representation**);*
- *due to the statements "Use a toothpaste that helps with both" and "Strengthens the inside protects the outside" the [Advertisement] mislead a reasonable consumer to believe that Colgate Total does not provide both benefits (i.e. strengthening the inside of the enamel on the one hand and protecting the outside), which it is clinically proven to do. This misleading message is reinforced by a visual of a Colgate Total box being pushed to the side by an Oral B Pro Health box (the **No Internal Benefit Representation**)*

(together the P+G Representations).

The Complainant went on to say that:

"the decaying core of the apple is a gross overrepresentation of the type of decay that could be treated by Oral B Pro Health and is likely to arouse unwarranted and unrealistic expectations of Oral B's effectiveness at treating internal decay. The extent of the decay of the apple would, in fact, better represent decay extending into the dentine of the tooth and possibly into the pulp that would require professional treatment by a dentist. ... the misleading nature of the [Advertisement] is further compounded by [the Advertiser's] use of a dentist to lend dental endorsement to its misleading or deceptive claims and representations."

In its subsequent letter dated 19 April 2017, the Complainant submitted further that although it does not consider the efficacy of the Oral B Pro Health product to be in issue it nevertheless submits that the Advertisement is objectionable because:

- the browning of an apple is not an accurate way to visualise demineralisation of tooth enamel, more so when it [the browning] extends to its [the apple's] core, whereas tooth enamel covers only the outer most layers of the tooth; and
- whether or not the browning of the apple is the result of oxidisation on the one hand or decay on the other, the use of the browning apple, gives the impression to a consumer that the browning core of the apple is "bad"; and
- the extent of the browning of the apple in to its core misrepresents the type and extent of the benefits that Oral B Pro Health can provide because Oral B Pro Health's internal enamel strengthening and acid erosion protection benefits do not extend beyond the enamel (i.e. the outermost layers) of the tooth, and do not extend to the core (as represented by the browning of the apple to its core); and
- by the use of a visual of a Colgate Total box being pushed to the side by an Oral B Pro Health box, and the use of the statements "*use a toothpaste that helps with both*" and "*strengthens the inside protects the outside*", the Advertiser misrepresents and misleads consumers into believing that Colgate Total is not capable of providing both benefits (when in fact the Complainant asserts it is proven clinically to have such benefits); and
- the use of a "dentist" or an actor portraying one, and the voice over referring to "My dentist said..." implies some endorsement by the dental profession.

5. Advertiser's response

5.1 The Advertiser's responses to the Complaint were conveyed in its letters dated 5 April and 2 May 2017 as follows:

- (a) the Advertisement provokes consumers into thinking about the importance of the inside and outside of their enamel through the use of a metaphor in the form of a visual representation of an apple;
- (b) the depiction of the apple is not a representation that the use of Oral B Pro Health will address or repair tooth decay, or that the apple symbolises decaying teeth;
- (c) the apple shows slight discolouration and not in any state of decay; the premise of the Advertisement is to create a metaphor illustrating the outside and inside of the tooth enamel by way of the whole object cut in half, to stress the importance of looking beyond the surface, and in turn the importance of taking care of both the outside and inside of the tooth enamel (the Advertiser submitted that "*if the visual representation was limited to only the outer part of the apple without also showing the inside, then the metaphor behind the set-up becomes otiose*");
- (d) the Advertisement offers Oral B Pro Health as a product that addresses both the strengthening of the inside of the tooth enamel and the protection of the outer part of the enamel from acid erosion;

- (e) the Advertisement conveys to a reasonable consumer that Oral B Pro Health provides superior protection from acid erosion on the outer part of the enamel to Colgate Total; and
- (f) the Advertiser's use of comparative advertising in the Advertisement is factual, accurate and relevant and meaningful to the reasonable consumer and does not mislead consumers into believing that Colgate Total does not provide benefits on the inside and the outside of the enamel, including because consumers are familiar with Colgate Total's tooth strengthening benefits in enamel protection.
- (g) in assessing whether conduct is likely to mislead or deceive, the overall impression of the Advertisement must be considered, and this overall impression must be false or inaccurate; the Advertisement should be considered as a "short narrative whole" and that consequently the Complaint has no merit when the Advertisement is viewed in its entirety (as a reasonable consumer would view it);
- (h) the representations in the Advertisement are clear; namely that the Oral B Pro Health product helps with strengthening enamel and protecting the outside of the tooth from acid erosion, and that in "protecting the outside" from acid erosion, the Oral B Pro Health product performs better than the Colgate Total product – this comparative claim being reinforced by the Colgate Total box being "pushed to the side" by the Oral B Pro Health product.

6. DETERMINATION

INTRODUCTION

- 6.1 In considering and determining the matters raised by the Complainant, the Board has adopted the approach of the High Court in *ACCC v TPG Internet Pty Ltd* (2013) CLR 640; [2013] HCA 54 in considering each version of the Advertisement as a whole. The High Court has noted that identifying the dominant message is central to the assessment of whether particular advertisements are misleading or deceptive (that is, whether the advertisements induce or are capable of inducing error). In *ACCC v TPG*, the High Court noted that use of any qualifying statements needed to be clear and prominent, in order to be relied upon to counter an argument that a representation may be misleading or deceptive. The Board considers that this general principle applies equally to the use of any qualifying or limiting language, as the Advertiser submitted has occurred in this case.
- 6.2 It is, of course, not only the dominant message which may be misleading or deceptive. While the dominant message of advertising material is of crucial importance³:

*Where advertising material uses simple phrases and words evoking attractive notions, but without necessarily precise meaning, and ambiguity or reasonably available different meanings may well arise. Context and the "dominant message" will be important. If one or more of the reasonably available different meanings is misleading, the conduct may well be misleading or deceptive, or false and misleading.*⁴

³ *ACCC v Coles Supermarkets Australia Pty Limited* (2014) 317 ALR 73 at para 42

⁴ *ACCC v Coles* at para 47

- 6.3 In cases of comparative advertising, where a person produces a television commercial that *boosts* its own product and compares it critically with a product of another, so that the latter is shown in an unfavourable light by the comparison, particular care needs to be taken to ensure that statements are correct⁵.

THE REPRESENTATIONS

- 6.4 Does the Advertisement communicate to consumers, on any reasonable interpretation⁶;-
- (a) the Decaying Apple Core Representation.
 - (b) the Oral B Treatment Representation.
 - (c) the No Internal Benefit Representation .

The Decaying Apple Core Representation

- 6.5 The 30 second version of the Advertisement opens with a woman emerging from what appears to be a dentist's surgery. The Advertisement cuts back to an earlier time with the dentist (with his back to the camera) speaking with the woman whilst holding an apple – as if to use it to illustrate a point. She says:

My dentist just said something very interesting. He said that I should think of my teeth like an apple.

The Advertisement then cuts back to the woman holding the apple, which appears intact, with the skin side to camera. She turns the apple towards the camera, showing it to have been cut in half – and displaying very clear signs of discoloration. This discoloration is mainly around the core, extending mainly in a vertical plane, so reaching the skin at the top and bottom, but with discoloration far less evident on the left and right hemispheres, distant from the Core. She then says:-

They could be great on the outside, but not so great on the inside, where it matters most. His advice? Use a toothpaste that helps with both.

She is then shown holding the Oral B Pro Health product. All of this "action" occurs within the space of the first 12 seconds in the 30 second advertisement.

In the 15 second version of the advertisement, the "action" is foreshortened to 3 seconds, with the voiceover:

My dentist said my teeth could be great on the outside but not so great on the inside.

- 6.6 The image of the half apple with discoloration facing camera is visible for a little over 2 seconds in the 30 second advertisement, and a little under 2 seconds in the 15 second advertisement. The Board noted the shortness of time of display of the discoloured half apple.

⁵ *Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 53 FLR 307 at 310; *State Government Insurance Commission v JM Insurance Pty Ltd* (1984) ATPR 40-465 at 45, 362.

⁶ *CRW v Sneddon* 1972 AR NSW; *TIA v AFCo* (1992) 38 FCR 1

- 6.7 The majority of the Board considered that, the lasting image that a reasonable consumer would be left with is that of an apple that is discoloured at and radiating from its core; he or she would not have had a reasonable opportunity to discern whether or not the apple was rotten or in a state of decay, or merely lightly oxidised. The image is striking and a key element of the message communicated by the Advertisement – namely that just as an apple that looks shiny and fresh on the outside could appear unhealthy or unappetising on the inside, in the context of tooth care, the shiny enamel of a tooth may not necessarily show the true state of affairs.
- 6.8 One member of the Board did not consider that the Decaying Apple Core Representation was made. In that member's view consumers would not take literally the image of the discoloured apple as an accurate graphic presentation of the area within a tooth which might be "*not so great on the inside*": particularly so given the shortness of time which this image (albeit striking) was visible. That Board member considered that consumers would treat the discolouration at and around the core of the apple as illustrative of activity on the inside of the tooth, and no more.
- 6.9 The Advertiser has contended that inside of the apple represented the inside of tooth enamel⁷. The Board (unanimously) cannot see the basis for that contention. Either:
- (a) The woman is holding an apple that is discoloured at its core, radiating outward – suggesting a tooth with weakness or decay at its core – as opposed to the inside of the tooth enamel which is very close to the surface and well away from the dentine; or
 - (b) Consumers would regard the fleeting view on the discoloured apple core as indicative of activity on the inside of the tooth, not anchored to a specific location.

There is only one possible indication in the Advertisement that inside protection (as the Advertiser contends) represents the inside of the tooth enamel. That is a connection by asterisks from the words "*Strengthens the inside**" to "*Teeth enamel**" in a later short frame of the Advertisement. The asterisked connection is barely able to be read: and even if it were better able to be read, would not create consumer understanding that the discolouration of the apple was a specific reference to the inside of tooth enamel in an earlier part of the Advertisement.

- 6.10 The Board (by majority) concludes that the Decaying Apple Core Representation has been made in the Advertisement.

The Oral B Treatment Representation

- 6.11 All of the above images are also relevant to the Oral B Treatment Representation, as the two are closely allied. The cut away to the woman holding the Oral B Pro Health product draws the consumer to the conclusion that the use of Oral B Pro Health product will protect the tooth. The majority of the Board consider that this protection would be in respect of the tooth part depicted in the manner illustrated by the striking metaphor of an apple with discoloration at and radiating from its core (paragraph 6.7 above), while one member considered that this would not be the representation made (paragraph 6.8 above).

⁷ The Advertiser's 1st letter para 43, 45(a); the Advertiser's 2nd letter A(1)(B), 8.

- 6.12 Accordingly the Board (by majority) is of the view that the Oral B Treatment Representation has been made in the Advertisement.

The No Internal Benefit Representation

- 6.13 The second part of the Advertisement commences at the 12 sec mark in the 30 sec version. The Advertisement moves to an animated image of the Oral B Pro Health product, and then the image of a tooth with particles interacting with it to produce a "protective barrier", accompanied by the voice over:

Go Pro with Oral B Pro Health. It's formulated with ActiveStrength™ technology to strengthen teeth on the inside, and is better at protecting the outside than Colgate Total

At the same time, superimposed on the screen are the words:

*STRENGTHENS THE INSIDE * (with the subscript "** teeth enamel")
PROTECTS THE OUTSIDE ** (with the subscript "*** Provides superior enamel protection from acid erosion vs Colgate Total Original")*

The shot moves to an image of the Colgate toothpaste box, which is pushed aside by the Oral B toothpaste box. During this shot, the subscript ** above remains in shot.

- 6.14 These parts of the Advertisement are also included in the 15 second version.
- 6.15 The subscripts are in very small white lettering at the bottom of the screen, appearing predominantly during the "teeth" animation against a white background, such that they are very difficult, if not impossible to read, on a screen when playing in real time. The subscript ** appears against a blue background and becomes more prominent during the shot of the Colgate toothpaste box being pushed aside by the Oral B toothpaste box.
- 6.16 The advertisement then moves to an image of the smiling woman squeezing Oral B toothpaste with the voice over:

All good, inside and out.

- 6.17 This is followed by a further image of the Oral B Pro Health product with the voice over:

Oral B Pro Health. Strengthens inside and protects outside.

- 6.18 The voice over in the Advertisement at paragraph 6.13 breaks down into two clear and distinct statements:

- (a) The formulation of the Oral B Pro Health product strengthens teeth on the inside.

This is accompanied by the written words "*STRENGTHENS THE INSIDE **" and the apparent clarification "** teeth enamel*".

This is a clear representation that the Oral B Product strengthens teeth on the inside. There is no mention of the Colgate Total product at this point.

(b) The Oral B Pro Health product protects the outside of the tooth, providing superior enamel protection from acid erosion than its competitor Colgate Total Original.

6.19 At an earlier point in the Advertisement the women narrator has recited her dentist's advice that teeth could be great on the outside but not so great on the inside. The use of the apple imagery reinforces the idea that the dentist is revealing significant insight, relevant to the performance of Oral B Pro Health, that inner tooth health is important. Then the "running together" of two statements – the first a representation about the ability of the Oral B Pro Health product to strengthen teeth enamel on the inside without reference to the Colgate product, and the second a statement of the superior ability of the Oral B Pro Health product to provide protection from acid erosion when compared with the Colgate Total Original product is important.

6.20 Viewing the Advertisement as a whole, but in particular having regard to the combination of these elements, the Board members conclude that reasonable consumers will consider that the No Internal Health Benefit representation has been made. This conclusion is further reinforced by the emphasis created by the visual of a Colgate Total box being pushed to the side by an Oral B Pro Health box.

ARE THE REPRESENTATIONS MISLEADING AND DECEPTIVE?

6.21 The Board now moves to consider whether the P&G Representations, having been found by the Board to have been made, were deceptive and misleading.

The Decaying Apple Core Representation

6.22 The Complainant in its 1st letter dated 10 March 2017 argues that the Advertisement communicates that use of Colgate Total would result in a consumer's teeth resembling the image of the apple with a decaying core as represented in the Advertisement.

6.23 The Advertiser took issue with the characterisation of the Advertisement on representing or symbolised tooth decay. It argued that the browning near the core of the apple did not show a state of decay⁸ but that the browning of the apple concerned *overall enamel health* and *enamel protection*⁹.

6.24 The Complainant's 2nd letter dated 19 April 2017 expanded on the Complaint about resemblance, and recast, or at least expanded, on the references to decay in its 1st letter in these ways:

(a) the browning of the apple was said to be inaccurate in visualising *demineralisation* of the enamel;

(b) the resemblance showed *demineralisation* at the apple's core, whereas tooth enamel was an outer layer of the tooth.

6.25 The Board agrees with the Advertiser, to this extent, that basing the Complaint on *decay* appears to have been a loose, even unjustified, basis for complaint. However, the Board

⁸ The Advertiser's 1st letter paras 42, 44

⁹ The Advertiser's 1st letter para 45

has continued to consider the Complaint on the basis that it concerned an inaccurate depiction as against overall *enamel health*. The Board does so because:

- (a) the Complainant's 2nd letter moved away from the terminology of *decay*, to *demineralisation of the enamel*, and the Advertiser has had the opportunity to, and has, provided a detailed response to the Complaint expressed on this basis in its 2nd letter; and
- (b) more importantly, the Advertiser plainly understood the Complaint even through the Complainant's 1st letter as relating to enamel health (no matter what terminology was used); and it addressed in its first letter, in some detail, the efficacy of Oral B in strengthening the inside of tooth enamel by combatting the effects of demineralisation and promoting the remineralisation process¹⁰. This showed a plain appreciation that the Complaint was not, in reality, about (or restricted to) the depiction of tooth decay.

6.26 The Advertiser's substantive answer to the Decaying Apple Core Representation is that the browning on the inside of the apple represented the inside of tooth enamel¹¹. This contention is relevant to what representation was made. However, if the Decaying Apple Core Representation was made (as the Board by majority has found to be the case), the Board does not understand any argument is put forward by the Advertiser that overall tooth health is relevantly promoted by use of Oral B extending distantly from the inside of tooth enamel (at the outermost layers of the tooth) towards the core of the tooth¹².

6.27 It follows that the Board's determination is that if the Decaying Apple Core Representation has been made (as is the case in the opinion of the majority of the Board) it is deceptive and misleading and in breach of the Code, sections 1.1, 1.2 and 1.3.

6.28 The Advertiser has presented arguments and substantiating material to support the proposition that Oral B strengthens teeth enamel on the inside. The Complainant has not contested this proposition. The Board does not consider that the proposition influences its determination in relation to this representation, which concerns the location of the area in a tooth at which the benefit of using Oral B may occur.

Oral B Treatment Representation

6.29 The comments made at paragraph 6.22 to 6.28 above are directly relevant to considering the falsity of the Oral B Treatment Representation, as it has been considered by the Board to have been made.

6.30 The Advertiser has disavowed an intention to represent that Oral B provides tooth health benefits distant from the inside of tooth enamel, as depicted in the Decaying Apple Core Representation. Its material arguments to the Board have been that the Decaying Apple Core and Oral B Treatment Representations were not made, for the reasons and on the basis that the Advertisement should be understood only as referencing only the part of the tooth enamel that is not seen, ie. the inside.

¹⁰ For example, the Advertiser's 1st letter paras 25-35.

¹¹ The Advertiser's 1st letter para 43, 45(a); the Advertiser's 2nd letter A(1)(B), 8.

¹² Advertiser's second letter page 3, points 8-11.

6.31 It follows, there being no argument put forward to defend the Oral B Treatment Representation, if made (as it has been, in the opinion of the majority of the Board), that the making of the Oral B Treatment Representation is also deceptive and misleading and in breach of the Code, sections 1.1, 1.2 and 1.3.

The No Internal Benefit Representation

6.32 Again, the Advertiser strongly contests that the No Internal Benefit Representation has been made.

6.33 For the reasons set out at paragraphs 6.13 to 6.18, the Board considers that this Representation has been made.

6.34 If the No Internal Benefit Representation has been made (as the Board considers is the case) the Advertiser argues that as the Complainant is the market leader and consumers are already familiar with its products and efficacies which have been actively communicated, such that consumers will not be shaken in their understanding of Colgate Total's internal strengthening claims¹³.

6.35 The Board rejects this argument. The No Internal Benefits Representation having been made, it is not realistic to consider that consumers will have a well-developed and detailed understanding of the tooth strengthening benefits of Colgate Total toothpaste, sufficient to displace, correct or negate this representation.

6.36 The Board cannot find any other attempt to justify the No Internal Benefits Representation. That is not surprising, given that the Advertiser's position is that it did not intend to (and it says it did not) make that representation at all; and that the falsity of any such representation is so well known to consumers that the representation is negated.

6.37 In these circumstances, the Board considers that the Advertisement breaches the Code in respect of the No Internal Benefit Representation, sections 1.1, 1.2 and 1.3.

7. Other issues raised

Preliminary question

7.1 The Advertiser contends that the Complainant does not articulate with clarity how the Advertisement falls short of complying with the Australian Consumer Law, that the Complainant's mere reference to the Australian Consumer Law without specifying the relevant provisions on which it seeks to rely as the basis for its allegations is vague and tenuous and that in turn there is no proper basis under law for the Complainant's complaint under section 1.1 of the Code¹⁴.

7.2 The Board considers that the Complainant sufficiently articulates how the Advertisement fails to comply with the Australian Consumer Law such that the Complaint is properly made under section 1.1 of the Code. The Complaint clearly states that the Complainant considers the Advertisement to be misleading and deceptive. Those terms are well known

¹³ The Advertiser's 1st letter, para 56

¹⁴ The Advertiser's response 36-38

as they are used in section 18 of the Australian Consumer Law. There is no Code requirement that a complaint specify particular provisions of the Australian Consumer Law.

- 7.3 In any event, the Complaint is also made under sections 1.2 and 1.3 of the Code, neither of which involve reference to the Australian Consumer Law.

Other issues

- 7.4 The Advertiser raised the following further issues:

- (a) that the Advertiser is an "underdog" in the market for toothpaste products and the Complainant is market leader;
- (b) that the Complainant has devoted substantial resources towards advertising;
- (c) that the amount of the Complainant's relevant advertising spend exceeds that of the Advertiser; and
- (d) that studies and research confirm that Oral B Pro Health Advanced ES strengthens teeth enamel on the inside, protects the outside and delivers superior efficacy on enamel erosion prevention compared to Colgate Total Original.

- 7.5 The Board considers that the market position, resources and advertising spend of the Complainant or Advertiser are not relevant to the Board's consideration of whether the Advertisement is misleading or deceptive or contains misrepresentations.

- 7.6 The Board considers that the studies and research referred to by the Complainant are not relevant to the Board's consideration of whether the P&G Representations were made and if so, whether the P&G Representations are misleading and deceptive. The Advertiser does not assert that the studies and research confirm the accuracy of any of the P&G Representations, but rather that they confirm different representations, being those noted in paragraph 5.1 (d) and (e) and 6.28 above.

- 7.7 The Complainant contends that the advertisement "*unjustly denigrates Colgate Total toothpaste*¹⁵. In its letter dated 19 April 2017, the Complainant clarified that by this it means that P&G misrepresents and misleads consumers that Colgate Total is not capable of providing internal and external enable benefits when in fact Colgate Total is clinically proven to deliver those benefits. The Complainant notes that the Advertiser acknowledges the enamel remineralisation and demineralisation prevention benefits of sodium fluoride toothpaste such as Colgate Total.

- 7.8 As stated in paragraph 6.18 above, the Board considers that the No Internal Benefit Representation has been made. The No Internal Benefit Representation is a representation that Colgate Total does not provide benefits internal to the tooth¹⁶ due to the statements and visual relied on by the Advertiser. The Board considers that the No Internal Benefit Representation was misleading and deceptive, for the reasons set out in paragraphs 6.32 to 6.37 above. The Board does not consider it necessary for it to separately consider whether

¹⁵ Colgate Palmolive complaint letter 10 March 2017 point 3

¹⁶ Complaint says "both benefits, which is clinically proven to do". But advertisement expressly represents Colgate Total has external benefits; albeit inferior to Oral B. So the "misleading" alleged benefit must be internal to tooth benefits.

the Advertisement "unjustly denigrates" Colgate Total, given the clarification noted above and the findings of the Board.

Advertiser Statement

On 13 June 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 20 June 2017, the Advertiser provided the following response:

"Without accepting the correctness of the Claims Board's determination of the complaint, Procter & Gamble Australia Pty Ltd will modify the advertisement the subject of the determination."