

## Article Information

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## L'Oréal's quest for preliminary discovery was "worth it"

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*Earlier this month, Justice Beach in the Federal Court handed down orders for preliminary discovery for L'Oréal Australia Pty Ltd against BrandPoint Pty Ltd. The discovery relates to a prospective claim for misleading or deceptive conduct or false representations. Such conduct or representations were said by L'Oréal to be embodied in an email sent by BrandPoint marketing its PuraSonic "sonic facial cleansing brush", a direct competitor to L'Oréal's own Clarisonic range.*

### Background

Clarisonic was developed in the USA by Pacific Bioscience Laboratories Inc (**PBL**) in 2004. In around November 2010, PBL engaged BrandPoint Pty Ltd (**BrandPoint**) as the exclusive distributor of the Clarisonic range in Australia and New Zealand under a distribution agreement. PBL was acquired in 2011 by L'Oréal SA, the French parent company of L'Oréal Australia Pty Ltd (**L'Oréal**), and in November 2012, the distribution agreement between PBL and BrandPoint expired.

Since the expiry of the distribution agreement between PBL and BrandPoint, L'Oréal has marketed the Clarisonic range which continued to dominate the sonic facial cleansing market until the launch of BrandPoint's PuraSonic in October 2014. Since its launch, 16,000 PuraSonic units have been sold in department stores, pharmacies and online and there has been a drop in sales of the Clarisonic products after the launch of the PuraSonic product. It was claimed by BrandPoint that PuraSonic and Clarisonic were "operationally similar", but PuraSonic was less expensive. Similarities include "degrees of movement, similar sizes, similar rounded shapes, brush heads that oscillate at more than 300 movements per second, one-minute pulsating timers and magnetic inductive chargers."

The prospective claim revolves around a promotional email and brochure that was sent by BrandPoint to a number of retailers in the month after launching the PuraSonic. This email stated:

*As you are aware Brandpoint launched the Clarisonic Brand in Australia, it was subsequently purchased globally by L' Oreal and is available in Myer and David Jones. [...]*

*The Purasonic cleansing device is half the price on the equivalent Clarisonic Aria product with all of the same features.*

The attached brochure went on to make a number of claims regarding efficacy of the product, most of which closely resembled findings from studies carried out by PBL in 2006 and 2008 regarding the Clarisonic products. At the hearing, the BrandPoint email claims about the PuraSonic product were supported by "only a vague implication that 'internal testing' may have been conducted". In November 2014, a website promoting the PuraSonic was launched by BrandPoint containing different claims to those in the email, with these details updated in February 2015 and again in April 2015, eventually containing references to specific studies carried out with the new product.

### Test for preliminary discovery

The Federal Court has power to grant preliminary discovery if an applicant establishes their reasonable belief in their right to relief in that Court from the described respondent. This requirement, as highlighted by his Honour, is not a very onerous one:

*Generally, I only have to be satisfied that L'Oréal Australia "reasonably believes" that it "may" have the right to obtain relief in this Court from BrandPoint. It is not required to be shown that the belief is that L'Oréal Australia would have such right to relief. (emphasis in original)*

The right to relief stems from sections 18 and 29 of the Australian Consumer Law (**ACL**) which concern actions for misleading or deceptive conduct or false representations respectively. Such relief need not include a claim for damages; injunctive relief will suffice to enliven the court's power to order preliminary discovery.

### **Contention**

The argument underpinning the application relied on the similarity of the claims found in the BrandPoint email regarding the PuraSonic, to those in the findings of the PBL studies regarding the Clarisonic, and also these claims seen in light of the later, *different* claims made on the PuraSonic website which included reference to specific studies. Such a discrepancy, it was submitted by L'Oréal, with the more modest and plausible claims only appearing on the website many months after the claims made in the email, meant that the earlier claims were unsubstantiated, exaggerated and inaccurate. In its defence, BrandPoint led evidence from its managing director that the email containing the earlier claims was sent out in error, being only a draft.

### **Resolution & Orders**

Justice Beach agreed with most of the arguments made by L'Oréal; however, his Honour rejected the submission that the claims displayed by BrandPoint on the PuraSonic website were also misleading or deceptive conduct or false representations as "*entirely speculative*". His Honour made orders for a wide scope of discovery to be made by BrandPoint. In the course of doing so, his Honour noted that despite repeated requests from L'Oréal, BrandPoint had refused to provide information to substantiate or explain the product claims and found that there was a reasonable basis for claiming that no appropriate trials, testing or analysis was carried out in relation to PuraSonic by BrandPoint when the email was sent, and that this may form the basis of a claim of a breach of the ACL.

### **Discussion**

This case highlights, among other things, the critical importance of good customer relations in valuable markets – were it not for a retail client of L'Oréal informing it of the launch of the cheaper competing product by BrandPoint, this application may not have had reasonable prospects of success.

It also demonstrates the need to be accurate in marketing products, and to have relevant trials or tests to substantiate claims that are made.