

When green wash won't wash Avoiding misleading environmental claims

By Michael Terceiro

Businesses are increasingly keen to present an environmentally friendly or 'green' image to their customers. Both large and small businesses realise that it makes good business sense to offer environmentally conscious consumers the option of a green product or service. Customers are often willing to pay a significant price premium for a green product.

Unfortunately, many businesses, including large businesses, have made fundamental mistakes in their green marketing. Instead of getting positive publicity for offering a green alternative, these companies have received negative publicity for their "green wash". In some cases, these companies have had to grapple with unwanted attention from the ACCC.

This article explores some of the green marketing mistakes that businesses have made in trying to sell their green credentials. The focus of this paper will be on the application of the *Trade Practices Act 1974* (TPA) to green marketing claims.

Relevant law

The TPA contains two main civil provisions which can be used to attack false or misleading green claims. Section 52 prohibits corporations from engaging in conduct which is misleading or deceptive, or is likely to mislead or deceive, while s.53 prohibits corporations from falsely representing:

- that goods are of a particular standard, quality, composition or have had a particular history; or
- that goods have performance characteristics or benefits they do not have.

These provisions are mirrored under state fair trading legislation which applies to corporations, individuals and unincorporated entities.

The remedies available to the ACCC under the TPA for a contravention of the consumer protection laws have recently undergone significant changes.

Prior to 15 April 2010, the only remedies which the ACCC could obtain for a civil contravention of Part V of the TPA were include injunctions, declarations, compensation, corrective advertising and non-punitive orders.

However, from 15 April 2010 a range of new remedies and powers were introduced to the TPA. The ACCC now has the ability to:

- seek civil pecuniary penalties of up to \$1.1 million for a contravention of a number or provisions of Part V including section 53 of the TPA;
- seek non-party redress for consumers who may have suffered loss due to a misleading environmental claim;
- disqualify directors and managers for making misleading environmental claims;
- issue infringement notices, or on-the-spot fines, to businesses which have engaged in green-washing in breach of section 53; and
- issue public warning notices, or name-and-shame notices, to alert consumers about traders which are engaging in conduct which the ACCC believes may be false or misleading.

The ACCC also has the ability to refer a brief to the CDPP if it believes that a criminal prosecution is warranted. The criminal penalties available under the TPA for breaches of Part V are a maximum of \$1.1 million per contravention.¹

One important aspect of the civil liability regime under the TPA is that it establishes a reverse onus of proof for representations about future matters.² Therefore, if a business makes a representation about the future environmental benefits of a product, it may bear the onus of demonstrating that it had reasonable basis for making such a representation.

Getting caught out

There are many groups regularly monitoring the green claims being made by businesses. Accordingly, there is a high likelihood of being caught out if a business makes a false green claim.

First, the Australian Competition and Consumer Commission (ACCC) appears to have made green claims an enforcement priority. The ACCC has been very active in this area, having concluded 11 cases and investigations involving environmental matters in the last 2 years.

Second, there are a large number of vigilant and sophisticated non-government organisations constantly on the lookout for green claims that are misleading. For example, it was a complaint from the Total Environment Centre which prompted the ACCC to investigate EnergyAustralia (discussed below). These organisations can also initiate their own private actions of breaches of the relevant civil provisions of the TPA.

The final major risk is posed by competing businesses. Competitors will be very keen to complain to the ACCC about a green claim which does not stack up.

¹ Part VC TPA – Section 75AZC(1)(a), (b), (e).

² Section 51A, TPA.

ACCC enforcement

Air-conditioning

The first notable series of environmental investigations taken by the ACCC relate to claims made by the Australian air-conditioning industry that its products were “environmentally friendly”.

The first case was taken in 2003 against Sanyo Airconditioning Manufacturing Singapore Pte Ltd,³ which claimed that its Eco Multi Series air conditioners had "environmentally-friendly HFC 'R407C' Added" and were "for a new ozone era - keeping the world green".

The problem with this representation was that R407C is considered to be a potent greenhouse gas and as such was hardly “environmentally friendly”. Another gas which was used in the Eco Multi Series was R22, an ozone depleting hydrochlorofluorocarbon. R-22 was clearly not beneficial to the ozone layer.

The ACCC decided to take this case for the following reasons.

First, the entire Australian air-conditioning industry at that time appeared to be making very similar and, in the ACCC’s view, false and misleading representations about the refrigerants used in their air conditioners.

Second, according to the ACCC’s research there had never been a decided case anywhere in the world in relation to the term “environmentally friendly”. Accordingly, the ACCC was keen to take litigation to establish a precedent in relation to the meaning of this term.

Finally, the ACCC was advised by Sanyo that the representations which it was making, and which all of its competitors were also making, were being made by air conditioning companies on a global basis. Therefore, the ACCC saw this case as raising global consumer protection issues which may have been amenable to global enforcement action by consumer protection regulators in a number of different jurisdictions.

Unfortunately, for the ACCC, Sanyo gave up immediately once legal proceedings were commenced. Indeed, the first directions hearing also became the last day of the matter.

Despite the premature end to this case, two important issues can be gleaned from the ACCC’s approach to the matter.

First, the ACCC took the view that “environmentally friendly” is a representation that a product will have a neutral effect, as opposed to a beneficial effect, on the environment. Therefore, a product that does not harm the environment could arguably be described as “environmentally friendly”.

³ ACCC institutes court action against Sanyo Airconditioners Manufacturing Singapore Pte Ltd:

<http://www.accc.gov.au/content/index.phtml/itemId/365424/fromItemId/621575>.

Federal Court finds "Green" claims to be misleading:

<http://www.accc.gov.au/content/index.phtml/itemId/398527/fromItemId/621575>.

(The author ran this investigation and litigation at the ACCC.)

Second, the ACCC took action against Sanyo Airconditioning in relation to both the text it used in its marketing materials, as well as the images of trees, the sea and the moon which featured prominently in its advertisements and brochures. The ACCC believes that such images added significantly to the strong environmental message being conveyed to consumers.

Following this case, there were two further investigations into air conditioning companies for making similar representations – namely investigations into Daikin⁴ and Dimplex⁵.

The ACCC commenced the Daikin investigation in the hope that Daikin may in fact decide to contest the matter in Court, so that the ACCC could establish the precedent which it had wanted to establish through the Sanyo case. Unfortunately, for the ACCC, Daikin must have seen the writing on the wall, as it immediately agreed to give up and implement all the remedies asked for by the ACCC.

In both the Daikin and Dimplex cases, the companies entered into s.87B undertakings to cease making the green representations and carry out a range of corrective remedies, including publishing corrective notices on their websites and industry magazines and writing corrective letters to customers and distributors.

In addition, the global enforcement action never materialised. Rather what happened was that Australia became the only jurisdiction in the world where air-conditioning companies avoided making any environmental claims about their products for fear of being prosecuted by the ACCC.

Motor vehicles

Another area of considerable ACCC enforcement activity relates to green representations made by business involved in the motor vehicle industry.

In 2008, the Federal Court declared by consent that representations made by GM Holden Ltd about the environmental benefits of Saab motor vehicles were misleading.⁶ In particular, GMH made the claim that “Every Saab is green. With carbon emissions neutral across the entire Saab range”. The basis for this claim was that GMH would plant 17 native trees per vehicle to offset the emissions generated during the life of each motor vehicle. In actual fact, the 17 trees would have only offset the carbon emissions for one year of a motor vehicle’s operation.

GMH was ordered to refrain from making such representations in the future and to re-train its marketing staff. However, the largest cost to GMH (apart from the damage to its credibility as a seller of “green” products) was its offer to plant an additional

⁴ *Warning to air conditioning industry after Daikin 'green' claims challenged by ACCC:*
<http://www.accc.gov.au/content/index.phtml/itemId/596776/fromItemId/621575>.

(The author ran this investigation at the ACCC.)

⁵ *Dimplex chills out on "environmentally friendly" claims:*

<http://www.accc.gov.au/content/index.phtml/itemId/770506/fromItemId/621575>.

(The author ran this investigation at the ACCC.)

⁶ *ACCC takes action against GM Holden Ltd over Saab 'green' claims:*

<http://www.accc.gov.au/content/index.phtml/itemId/808355/fromItemId/621575>.

Saab 'Grrrrreen' claims declared misleading by Federal Court:

<http://www.accc.gov.au/content/index.phtml/itemId/843395>.

12,500 trees to offset the carbon emissions from the motor vehicles which it did sell during the Saab "Grrrrreen" advertising campaign.

Another ACCC matter involved green representations made by V8 Supercars as part of its 'Racing Green Program'.⁷ V8 Supercars claimed that the planting 10,000 native trees would offset the carbon emissions from the V8 Championship Series as well as all associated transport emissions of the racing teams travelling to events. The ACCC was concerned that consumers would understand that the 10,000 trees would absorb the carbon emissions in a short period of time, when in actual fact the emissions from one year of racing would only be absorbed by these trees over several decades.

The final matter involved representations made by Goodyear about its Eagle LS2000 range of tyres.⁸ Goodyear said that this tyre range was environmentally friendly, designed for minimal environmental impact, and that its production processes resulted in reduced carbon dioxide emissions. Goodyear settled this matter with the ACCC by providing a s.87B undertaking in which it admitted that these environmental benefits could not be substantiated.

These cases raise the fairly fundamental issue of whether car manufacturers can ever say anything meaningful about the environmental benefits of their products. Given that motor cars are inherently damaging to the environment, it seems that any claims made by car manufacturers would have to be extensively qualified to ensure that the representation was accurate.

It may be appropriate to take the approach adopted by one European jurisdiction and simply ban car manufacturers from making any environmental benefit claims about their cars.

Energy Australia

The ACCC has also looked closely at green claims made by energy companies.

One particular investigation related to EnergyAustralia and its representations about its CleanAir and GreenFuture non-accredited electricity products.⁹ EnergyAustralia claimed that consumers who signed up would get "100% green electricity at no extra cost" and that "for every kilowatt hour of electricity you buy, the same amount of electricity will be generated from 100% renewable sources, and that's guaranteed".

The ACCC was concerned that consumers would interpret these representations to mean that by choosing these products, they were supporting new sources of renewable energy rather than simply offsetting their electricity against existing or old sources of renewable energy.

While EnergyAustralia did not admit that its representations were misleading, it did acknowledge that customers might have been confused by the representations.

⁷ V8 Supercars corrects carbon emissions claims: <http://www.accc.gov.au/content/index.phtml/itemId/843360>.

⁸ Goodyear Tyres apologises, offers compensation for unsubstantiated environmental claims: <http://www.accc.gov.au/content/index.phtml?itemId=833219>.

⁹ EnergyAustralia clears air about green electricity claims: <http://www.accc.gov.au/content/index.phtml/itemId/806650/fromItemId/621575>.

(The author ran this investigation at the ACCC.)

As a result, EnergyAustralia agreed to a range of remedies including compensation, corrective letters to customers and a contribution of \$100,000 to an educational brochure to explain the difference between accredited and non-accredited products.

Prime Carbon

In March 2010, the Federal Court declared that Prime Carbon Pty Ltd has made false and misleading representations about the supply of carbon credits. Prime Carbon was involved in the sale of a “soil carbon and sequestration program” to farmers.¹⁰

However, the false and misleading claims did not relate to the ability of Prime Carbon to provide the claimed services, but rather to a number of associated representations. For example, Prime Carbon claimed that it had an affiliation with the National Stock Exchange (which it did not have) and also made a number of representations about the status of National Energy Registry (which were not correct).

The main vice of Prime Carbon’s conduct appears to be that it represented to consumers that its services were to be preferred to its competitors because it was operating through National Energy Registry which it claimed was regulated and approved by the Commonwealth Government.

Global Green

In January 2010, Global Green Plan Pty Ltd provided the ACCC with court enforceable undertakings in relation to the purchase of renewable energy certificates.¹¹

Global Green accepted payments from its customers to purchase renewable energy certificates. These REC’s were to be used to offset the carbon emissions generated by both commercial and residential customers. However, Global Green did not use all the money it obtained from customers to purchase the REC’s as promised.

As a result of the settlement Global Green was required to purchase more than 4000 REC’s to make up for the REC’s it failed to buy for consumers during 2007 and 2008.

Nappies

The final matter relates to biodegradable nappies.

In December 2008, the ACCC instituted legal proceedings against SeNevens International Ltd and its director, Ms Charishma Seneviratne, for making allegedly misleading representations that the Safeties Nature Nappy product was 100% biodegradable.¹²

The Federal Court found that these representations were false as the nappies contained plastic components that were not capable of being broken down by the biological activity of living organisms.

¹⁰ Company admits misleading consumers about marketing carbon credits:
<http://www.accc.gov.au/content/index.phtml/itemId/918242>

¹¹ Former GreenPower retailer to purchase outstanding certificates:
<http://www.accc.gov.au/content/index.phtml/itemId/908477/fromItemId/621575>

¹² Nappy biodegradability claims declared false and misleading:
<http://www.accc.gov.au/content/index.phtml/itemId/851993>

In March 2009, the proceedings against Ms Seneviratne were also resolved. The Court found that she knowingly made false representations about the biodegradability of the nappies.¹³ As a result she was restrained for five years from making similar representations in the future.

Lessons

The main lessons to come out of this review of ACCC case and investigations are that businesses:

- (1) have to make sure that they scientific evidence to back up the claim – eg Sanyo, Daikin, Dimplex and Goodyear
- (2) are careful in their use of at any images or pictures in any green advertising – eg Sanyo and Daikin
- (3) should avoid overstating the environmental benefits of a green initiative – eg GM Holden, V8 Supercars and SeNevens
- (4) avoid making green representations which are simply too confusing for consumers to understand – eg EnergyAustralia
- (5) recognise that some environmental benefits are simply too complex to translate into a short and sharp marketing message – eg EnergyAustralia
- (6) do not misrepresent government policy or the government’s administrative arrangements in relation to green issues – eg Prime Carbon
- (7) deliver on what they promise their consumers - eg Global Green, V8 Supercars and GM Holden.

These cases and investigations also demonstrate that the ACCC continues to be very vigilant in the area of green marketing. The main reasons for the ACCC’s vigilance in this area is two fold:

- (1) the ACCC clearly recognises that environmental issues are becoming increasingly important to consumers and
- (2) green marketing is a relatively new and evolving market which can attract more than the usual number of rogue traders.

Resources

There are a number of resources which can help businesses to avoid breaching the TPA in relation to their green marketing. The three resources I would recommend for any business which is considering making green marketing claims are:

- (1) *“Green marketing and the Trade Practices Act”*.¹⁴

¹³ Company director ‘knowingly concerned’ in false nappy biodegradability claims:

<http://www.accc.gov.au/content/index.phtml/itemId/866630/fromItemId/621575>

¹⁴ *Green marketing and the Trade Practices Act*, ACCC, 2008 – electronic version available for free download at <http://www.accc.gov.au/content/index.phtml/itemId/815763>.

- (2) *“Carbon claims and the Trade Practices Act”*.¹⁵
- (3) *“Environmental labels and declarations – Self-declared environmental claims”*.¹⁶

The first two publications have been issued by the ACCC and provide a simple guide to the types of issues which businesses need to be conscious of when engaging in green marketing or marking carbon claims.

The final document is a fairly old voluntary standard which provides a lot of practical guidance on the types of claims which businesses should be careful using or avoids altogether.

Conclusion

Green marketing claims continue to be important area for businesses and for the ACCC. Businesses risk breaching the TPA if they make sloppy, vague or unresearched green representations.

The ACCC’s strong enforcement approach to misleading environmental claims appears to have had a positive impact on the accuracy and clarity of green marketing claims across the board.

For example, the use of green marketing claims has changed significantly since 2003 when entire industries were making wide ranging and fairly blatant misleading representations about the environmental benefits of their products. Today, blatant examples of false or misleading environmental claims are much rarer and unlikely to be occurring on an industry wide basis.

Despite these developments, it remains a significant challenge for the ACCC to stay in-step with the science which underpins many environmental representations. For this reason, the ACCC will continue to need the assistance from environmental groups, such as the EDO, in bringing to its attention examples of alleged green washing and providing the ACCC with the scientific evidence it needs to establish its cases.

¹⁵ *Carbon claims and the Trade Practices Act*, ACCC, 2008 – electronic version available for free download at <http://www.accc.gov.au/content/index.phtml/itemId/833279>.

¹⁶ *Environmental labels and declarations – Self-declared environmental claims*, AS/NZS ISO 14021: 2000, available for purchase at <http://www.saiglobal.com>.