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## Do you "green wash"? Avoiding Green Marketing Legal Traps

Stephens Lawyers & Consultants: Australian Consumer Legal Update: March 2011

### Overview

"Green washing" in advertising, is a powerful marketing tool, enabling advertisers to tap into the growing consumer market for environmentally friendly products and services. Environmental claims are now being attached to a wide variety of products, from small household items (toilet paper, detergents, shampoos) to office supplies (paper and stationery), whitegoods and appliances, and vehicles. A 2008 survey by CHOICE of 185 non-grocery items found 637 green claims (an average of three per product). [\[1\]](#) In response to the increased proliferation of green marketing in recent years, the Australian Competition and Consumer Commission ('ACCC') is cracking down on unsubstantiated or misleading "green" claims.

If your business manufacturers, supplies or advertises products or services with statements about environment sustainability, recycling, energy and water efficiency, or the impact on animals or the environment, it is important to ensure that your claims are accurate and verifiable. Businesses who fail to do so, may breach the misleading and deceptive conduct [\[2\]](#) and false representation [\[3\]](#) provisions of the *Competition and Consumer Act 2010 - Schedule 2 The Australian Consumer Law* (formerly *Trade Practices Act 1974*) ("Australian Consumer Law"), and/or the *Environmental Claims in Advertising and Marketing Code*. Additionally, businesses may suffer commercially and risk reputational standing if their environmental claims prove false.

Under the **Australian Consumer Law**, the ACCC has wide enforcement powers to combat "green washing" claims. The ACCC has stepped up prosecutions in this area. This Legal Update looks at the recent ACCC court actions..

### Australian Consumer Law & Penalties

With the global focus on environmental sustainability, being a "green" company or supplying products which are "green", "energy efficient", "carbon neutral" "organic" "environmentally friendly" or "not tested on animals", has significant commercial benefits and can result in increased sales and market share. Marketing campaigns that are focused at the environmentally conscious consumer, need to be carefully planned and scrutinised to ensure that the "environmental" or "green" claims made can be substantiated and the representations are clear and unambiguous. The use of technical or scientific jargon can be particularly risky, if the claims made can not be substantiated or proven. [\[4\]](#)

Under the Australian Consumer Law two key provisions can be invoked in legal proceedings scrutinising false or misleading environmental claims. Section 18 of the Australian Consumer Law, [\[5\]](#) contains a general prohibition against misleading and deceptive conduct; this section covers conduct which is misleading or deceptive or likely to mislead or deceive members of the target audience.

Section 29 of the Australian Consumer Law prohibits the making of false or misleading representations about specific aspects of goods or services. [6] Whilst this section outlines numerous types of representations which will be considered false or misleading, in the context of green claims, businesses must ensure that they do not falsely represent that goods or services:

- are of a particular standard, quality, composition or have a particular history; [7]
- have a sponsorship, approval, performance characteristic or benefits; [8] or
- are of a particular place of origin. [9]

Any person who suffers loss or damage because of the contravention of Sections 18 and 29 of the Australian Consumer Law, can take court proceedings and the court can grant injunctive relief and award damages for the loss or damage suffered. The ACCC and State regulators can also take court action against the offending party. Further, under recent changes implemented under the Australian Consumer Law, the ACCC and state regulators can issue substantiation notices which will require businesses to provide evidence to support environmental claims [10]. The ACCC and State regulators can also issue infringement notices and public warning notices against offending businesses.

In relation to contravention of Section 28 of the Australian Consumer Law which prohibits false or misleading representations about goods or services, significant pecuniary penalties can also be imposed by the courts: in the case of companies up to \$1.1million, and in the case of individuals up to \$220,000 [11].

## Recent Actions

### "Free Range" eggs misleadingly labelled

In December 2010, the Federal Court declared that Mr and Mrs Pisano (trading as C I & Co), misled the public as to the nature and characteristics of eggs they supplied to customers by labelling eggs as being "free range", when a substantial portion of the eggs were not. [12] In finding that the parties breached sections 52 and 53 of the *Trade Practices Act (equivalent provisions to Sections 18 and 28 Australian Consumer Law)*, Justice North noted that "the conduct involved a high level of dishonesty. The conduct was extremely difficult to detect because once the eggs were placed in the cartons, it was impossible to determine whether they were free range or not". [13] Mr Pisano was ordered to pay a penalty of \$50,000, and Mr and Mrs Pisano were restrained from engaging in similar conduct in the future. The respondents were also ordered to pay the ACCC's costs and to publish notices of the decision in *The Australian*, newspaper. [14]

### False, Misleading and deceptive claims: "Goody" Plastic Bags

In December 2010, Justice Lander of the Federal Court declared by consent that Good Environment Pty Ltd had engaged in misleading and deceptive conduct, and made false representations [15] regarding the biodegradability of its "Goody" branded plastic bags. [16] Goody had asserted that its bags were biodegradable and compostable, and met the relevant Australian Standard to be supplied in South Australia. [17] However, the bags were found to contain a heavy metal in amounts exceeding the maximum permissible under the Australian Standard, and did not biodegrade, disintegrate or compost. [18] The ACCC accepted court enforceable undertakings from Goody that it would refrain from making such representations until it had obtained independent scientific testing, to comply with the Australian Standard. Goody was also ordered to publish corrective advertising on its website and in *The Advertiser* newspaper, implement a Trade Practices Compliance program and contribute \$65,000 to the ACCC's costs of the proceedings. [19]

## Prime Carbon Pty Ltd: False Affiliations

In January 2010 the ACCC instituted Federal Court proceedings against Prime Carbon Pty, alleging that it made false or misleading representations about marketing carbon credits and its affiliations, on the company website and promotional brochures. Prime Carbon sells a 'soil carbon and sequestration program' to farmers which aims to sequester carbon from the atmosphere and store it in agricultural land. The company also assists farmers with: the creation and management of specific amounts of carbon dioxide sequestered or abated from the environment ("carbon credits"); the registration and marketing of carbon credits and designing and facilitating carbon sequestration projects. [20] In court orders, made by consent, in March 2010, Justice Spender declared that between July 2008 and December 2009, Prime Carbon breached section 53 *Trade Practices Act* (equivalent to Section 18 *Australian Consumer Law*), by claiming a false affiliation or association with the National Stock Exchange of Australia. Further, Prime Carbon misrepresented its association with the National Environment Registry Pty Ltd, which Prime Carbon incorrectly claimed was supported by the Australian Government. [21] The Federal Court made orders:

- Restraining Prime Carbon and its sole director from engaging in such conduct;
- Required the sole director to undertake *Trade Practices* compliance training;
- Required Prime Carbon to publicise the Court's orders, send letters to customers and place a notice on their website; and
- Required Prime Carbon to pay the ACCC's costs. [22]

## Environmental Claims in Advertising and Marketing Code

In addition to the prohibitions under the Australian Consumer Law, "green claims" are also regulated by the Australian Association of National Advertisers' (ANNA) *Environmental Claims in Advertising and Marketing Code*. [23] This voluntary code came into effect on 1 January 2010, and provides a set of guiding principles to assist advertisers when making environmental claims in relation to products or services. Significantly, the Code emphasises that claims should be:

- truthful and factual;
- relevant to the product or service and its actual environmental impacts; and
- substantiated and verifiable. [24]

The ANNA also released a Practice note in January 2010, to assist in interpreting the Code. [25]

Complaints about breaches of the Code are adjudicated by the Advertising Standards Board (ASB). The ASB can request that a business/advertiser remove or amend any marketing material found to be in breach of the Code.

## Implications

If your business manufactures, markets or sells products or services with claims as to their sustainability or "environmentally friendly" attributes, it is important to ensure that you can verify and substantiate your representations. Given the ACCC's recent crackdown on unjustifiable "green" claims, businesses may face legal action and substantial fines if they fail to comply with the Australian Consumer Law. Further, whilst "green" claims are becoming increasingly important to consumers, businesses risk losing customer trust, if their environmental claims prove inauthentic.

Stephens Lawyers & Consultants can advise on all aspects of Australian Consumer Law compliance and the *Competition and Consumer Act*.

**Our** lawyers represent leading companies in both litigious and commercial matters.

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[1] ACCC, 'Green Marketing and the ACCC', Speech: ACCC Deputy Chair Louise Sylvan, 8 May 2008, available at:

<http://www.accc.gov.au/content/item.phtml?itemId=826938&nodeId=076f0ada7d4d555540b83ba6fba76b0&fn=Green%20marketing%20and%20the%20ACCC.pdf>.

[2] *Competition and Consumer Act*, sch 2, s 18.

[3] *Competition and Consumer Act*, sch 2, s 29.

[4] ACCC, '[Green Marketing and the Trade Practices](#)', 8 February 2008.

[5] This provision is equivalent to section 52 under the former *Trade Practices Act 1974*.

- [6] This provision is relates to section 53 of the *Trade Practices Act 1974*, however, some minor amendments were included in the 2010 revisions to Australian consumer law.
- [7] *Competition and Consumer Act*, sch 2, ss 29(1)(a), 29(1)(b).
- [8] *Competition and Consumer Act*, sch 2, s 29(1)(g).
- [9] *Competition and Consumer Act*, sch 2, s 29(1)(i).
- [10] *Competition and Consumer Act*, sch 2 Division 2 - Substantiation Notices. Section 219
- [11] *Competition and Consumer Act*, sch 2 Division 1 - Pecuniary Penalties. Section 224
- [12] *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511 (23 December 2010).
- [13] *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511 (23 December 2010) (North J), at [31].
- [14] ACCC, '[Court penalises wholesalers for "cruel deception" on free range eggs](#)', News Release, 4 February 2011.
- [15] This decision was made under the now superseded legislation, under section 52 and 53 of the *Trade Practices Act 1974*.
- [16] ACCC, '[Misleading conduct in relation to "Goody" plastic bags](#)', News Release, 5 January 2011.
- [17] *Australian Standard AS4736-2006 for Biodegradable plastics suitable for composting and other Microbial Treatment*.
- [18] ACCC, '[Misleading conduct in relation to "Goody" plastic bags](#)', News Release, 5 January 2011.
- [19] ACCC, '[Misleading conduct in relation to "Goody" plastic bags](#)', News Release, 5 January 2011.
- [20] ACCC, '[Company admits misleading consumers about marketing carbon credits](#)', News Release, 11 March 2010.
- [21] ACCC, '[Company admits misleading consumers about marketing carbon credits](#)', News Release, 11 March 2010.
- [22] ACCC, 'Company admits misleading consumers about marketing carbon credits', News Release, 11 March 2010,
- [23] Australian Association of National Advertisers' (ANNA) [Environmental Claims in Advertising and Marketing Code](#).
- [24] Australian Association of National Advertisers' (ANNA) [Environmental Claims in Advertising and Marketing Code](#).

[25] Australian Association of National Advertisers' (ANNA) [\*Environmental Claims in Advertising and Marketing Code: Practice Note.\*](#)