

update

19 September 2008

Friday Facts: Exercise caution in the race to be green

With growing concern for the future of our planet, consumers are increasingly demanding a “green” marketplace. In an effort to entice consumers and oust competitors, businesses are rapidly adopting “greener” practices and vigorously promoting their “green” credentials. However, in the race to be “green”, businesses must be careful not to make inaccurate and unsubstantiated claims or will risk facing the full brunt of Australia’s consumer watchdog, the Australian Competition & Consumer Commission (“ACCC”).

The environmental impact of a business, product or service plays a significant role for an increasing number of consumers when making decisions about what to purchase. This unprecedented “green” consumer mentality has meant that “green marketing” has not only become a powerful business tool but is necessary for survival.

“Green marketing” involves a claim or representation with respect to the benefit or impact which a business practice, product or service has on the environment. For example, claims may be made about recycling, environmental sustainability, energy or water efficiency. Catchphrases such as “carbon neutral”, “energy efficient” and “environmentally friendly” are examples of the type of “green” marketing dominating our marketplace. However, such marketing is not limited to the use of words and can take on various forms.

“Green” claims can be made through the use of pictures (such as of forests or the earth), symbols (such as those that have been widely accepted as having a particular meaning) and even through the overall impression conveyed by packaging or an advertisement. For instance, the ACCC has noted that a picture of a dolphin on a can of tuna may be taken by consumers to mean that the tuna has been fished without harming dolphins.

The ACCC is alive to “green” marketing and has warned that businesses must ensure that their claims are scientifically accurate and can be appropriately substantiated. Inaccurate and unsubstantiated claims may contravene several provisions of Part V of

the *Trade Practices Act 1974* (Cth) (the “TPA”), and equivalent state and territory legislation.

The TPA contains a broad prohibition on conduct which misleads or deceives, or is likely to mislead or deceive. Importantly, the TPA does not require that someone actually be misled or that the business have the intention to mislead. Thus, a business with the best of intentions can still contravene the TPA.

The TPA also contains provisions prohibiting various false or misleading representations such as representations that goods or services are of a particular standard, quality, value, grade, composition, style or model, or have a particular history or previous use. To illustrate, an inaccurate claim that a product is made of 100% recycled parts may amount to a false representation as to standard, quality, composition, history and previous use. Finally, the TPA prohibits representations that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have. For instance, a product that falsely claims to have been approved by a particular environmental body would most likely breach the TPA.

Not only does a business risk damaging its reputation by engaging in contravening conduct, but it may be subject to serious consequences, including criminal penalties. It is essential that businesses have a comprehensive trade practices compliance program in place to reduce the likelihood of a breach.

Recently, the ACCC successfully took action against Hagemeyer Brands Australia (“HBA”). HBA advertised particular air conditioners as “environmentally friendly”. Whilst the air conditioners were using less harmful forms of refrigerants, the refrigerants were a potent form of greenhouse gas and thus were still contributing to global warming. To assist businesses, the ACCC has set out five basic principles that should be followed when a business makes a “green” claim. It has stated that a claim should:

1. be honest and truthful;
2. detail the specific part of the product or process it is referring to;
3. use language which the average member of the public can understand;
4. explain the significance of the benefit; and
5. be able to be substantiated.

The ACCC is serious about protecting consumers from inaccurate green claims and is currently seeking greater investigatory powers. The Productivity Commission recommended in its paper, *Consumer Policy Framework*, that the TPA be amended to give the ACCC the power to issue “substantiation notices”. Such notices would require a business to “reasonably substantiate” the “green” claim or representation made.

Whilst the ACCC already has the power, under section 155 of the TPA, to issue a notice requesting information with regards to a marketing claim, it can only do so where it has “reason to believe” that the claim may contravene the TPA. However, given that

environmental claims often involve complex scientific evidence, it can be difficult for the ACCC to determine, on the face of the claim, whether it is true or not and thus whether it has the requisite "reason to believe". The proposed "substantiation notices" would not require the satisfaction of any such threshold and therefore could be issued with ease. The notices would not only be an effective way for the ACCC to determine the truth of a claim, but would also act as a powerful compliance mechanism and deterrent.

Ultimately, the answer is simple. Businesses should heed the ACCC's warning: "if you can't back a claim with verified scientific evidence, don't make it".

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