



Presentation to
Annual National Air Conditioning & Energy Forum

“Environmental Claims and the Trade Practices Act”

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1. INTRODUCTION

It is the role of the Australian Competition and Consumer Commission to enforce the Trade Practices Act and therefore enhance the welfare of all Australians through the promotion of competition and fair trading, as well as to provide for consumer protection.

In doing this, we are fairly unique – in most other countries these two roles – consumer protection and promoting competition - are administered by separate agencies.

But in reality they are actually two sides of the same coin - if for example, one business is able to get away with false or misleading conduct and representations then it could gain an unfair advantage over its competitors.

And if consumers are given deceptive or misleading information about goods and services they are not able to make an informed choice when choosing between competing products.

This is especially so when it comes to such an emotive and complicated area as claims related to environmental attributes.

2. ACCC INITIATIVES ON THE ENVIRONMENTAL CLAIMS

The ACCC first became involved with environmental issues in 1992 when the then Trade Practices Commission, issued an industry guideline for environmental claims in marketing.

The guideline was a response to a number of misleading environmental marketing claims made in the late 1980s and early 1990s.

This was at a time when the environment had become a major political and social issue, and many businesses were eager to satisfy demands by consumers for environmentally friendly products by either promoting their green credentials or developing new green products.

Regrettably, quite a number of those promoting these new products had very little basis on which to make their claims, either because the products weren't environmentally friendly at all, or because the claims left out crucial details.

There were claims for example that certain types of dishwashing liquid were environmentally friendly because they didn't contain phosphates when, as it turned out, they'd never contained phosphates in the first place. Everybody, it seemed, wanted to jump on the environmental bandwagon.

So the guide we issued in 1992 highlighted the potential of some environmental claims to breach the general prohibition on misleading and deceptive conduct in Section 52 of the Trade Practices Act.

Of course, given the passions that the environment arouses, there are many difficulties in deciding just what constitutes misleading and deceptive conduct when it comes to environmental claims.

I should stress here that it is NOT the task of the ACCC to rule on the environmental merits of particular products or services.

It is not our job to decide whether, for example, a certain agreed environmental standard is in fact good enough and if a business meeting that standard is, or is not, doing enough to help the environment.

But if a business falsely claimed to have met such a standard, then that is an issue for us as it breaches the general prohibition on misleading and deceptive conduct contained in the Trade Practices Act.

Some pretty clear examples of this include:

- **Wood heaters.** In June this year the ACCC accepted court-enforceable undertakings from **10 different companies** for falsely claiming that their wood heaters met Australian particle emission standards.
- **Washing machines.** In August last year **LG Australia** was forced to correct false claims that models of its washing machines were “4A Rated” by Water Services Association of Australia.
- **Insulation batts.** **Auspoly P/L** and **Autex P/L** were forced to correct erroneous claims about the “R” value rating of certain polyester insulation batts.
- And, of particular interest to this conference - **air conditioners**, which I will outline in more detail later.

These were fairly straightforward cases of claims being made that could not be substantiated, but often, it’s not quite that clear cut. However, a major step towards enforcing environmental claims came in 1998 when the International Standard for environmental marketing (ISO/DIS 14021.2) was approved.

3. MEASURING ENVIRONMENTAL CLAIMS

The Joint Standards Australia/Standards New Zealand Committee on environmental labelling subsequently adopted the ISO Draft International Standard as an interim Australian Standard although it should be noted this deals only with voluntary self-declared claims.

There are 18 specific requirements contained in the Interim Standard, including that claims be:

- Accurate and non-deceptive
- Substantiated and verified
- Specific about the improvement or benefit claimed
- Specific about whether the claim relates to the product or its packaging

The Interim Australian Standard covers essentially the same issues as the ACCC's 1992 guidelines but is more detailed on both specific claims and procedures for verification.

What this standard did was to give us a benchmark against which we could measure whether environmental claims were likely to breach the Trade Practices Act.

In short, those claims which do not meet the requirements of the Interim Standard are likely to breach the Act in one, or more of three ways.

- **Section 52** of the Act generally prohibits misleading and deceptive conduct. It does not matter whether or not the conduct did actually mislead anyone. Intention also does not need to be proven for the Act to have been contravened – it is possible to mislead someone without intending to do so.

It is even possible for a claim to be true, and still misleading. In the mid-90s battery makers **Hitachi, Makita, Eveready** and others sold batteries labelled with the 'three arrow' symbol which indicates a product is recyclable. While it was true that the batteries were recyclable, there weren't actually any facilities for recycling them in Australia. In the opinion of the ACCC, this was misleading for consumers and the battery makers agreed to withdraw the claims and give undertakings not to repeat them.

- **Section 53(c)** prohibits representations that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have. This includes misrepresentations about 'benefits' to the environment. It could also include, for example, claims that a product or business had the approval of bodies like Greenpeace, if this were not true.
- **Section 55** makes it an offence to mislead customers about the nature, manufacturing process, characteristics, suitability for purpose or quantity of any goods or services.

Possible contraventions of these sections can take many forms.

The vague nature of some environmental or green claims could itself be misleading, even if they not strictly false. Producers who make a generic claim that their products are "environmentally friendly" may be misleading the public given there are few products which are 100 per cent harmless to the environment.

Claims made in relation to the environmental friendliness or benefits of a particular product need to be clearly stated. If the claims relate only to one feature of a product, for example its packaging or manufacturing process, this must be specifically identified to avoid any potentially misleading and absolute impressions being formed.

The terms used in environmental claims may change in meaning and relevance as knowledge and understanding of environmental processes grow. A claim that was not misleading a decade ago could potentially become so if new information comes to light and the claim is not altered to reflect this.

4. COOPERATION AGREEMENT WITH THE AUSTRALIAN GREENHOUSE OFFICE

In March 2000, a further significant step was taken towards policing environmental claims with the signing of a co-operation agreement between the ACCC and the Australian Greenhouse Office.

The agreement enables the two organisations to work together to protect the interests of consumers and assist Australia meet its commitment to reducing greenhouse gas emissions.

A specific section of the agreement covers the energy efficiency claims on white goods – the star ratings which many consumers use to determine if an appliance is energy efficient, and therefore cheaper to run and friendlier to the environment.

As the Australian Greenhouse Office has national administration of the energy efficiency program, it is in the front line for identifying cases of misleading energy labelling and referring these cases to the ACCC for possible enforcement action.

Consumers must receive accurate information when making purchases, especially when the goods they are buying are significant, as, of course, most whitegoods are. This agreement helps ensure consumers receive accurate information by assisting the ACCC to act when misleading labelling is identified.

After receiving advice from the Australian Greenhouse Office, the ACCC considers whether there appears to be:

- apparent blatant disregard for the law;
- a history of previous contraventions of the law, including overseas contraventions;
- significant public detriment;
- the potential for action to be worthwhile or have an educative or deterrent effect; and
- a significant new market issue.

One such referral from the Australian Greenhouse Office resulted in full refunds being offered by **Haier** and **Retravisio**n to purchasers of certain Haier washing machines.

Tests commissioned by the AGO found that the machines failed soil removal, water extraction and energy consumption tests and therefore did not meet the requirements for the energy rating advertised on the machines.

The AGO referred its findings to the ACCC, which was then able to take action against the two companies and secure court enforceable undertakings.

ACCC / AGO co-operation also led to court enforceable undertakings from **Auspoly** and **Autex** for overstating the 'R' value of their insulation batts.

Testing revealed the batts actually had a lower insulation rating than that stated on the packaging.

The two companies provided court enforceable undertakings to ensure that the representations made concerning the R Value of their polyester insulation batts are in fact derived from testing in accordance with the official Standard.

5. AIR CONDITIONERS

As I mentioned earlier, the ACCC has been involved in a number of cases in recent years concerning environmental claims in air conditioning.

In the most recent case, action by the ACCC led to the Federal Court ruling that a brochure promoting **Sanyo Air Conditioners** as environmentally friendly was false and misleading.

The brochure made claims that the Sanyo Eco Multi Series air conditioners had "environmentally friendly HFC R407C added" and were "for a new ozone era – keeping the world green".

In fact, as I'm sure many of you here are well aware, R407C contributes to global warming and does not benefit the environment, while R-22, which is also included in the company's air conditioning units, is another ozone depleting substance which contributes to global warming.

Based on these facts, the Federal Court found the brochure was misleading and deceptive in breach of Section 52 and contained false and misleading representations in breach of Section 53 of the Trade Practices Act.

The Court ordered that Sanyo Airconditioning Australia:

- Be restrained from engaging in similar misleading conduct in its future promotional activities
- Write to recipients of the brochure and members of the Airconditioning Refrigeration Equipment Manufacturing Association enclosing the Federal Court's orders and the agreed Statement of Facts
- Implement a trade practices compliance program

- Pay the ACCC's costs.

Also in 2003 **Daikin** was forced to correct false claims that its air conditioners used environmentally friendly gases and would not contribute to global warming.

Between January 2001 and August 2003, Daikin made representations in brochures distributed to its sales agents and on its website that:

- Hydro fluorocarbon (HFC) refrigerants HFC-407C and HFC-134a are environmentally friendly.
- Certain Daikin airconditioning units that use those HFCs are environmentally friendly
- Using certain Daikin air conditioning units will be beneficial to the environment or at worst be benign in its environmental impact
- Using certain Daikin air conditioning units will prevent, or at least not contribute to, global warming.

Expert advice stated that refrigerants HFC-407C and HFC-134a are in fact potent greenhouse gases and contrary to the claims made by Daikin, would therefore not benefit the environment and would in fact contribute to global warming.

ACCC therefore considered that Daikin's representations were misleading and contravened sections 52, 53(c) and 55 of the Trade Practices Act.

Daikin provided court enforceable undertakings that it would:

- Not make the representations for a period of five years
- Place corrective advertising on its website
- Write to its distributors and the Australian Airconditioning and Refrigeration Equipment Manufacturers Association explaining the undertaking
- Review its existing trade practices compliance program

The third case is a little different as it involved a supplier of gases used in air conditioning, But it is also a pretty good illustration of the point I made earlier about not making general or vague environmental claims.

In 1999, following concerns expressed by the ACCC, **BOC Gases** agreed to stop making unqualified environmental representations about air conditioning gas.

BOC Gases used the image of a frog, the words 'green', 'green air conditioning'; 'environmentally preferred' and the logo 'Ozone Care in association with FR 12' in its

technical and promotional materials to air conditioning installers.

FR 12 is a replacement gas used in automotive air conditioners and actually contains an ozone-depleting potential component referred to as R124.

BOC Gases agreed to clarify the environmental and performance comparisons, cease using general terms such as 'environmentally preferred' or general 'green' claims with respect to FR 12.

It also agreed to remove the frog image and the Ozone Care logo in relation to FR 12 from its publications and to implement an internal policy to prevent misleading environmental representations from being made in the future.

This was a classic example of the need to avoid such sweeping terms as 'environmentally friendly' or 'environmentally safe', or images that appeared to make sweeping environmental claims.

6. ENFORCEMENT – COMPLIANCE OPTIONS

So, as you can see, under the Trade Practices Act the ACCC has a number of different avenues through which it can address environmental claim issues.

- We can take **court action**, the consequences of which may include injunctions, corrective advertising and community service orders
- We are also able to obtain **court-enforceable undertakings** from companies which have made false environmental claims, requiring them to withdraw the claims and undertake not to repeat them.
- On the other side of the ledger, we are also able to give **authorisation** to conduct which could otherwise be a breach of the Act, if it can be shown that the public benefit from the conduct outweighs any detriment caused by the anti-competitive behaviour.

Good examples of authorisation include:

- **drumMUSTER** – this is a four cents per litre or kilogram levy on certain non-returnable chemical containers. The money raised from the levy funds the collection and disposal of unwanted empty agricultural and veterinary chemical containers.
- **Refrigerant Reclaim Australia** – this is a refrigerant gas recovery program funded by a \$1 per kilo levy on refrigerant gas, which prevents certain environmentally harmful gases being released into the atmosphere.

In both cases, these schemes could have breached the Trade Practices Act as an agreement to raise prices could be seen as anti-competitive. However, the ACCC ruled that the environmental benefits of the scheme outweighed any competition detriment caused by the agreement. We therefore authorised the conduct and enabled the levies to be charged to customers.

7. CONCLUSION

Many consumers are keen to help the environment, and where possible, to make purchases that benefit the environment.

As a result, businesses able to make environmental claims have a powerful tool for winning sales. But this will only last as long as consumers are confident that the claims being made are true.

It is not the job of the Australian Competition and Consumer Commission to rule on the worth of one set of environmental claims over another. But where those claims breach the Trade Practices Act, we will intervene.

To avoid such a breach, and the damage that will inevitably follow to a company's reputation when caught, business should be careful not to make sweeping environmental claims, and to ensure any environmental claims are specifically spelt out.