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Editorial

This edition of Impact! deals with consumer protection and environmental claims. Businesses in Australia are responding to consumer demand for more environmentally friendly products, and new 'green' industries are emerging every year. But is the law adequately protecting consumers from the inevitable 'greenwash' that results when unscrupulous operators seek to take advantage of the greening economy, and is the law capable of responding to future developments in this field?

Some of the articles in this edition discuss the role of the Australian Competition and Consumer Commission in enforcing consumer protection law and holding businesses accountable for the green claims that they make. Others outline areas where the law needs to change to keep up with community expectations; for instance, with regards to product labelling.

Several articles discuss Australia's key consumer protection law, the *Trade Practices Act 1974* (Cth). It is important to note that this area of law has recently undergone significant change. On 1 January 2011 the *Trade Practices Act 1974* was renamed the *Competition and Consumer Act 2010*. These changes came about as a result of the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*.

This Bill represented stage two of the legislative changes necessary to give effect to the Federal Government's consumer law reforms. It follows on from the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*.

In July 2009, the Federal Government, with the States and Territories, settled an Intergovernmental Agreement on consumer law. In accordance with the Intergovernmental Agreement, the Australian Consumer Law creates national laws for consumer product safety and for statutory consumer guarantees, to reform and replace existing Commonwealth, State and Territory laws. Many of the provisions of the *Trade Practices Act* that are discussed in these articles continue in force in the *Competition and Consumer Act*.

The changes occurred after the deadline for articles for this edition, so the articles refer to the *Trade Practices Act 1974*. Some of the articles do, however, flag the changes and refer to provisions of the new regime.

I'd like to congratulate our student prize winner Glen Wright from the University of NSW who has written an excellent article on carbon offsets and consumer protection. Glen has won $500 from Maddocks Law Firm for his efforts.

The next edition of Impact! is due for release in June/July 2011. The topic will be Ecologically Sustainable Development. If you would like to contribute an article on one of the principles of ESD or an analysis of the effectiveness of ESD in achieving sustainable outcomes, please email the editor at jemilah.hallinan@edo.org.au or call (02) 9262 6989.

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Green Claims and the Trade Practices Act

Peter Kell, Deputy Chairman, Australian Competition and Consumer Commission[1]

Introduction

As consumers become more aware of environmental issues, they are increasingly choosing to consider environmental benefits as a factor in their purchasing decisions. This, in turn, has resulted in businesses seeking to promote their environmental credentials to the public, in order to differentiate themselves and their products from the competition and, in some instances, justify charging a premium price.

This response to consumer demand can be an indication of an efficient and well functioning market. However, the Australian Competition and Consumer Commission ('ACCC') recognises that environmental marketing can also be problematic as often there is insufficient information available for consumers to adequately establish the credibility of green claims.

False or inaccurate green claims not only have the capacity to cause individual consumer detriment, but also inhibit the ability of legitimate traders to supply cleaner, more efficient products and services. The ACCC regularly receives complaints from businesses about allegedly misleading green claims by competitors. The concern is that firms that make such claims without actually bearing any costs may undermine the efforts of those businesses that are investing in genuine environmental initiatives. As such, it is important that any green claims made by businesses are scientifically sound and able to be appropriately substantiated.

The ACCC is an independent statutory authority responsible for ensuring compliance with and enforcing the *Trade Practices Act 1974* ('TPA'). The ACCC monitors environmental marketing as part of its broader consumer protection responsibilities under this Act. In particular, the ACCC ensures that green claims, including environmental claims, do not breach the prohibitions against misleading or deceptive conduct or misrepresentations in the TPA.

This article examines how the ACCC regulation of environmental marketing operates in Australia. In particular, it will discuss how green claims may breach the TPA; what action the ACCC may take in relation to a breach; and developments which may impact on how the ACCC monitors environmental marketing in the future, including emerging areas of complaint and the impact of the new Australian Consumer Law ('ACL') on the regulation of green claims.

Green claims and the TPA

The TPA applies to all forms of marketing, including claims on packaging, labelling and in advertising and promotion across all mediums. In regards to environmental marketing, two main provisions are relevant – the prohibition against misleading or deceptive conduct and the prohibition against misrepresentations.

Misleading or deceptive conduct

The TPA states that businesses must not mislead or deceive consumers in any way.[2] This can include misleading them through silence, if in all the relevant circumstances there is an obligation to say something or if a reasonable expectation is created that matters will be disclosed. Predictions can also be misleading, if there is no reasonable basis for making the prediction, or if the prediction should have been qualified and it was not. Notably, intention to mislead or the actual effect of misleading consumers is not necessary. Rather, the conduct will breach the TPA if there is a real possibility that members of the target audience have been misled.

Misrepresentations

The TPA also prohibits a variety of false or misleading representations about specific aspects of goods and services.[3] Those most relevant to environmental claims include that a business must not falsely represent goods as being of a particular standard, composition or model, or as having a particular history or previous use. Businesses must also not represent that goods have sponsorship, approval, uses or benefits that they do not have.

While using endorsements or logos can be helpful in reassuring consumers as to the credibility of the claims made, they can also be misleading or simply confusing if they are not well known or recognisable. Any claims of compliance with a certification scheme should be able to be substantiated and preference should be given to schemes that have industry wide, or government acceptance.

Broad or unqualified environmental claims, for instance that a product is 'green', 'environmentally friendly', 'energy efficient', 'recyclable' or 'carbon neutral', are a popular tool in green marketing. However, such claims can be problematic as they are ambiguous and may not adequately explain any specific environmental benefit. As such, there may be great capacity for consumers to be misled as it is difficult for them to assess if these claims are actually true.

Where a business makes false or misleading environmental claims, or misrepresents the environmental benefits of its product, the ACCC may take enforcement action under the TPA.

Action for false green claims

The ACCC, consumers and competitors may take legal action if an environmental claim breaches the TPA. The ACCC has a wide range of enforcement powers and remedies in this regard, including monetary penalties, injunctions, orders and the acceptance of court enforceable undertakings.[4]

Recent examples of ACCC enforcement action in relation to false environmental claims include:

- In March 2010, the Federal Court of Australia declared, by consent, that Prime Carbon Pty Ltd ('Prime Carbon') contravened s. 53 of the TPA by making false or misleading representations that its carbon offset products were part of the National Environment Registry and the National Stock Exchange of Australia Limited. The Court made orders that Prime Carbon and its director, Kenneth Bellamy be restrained from making false or misleading statements in relation to the supply of carbon for 3 years; alert all consumers and small businesses who had been adversely affected by their actions; enter into a compliance program, including attending a Trade Practices Law Seminar; and pay the ACCC's costs.
- In January 2010, the ACCC obtained court enforceable undertakings against Global Green Plan, a former GreenPower retailer. In these undertakings, Global Green Plan admitted that it had made false or misleading representations when it promised to purchase a certain number of renewable energy certificates on behalf of its customers and then failed to do so. Global Green Plan agreed to purchase these certificates and its directors agreed to attend a Trade Practices Compliance Seminar.
- In September 2008, the Federal Court declared, by consent, that GM Holden Ltd made false and misleading representations concerning claims made in the advertising of Saab vehicles including, "Grrrrrreen", "Every Saab is green. With carbon emissions neutral across the entire Saab range" and "Shift to Neutral". In the advertisements, GM

Holden represented that it had taken measures to ensure that the carbon dioxide emissions from any Saab motor vehicle would be neutral over the life of that motor vehicle. The advertisements also contained a statement that, in addition, Saab would plant 17 native trees in the first year following a Saab vehicle purchase as a carbon offset. The ACCC considered that these initiatives would not actually neutralise carbon emissions over the entire lifecycle of the vehicle.

- In March 2008, Woolworths Limited agreed to amend the packaging on its Woolworths Select tissue products following concerns raised by the ACCC regarding premium environmental representations made on the packaging. In particular, the representations related to the sustainability of fibre used in the products and the environmental management record of the producers. Woolworths also agreed to conduct a review of its trade practices law compliance program, to ensure it adequately deals with these issues in the future, and keep the ACCC updated on the progress of the project.

Examples of other matters investigated by the ACCC include:

- Carbon claims, for instance relating to the performance of carbon offset initiatives;
- Claims relating to green energy, for instance, stating that solar panels could substantially reduce energy consumption and electricity bills when this was not the case;
- Claims relating to grey water, for instance, that the grey water from a washing powder was safe to use on the garden when this was not the case;
- Claims relating to energy efficiency labels, for instance, that a fridge has a higher energy rating than reflected in its actual annual energy consumption; and
- Claims relating to the green credentials of bamboo textiles, for instance, that the fabric was safer, more environmentally friendly and bio-degradable when this may not be the case.

Future developments

As shown by past ACCC enforcement action, environmental marketing practices are wide ranging, covering a large subject matter of claims and industries. Indeed, the ACCC has observed that green marketing is an area which is constantly evolving, with new types of claims and subsequently complaints continually emerging. For this reason, the ACCC continues to have a focus on green marketing claims, especially as consumer interest continues to grow.

In relation to potential future regulatory actions, recent changes as part of the Australian Consumer Law ('ACL') reform package have given the ACCC some important new powers that will assist our approach to market regulation of green claims.

The ACL provides the ACCC with a range of new 'tools' in our consumer protection toolkit. One that is directly relevant to environmental marketing is the power to more readily require firms to substantiate claims made in advertising or labelling.[5] Under this power the ACCC can issue a substantiation notice which requires a person to furnish information,

produce documents, or give evidence which may be capable of substantiating claims or representations made by that person. The ACCC does not have to have a 'reason to believe' that there has been a breach of the law before issuing such a notice. The notices will be particularly useful to the ACCC in considering environmental claims, as businesses may now be required to verify the credibility of any claims.

The ACCC has also gained more significant penalty provisions for breaches of the consumer protection law. A new civil pecuniary penalty regime means that fines of up to $1.1 million for corporations or $220,000 per person are available. Orders banning individuals from managing companies may also be sought. These new penalties for breaches of consumer protection provisions will assist the ACCC to send strong messages and achieve greater levels of compliance.

Conclusion

Where businesses are taking genuine steps to reduce their impact on the environment they deserve to be able to promote that to their customers. However, this outcome is undermined if businesses are not being truthful about the environmental costs and benefits of their products and services.

Environmental marketing is monitored by the ACCC as part of its consumer protection responsibilities under the TPA. Should a green claim breach the prohibitions against misleading or deceptive conduct or misrepresentations under the Act, the ACCC may choose to take enforcement or other action in relation to the breach.

Given the high profile nature of environmental issues, as well as the great potential for false claims to harm not just individual consumers, but also Australia's international environmental obligations and other traders in the market, it is important that the ACCC ensure that any green claims made by businesses are scientifically accurate and able to be appropriately substantiated.

1 Further information is available on the ACCC's website, www.accc.gov.au

2 *Trade Practices Act 1974* (Cth), s.52.

3 *Trade Practices Act 1974* (Cth), s.53.

4 *Trade Practices Act 1974* (Cth), s. 87B.

5 *Trade Practices Amendment (Australian Consumer Law) Act (no. 2) 2010* (Cth), Schedule 2, s. 219.

When Green Wash Won't Wash: Avoiding misleading environmental claims

Michael Terceiro, Trade Practices Lawyer

This paper was delivered by Michael Terceiro at the EDO's national conference 'Public Interest Environmental Law in Australia: 25 Years On' in May 2010

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 Australian Competition and Consumer Commission ('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 section 53 prohibits corporations from falsely representing:

"...there is a high likelihood of being caught out if a business makes a false green claim."

- 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.

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 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 that 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 Commonwealth Director of Public Prosecutions 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 grounds 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 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.

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 Pty 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 hydrochloroflurocarbon. R-22 was clearly not beneficial to the ozone layer.

The ACCC decided to take this case for a number of 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".

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 Daikin[4] and Dimplex.[5]

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, Daikin also 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 undertakings[6] 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 one instance, green representations were made by V8 Supercars as part of its 'Racing Green Program'.[7] V8 Supercars claimed that the planting of 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.

Another 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 an 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.[9]

Energy Australia

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

One particular investigation related to Energy Australia and its representations about its CleanAir and GreenFuture non-accredited electricity products.[10] Energy Australia 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.

As a result, Energy Australia 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.

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.[11]

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.

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.[12] 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 cases and investigations are that businesses:

(1) have to make sure that they have scientific evidence to back up the claim – e.g. Sanyo, Daikin, Dimplex and Goodyear

(2) are careful in their use of any images or pictures in any green advertising – e.g. Sanyo and Daikin

(3) should avoid overstating the environmental benefits of a green initiative – e.g. V8 Supercars and SeNevens

(4) avoid making green representations which are simply too confusing for consumers to understand – e.g. Energy Australia

(5) recognise that some environmental benefits are simply too complex to translate into a short and sharp marketing message – e.g. Energy Australia

(6) deliver on what they promise their consumers – e.g. V8 Supercars.

Resources

There are a number of resources which can help businesses to avoid breaching the TPA in relation to their green marketing, including:

(1) "Green marketing and the Trade Practices Act";[13]

(2) "Carbon claims and the Trade Practices Act";[14] and

(3) "Environmental labels and declarations – Self-declared environmental claims".[15]

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 marketing 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 avoid altogether.

Conclusion

Green marketing claims continue to be an 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 of environmental groups, such as the EDO, in bringing to its attention examples of alleged greenwashing and providing the ACCC with the scientific evidence it needs to establish its cases.

1 *Trade Practices Act 1974* (Cth), Part VC, ss. 75AZC(1)(a), (b), (e).

2 *Trade Practices Act 1974* (Cth), s. 51A.

3 *ACCC institutes court action against Sanyo Airconditioners Manufacturing Singapore Pte Ltd:* www.accc.gov.au/content/index.phtml/itemId/365424/fromItemId/621575.
Federal Court finds "Green" claims to be misleading: www.accc.gov.au/content/index.phtml/itemId/398527/fromItemId/621575.
(The author ran this investigation and litigation at the ACCC.)

4 *Warning to air conditioning industry after Daikin 'green' claims challenged by ACCC:* 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:* www.accc.gov.au/content/index.phtml/itemId/770506/fromItemId/621575.
(The author ran this investigation at the ACCC.)

6 As provided for under s.87B of the *Trade Practices Act 1974*.

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

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

9 Norwegian car manufacturers are forbidden from claiming that their automobiles are environmentally friendly on the basis that cars "can't be environmentally beneficial". Manufacturers may face fines if they even use the terms "environmentally friendly", "green", "clean", or "natural" in their advertisements. See: Naish, J. (2008). 'Lies, damned lies and green lies', *Ecologist*, 38(5), 36-39.

10 *Energy Australia clears air about green electricity claims:* www.accc.gov.au/content/index.phtml/itemId/806650/fromItemId/621575.
(The author ran this investigation at the ACCC.)

11 *Nappy biodegradability claims declared false and misleading:* www.accc.gov.au/content/index.phtml/itemId/851993

12 *Company director 'knowingly concerned" in false nappy biodegradability claims:* www.accc.gov.au/content/index.phtml/itemId/866630/fromItemId/621575

13 ACCC, 2008, *Green marketing and the Trade Practices Act* – available at: www.accc.gov.au/content/index.phtml/itemId/815763.

14 ACCC, 2008, *Carbon claims and the Trade Practices Act*– available at: www.accc.gov.au/content/index.phtml/itemId/833279.

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

Green Marketing: Environmental claims and consumer rights

Mary McCafferty, EDO Volunteer

Many Australians are now considering the environmental impacts of their purchasing decisions. Businesses are also increasingly using environmental claims in an attempt to differentiate their products and gain a competitive edge. These claims take many forms, including statements about environmental sustainability, recycling, energy and water efficiency or impact on animals and the natural environment.

Environmental claims are now being made about a much larger range of products, from household items such cleaning products and nappies to larger items such as whitegoods and appliances. As of 1 November 2010, even commercial buildings have mandatory energy efficiency disclosure obligations under the Commercial Buildings Disclosure ('CBD') program.[1]

Both consumers and businesses need to think about the claims that are being made. The Australian Competition and Consumer Commission ('ACCC') has Guidelines relating to green marketing and the TPA to educate businesses about their obligations regarding environmental claims. It also aims to assist manufacturers, suppliers, advertisers and others to assess the strength of any environmental claims they make and to improve the accuracy and usefulness to consumers of their labelling, packaging and advertising.

The Guidelines set out what consumers and businesses should consider when making green claims and prevent a possible breach of the TPA. This article will summarise some of the key points to consider.

Accurate claims

A claim that that a product is made from recycled material where only part of the product is made from recycled material could mislead consumers into thinking that the entire product is comprised of recycled material. For example, if a timber business sells a timber product made from 10% recycled timber, then an accompanying ad or label should state "made from 10% recycled timber" rather than "made from recycled timber".

Substantiated claims

If a business wants a consumer to think that its product has a special quality or is better than another product because of claims made by the business, the claims need to be substantiated. For example, the statement "safe for the environment" could be understood by the consumer to mean that the product is biodegradable; others may infer that it contains no toxic components or ingredients.

A business that produced a number of 'environmentally friendly' plastic kitchen, garbage and freezer bags promoted its products with several environmental claims, including: "even if this bag isn't thrown in the bin, it won't end up as litter" and "this bag won't contribute to the landfill problem. It will make it disappear". Additionally, the business claimed on its website that its bags would "compost just like Kraft

paper bags, sticks and twigs, yard trimmings and food scraps which are quickly broken down" and stated that its bags would compost within 28 days.

The company claimed that the green benefits were due to the tapioca starch used to make the bags but could not substantiate the claims. The Federal Court declared that the company had engaged in false or misleading conduct, misrepresented the bags' benefits and performance characteristics, and misled the public about the nature and characteristics of the bags. The Court made orders against the company, including injunctions restraining it for three years from supplying its bags in their current packaging and from promoting that they would biodegrade, disintegrate or benefit the environment without independent scientific evidence to support such claims. The Court also required the company to establish a trade practices compliance program.[3]

Pictures

Pictures such as forests, the earth or endangered animals can be used to convey an environmental message that may lend itself to various meanings. A business could be engaging in misleading conduct if it uses a symbol that is widely recognised as having a particular meaning or affiliation when no such connection exists. For example, the picture of a triangle which is known to mean that a product is recyclable may be taken by consumers to mean that the product is recyclable. If this is not the case then the use of the picture risks misleading the consumers.

Packaging or content

Some businesses cause confusion as to whether they are claiming environmental benefits stemming from the product itself or from the product's production process. This is particularly so where the non-recyclable (or non-recycled) product has been packaged in recyclable (or recycled) materials. Clarification is necessary to avoid misleading the public. For example, if the non-recycled product is packaged in 50% recycled materials, a simple statement on the product along the lines of "packaged in 50% recycled materials" could avoid misleading consumers.

"Environmental claims are now being made about a much larger range of products..."

Endorsements or logos

If a logo or endorsement from a particular certification scheme is used by a business, consumers may make assumptions if they aren't given further information. For example, a red panda is used to indicate a scheme that plants trees to offset those logged in the production of paper products. Consumers unfamiliar with the scheme may assume that the production of paper doesn't harm the natural habitat of red pandas. This isn't the case and, without further information, consumers may be misled.

Problematic words

- Green – This is a vague word that gives various meanings to the consumer (even that the product is the colour green).
- Environmentally friendly or environmentally safe – Again, these are vague words that could lead consumers to believe that the product has less harmful impacts on the environment than it does, or less harmful impacts on the environment than other products.
- Energy efficient or water efficient – This is a meaningless claim unless quantified by comparison to existing benchmarks. Efficiency claims should be measured by using accepted rating schemes. There are several government administered schemes that cover environmental claims. In addition to the TPA, these schemes have their own mechanisms for regulation and enforcement.[4]

Between May 2004 and August 2004, LG Australia released certain models of its washing machines for sale on the Australian market and represented that they were approved "4A Rated" by the Water Services Association of Australia when in fact, at the time they were not.

Western Australian consumers who bought these machines and approached the Water Corporation for a $150 Waterwise Rebate may have had their claims

rejected, as certification was not complete until 28 August 2004.

The ACCC was of the view that LG's conduct in making these representations contravened sections 52 and 53(c) of the TPA.

LG provided court enforceable undertakings to:

1) place a corrective notice on the LG Australia website;
2) send a corrective notice to retailers; and
3) upgrade and maintain its trade practices compliance program.

- Recyclable and recycled – The use of these words raises the question: is the product recyclable and are facilities available in Australia to do so?

Eveready sold in Australia a brand of rechargeable batteries on which appeared a triangular symbol consisting of three arrows above the word 'recycle' when no recycling facilities were actually available. The ACCC contacted Eveready about the claims and Eveready made an undertaking that it would not use the recyclable symbol on batteries unless certain conditions were met.[6]

The use of the recyclable symbol on products means that the product is likely to end up in a recycling facility and this is well known and understood by consumers. If however, the product is recovered from the waste system during manufacture and reused, the word "recycled" is inappropriate. This must be made clear by using the words "materials reclaimed from manufacturing".

- Carbon neutral, carbon offsets or greenhouse gas emissions - Some businesses make claims about the levels of greenhouse gas emissions associated with their products and the measures they have taken to offset them. When doing this, the product's entire lifecycle needs to be considered to ensure that the process is in fact carbon neutral. For example, advertising a motorcycle as carbon neutral on the basis that the business that manufactured it has offset the carbon used in the manufacturing process up to its sale could mislead consumers that the motorcycle is carbon neutral for its entire lifecycle. However, the carbon used after the consumer purchases the motorcycle is not offset.
- Renewable or green energy - Consumers value renewable or green energy and need accurate information on which to base their purchasing decisions. Businesses should accurately represent the costs, amounts supplied and the associated benefits. For example, a business should disclose the proportion of the energy which is obtained from renewable sources if it is less than 100%.

1 Commenced under the *Building Energy Efficiency Disclosure Act 2010* (Cth).The Building Energy Efficiency Disclosure Act 2010 (Cth) started on 1 November 2010. Introduced as part of the Federal Government's National Strategy on Energy Efficiency, the Act places obligations on owners and landlords of large commercial office spaces to disclose energy efficiency information to purchasers and tenants.

2 ACCC, 2008, *'Green Marketing and the Trade Practices Act 1974'*, available at: www.accc.gov.au/content/index.phtml/itemId/815763.

3 ACCC, 2010, *'News for business: Biodegradable, Degradable and Recyclable Claims on Plastic Bags'*, available at: www.accc.gov.au/content/item.phtml?itemId=910298&nodeId=b8fb3f87a088ce8bfd6bfb9e56497a65&fn=Biodegradable,%20degradable%20and%20recyclable%20claims%20on%20plastic%20bags.pdf

4 For information on four of the biggest accepted rating systems see: The Equipment Energy Rating Efficiency Program at: www.energyrating.gov.au; The Water Efficiency Labelling and Standards Scheme at: www.waterrating.gov.au; The Motor Vehicle Fuel Consumption at: http://greenhouse.gov.au/fuelguide/label.html; Commercial Buildings Disclosure at: www.cbd.gov.au

5 See ACCC website at: www.accc.gov.au/content/index.phtml/itemId/676067

6 See ACCC website at: www.accc.gov.au/content/index.phtml/itemId/539555

Carbon Offsets and Consumer Protection

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Introduction

In recent years consumer interest in reducing carbon emissions has increased rapidly and a new market for the purchase of carbon offsets has appeared.[1] This emerging market carries with it both opportunities and risks. While there is potential for genuine environmental outcomes, the market moves rapidly and has been left largely unregulated.[2] There is a risk that, without regulation, consumers will be exploited by unscrupulous operators overstating the environmental benefits of their products.

This is compounded by varied levels of consumer understanding of carbon offsets, the varied meanings attached to relevant terms, such as 'carbon neutral', and the wide range of carbon offset standards and logos that seek to verify carbon offset claims.[3] One US study found that only 17% of people could even describe carbon offsets adequately in their own words.[4] This lack of regulation and consumer awareness has sparked concerns over what consumers are actually buying when they purchase carbon offsets.[5]

The Australian Competition and Consumer Commission ('ACCC') has taken an active role in protecting consumers from the risks associated with this emerging market. This short paper provides an overview of the ACCC's regulation of the voluntary carbon market ('VCM') to date, with a focus on recent cases brought by the ACCC, and discusses the limitations on the ACCC's ability to adequately protect consumers in the VCM.

This paper concludes that while the ACCC has an important role to play in protecting consumers, it is limited by its mandate and can only be a last line of defence. In particular, the ACCC has struggled to address the issue of low quality offsets, as this ultimately lies beyond its powers. In order to ensure consumers are fully protected, and that the environmental outcomes desired from a VCM come to fruition, a widening of the ACCC's mandate or the implementation of a mandatory standard for carbon offsets is advocated. Without these changes, consumers risk being misled and sold ineffective offsets.

"There is a risk that consumers will be exploited by unscrupulous operators overstating the environmental benefits of their products."

The VCM in Australia

The size of the VCM is difficult to estimate. Estimates of the size of the market worldwide vary wildly, from 3 to 50 million tonnes of CO2.[6] Australia hosts 7% of offset projects worldwide,[7] while Australia and New Zealand jointly account for 8% of demand.[8]

The Australian Government has said that Australia accounts for 7% of offset sales, calling the VCM "relatively small", as this is only 0.5% of Australia's emissions.[9] However, it is submitted that the apparently small figure of 0.5% is actually quite high,

given that these offsets are purchased voluntarily and absent the compliance market that results from a mandatory emissions trading scheme.[10] Regardless of size, it is clear that the VCM is growing quickly,[11] "fuelled by rapidly rising community concern about climate change threats".[12] As the market grows, so too does the threat to consumer protection.

Carbon offsets and the *Trade Practices Act 1974* (Cth)

The role of the ACCC is to "ensure that individuals and businesses comply with the Commonwealth's competition, fair trading and consumer protection laws".[13] The primary measure in this regard is the Commonwealth *Trade Practices Act 1974* ('TPA'), which sets out the framework for consumer protection in Australia.

While other jurisdictions, such as the UK,[14] have specific provisions regarding environmental claims, the TPA does not. However, environmental claims can be brought under the auspices of a number of TPA provisions. For example, the TPA provides that a corporation shall not engage in misleading or deceptive conduct,[15] thus a company cannot make claims about a carbon reduction that does not actually take place. Section 53 sets out a list of false claims that are prohibited, such as representing that a product is of a particular standard[16] or that it has certain sponsorships or affiliations,[17] which could be relevant where a company claims its offsets have been accredited to a standard when they have not.

The ACCC's role in the VCM

The ACCC states that its mandate in relation to carbon offsets is to "ensure compliance with the [TPA] through education, compliance activities and, where necessary, enforcement and litigation".[18] The ACCC has pursued each of these activities to some extent, including the production of carbon claims guidance, negotiation with industry to ensure compliance, and bringing cases in the courts.

Guidance for offset claims

In January 2008, the ACCC released an issues paper and invited submissions regarding how it should deal with carbon claims.[19] Over 100 submissions were received.[20] The ACCC also liaised with a wide range of stakeholders, including business and industry representatives and environmental groups.[21] The resulting guide to carbon claims helps businesses to comply with the TPA by ensuring they know how to formulate their advertising claims and are not misleading consumers. The guide advises offset providers on issues of additionality, timing of offsets, double counting and permanence.

Pre-emptive measures

The ACCC has also taken some action to pre-empt issues with carbon claims. For example, following discussions with the ACCC, GreenPower, the Federal accreditation program for renewable energy, issued a notice to electricity companies suggesting that they "soften their language" in relation to GreenPower claims, so as not to mislead consumers.[22] In response, at least one retailer, Energy Australia, conducted an audit to ensure that its marketing practices complied with the TPA.[23]

Given that many companies are genuine about providing environmental benefits, it may be that these pre-emptive measures will be highly effective in ensuring their compliance with the TPA, and thus consumer protection. On the other hand, where companies are not genuine, the ACCC has compliance and enforcement measures at its disposal.

Compliance measures

The ACCC seeks compliance from companies by informing them when breaches of the TPA are actual or imminent.

The *Australian Consumer Law*[24] ('ACL') empowers the ACCC to issue substantiations notices, requiring a company to provide further information to verify claims made.[25] While this is a general provision, it may be particularly relevant to carbon offset claims. For example, if a company states that a certain level of greenhouse gases will be removed from the atmosphere by its offsets, the ACCC could issue a notice requiring an explanation of the methodology used to make the claim.

Enforcement action

The ACCC has stated its intention to "ramp-up its green compliance activities with… targeted enforcement action"[26] and "vigorously pursue" companies making misleading carbon offset claims.[27] So far, this has resulted in a small handful of cases against businesses that are considered to be making misleading claims about their carbon offsets. Such cases are likely to become more frequent given the increased involvement of non-government organisations in identifying misleading and deceptive green claims. For example, in the Holden case below, the NSW Greens played a part in identifying the claim.[28] Alongside this increased level of enforcement action is the new power, given to the ACCC under the ACL, to seek a fine of $1.1 million. The ACCC has indicated that it may use these powers in cases where a company makes misleading environmental claims.[29]

In the Global Green Plan ('GGP') case,[30] GGP entered into agreements with customers to purchase and surrender 11,300 Renewable Energy Certificates ('RECs') under the Government's GreenPower program, but only actually purchased 7,163. GGP was deregistered from the program, but continued to trade for 3 months. The ACCC considered that GGP contravened the TPA by making misleading representations as to the future purchase of RECs,[31] representing that there were environmental benefits that did not exist[32] and that GGP had an affiliation that it did not have.[33] GGP made a legally binding undertaking to the ACCC,[34] to purchase RECs to cover the 4,137 shortfall and inform all customers of the proceedings. It also agreed that if it again operated as a GreenPower retailer it would ensure that it possessed sufficient RECs before entering into an agreement with a customer. The directors undertook to attend trade practices compliance training.

In the Prime Carbon case,[35] Prime Carbon claimed that it had an affiliation or association with the National Stock Exchange. It also claimed that it had a relationship with the National Environment Registry ('NER'), which it said is regulated by the Australian Government and is the registry for all approved carbon credits in Australia. Prime Carbon claimed that the NER had an agreement with the Chicago Environment Registry, which would facilitate the trading of Australian credits internationally. The ACCC found these assertions to be false. Prime Carbon admitted these contraventions and court orders were made by consent, restraining Prime Carbon from making such assertions for three years and requiring it to seek written legal advice before making such claims in the future. The sole director was also required to attend trade practices compliance training and inform customers of the proceedings, both by letter and website announcement.

In the Holden case,[36] Holden placed advertisements in a number of newspapers stating that its cars were "Grrrrrreen", suggesting that it had taken measures to ensure the carbon neutrality of its vehicles, and that it would plant 17 native trees within one year of purchase of a vehicle from its Saab range, which would offset the carbon emissions from the car over the life of the vehicle. In fact, the carbon emissions would not be neutral over the life of the car, and 17 trees would not provide an offset for more than a single year of operation of any of the cars in the Saab range. Following contact from the ACCC, Holden planted 12,500 native trees to offset the emissions of those cars sold during the period of the misleading advertisement. Holden also undertook to provide training to all marketing staff and to review their Trade Practices Compliance Program.

These cases are a welcome development and may have a significant impact on consumer protection in the VCM by deterring companies from making unsubstantiated claims and increasing the utilisation of compliance and training programs.

Deterrence

Deterrence operates on three levels. Firstly, companies will have to make good on their claim, thus negating any benefit sought in making misleading statements. Secondly, there is the high financial penalty the ACCC can seek under the ACL. Thirdly, and probably most importantly, companies are likely to fear the reputational damage that can occur as a result of misleading customers. In this regard, the Total Environment Centre advises

businesses that the "biggest risk of greenwash is damaging your company's reputation".[37] Recall that in all three cases discussed the companies had to write to customers and explain how they had been misled. This undoubtedly stimulates word-of-mouth publicity about the claims, in addition to the numerous news stories written about the cases, which may linger for some time.[38]

The fear of reputational damage can be seen at work in the Prime Carbon case, where Prime Carbon felt it necessary to make a press release informing customers that its program had maintained its integrity,[39] even though that was not at issue in the proceedings. It seems clear that Prime Carbon feared that the mere fact that it had been the subject of ACCC proceedings would lead consumers to believe that its offsets lacked credibility and that its reputation would be damaged. A similar move was made by Holden, who very quickly responded to a posting on a website entitled 'PR Disasters' with a statement attempting to counter bad publicity.[40]

Under the ACL, the ACCC will no longer need to make a complaint to a company or take them to court as it can issue a public warning notice.[41] These public warning notices can be issued by the ACCC when it reasonably suspects that a company is making false or misleading claims and where it is in the public interest to disclose its suspicion. As well as having a deterrent effect, these notices directly protect consumers, by ensuring that they are aware of misleading claims being made by offset providers.

Increased compliance and training programs

In all three cases the companies in question agreed to provide or undergo training, or review their compliance program, to ensure compliance with the TPA when making carbon claims. Given the risk of prosecution that these cases evidence, it seems likely that one impact of the cases will be to encourage companies to provide training and develop compliance programs of their own accord to ensure compliance. This is not uncommon in other sectors. For example, companies generally maintain an occupational health and safety program so as to ensure compliance with the relevant legislation, and the ACCC already provides a number of compliance program templates for companies to use.[42] Holden expanded their compliance program subsequent to the ACCC proceedings.

This increase in training and compliance programs is even more likely given that the "verifiable presence of a compliance culture, as demonstrated by a substantial and successfully implemented compliance program" can be taken into account by the courts should the ACCC bring a claim.[43]

The limit to ACCC regulation of the VCM: Offset quality

One issue that has particularly concerned the ACCC is how to approach cases where it appears that a company overstates the efficacy of the offsets themselves, or where a company claims to be carbon neutral, but uses poor quality offsets to do so. In the Prime Carbon and GGP cases, neither company was challenged as to the quality of the offsets provided, while in the Holden case, the ACCC did question the offsets, *inter alia*, contending that 17 trees would not offset the emissions of a vehicle over its lifetime. However, as Holden agreed to orders by consent, the issue of how the ACCC would have measured offset quality and argued its case was not explored.[44] Thus it remains to be seen how the ACCC will approach a case where it believes the offsets are of poor quality and needs to establish this as fact.

In the guide to carbon claims, the ACCC deflects calls to adopt a standard for offsets[45] by focusing on consumers and their perceptions of a carbon claim.[46] It suggests that companies must "provide accurate and complete information" to customers and spell out "exactly what is included" in the claim, because, absent a universal standard, consumer understanding of terms such as 'carbon neutral' is varied.[47] However, the ACCC also states that provision of poor quality offsets may itself amount to misleading consumers, but does not provide a reference standard for this quality, instead merely suggesting that businesses consider the "certainty, longevity and timeliness" of the offsets.[48]

While the ACCC is "not a policy agency", and so is not able to create and enact minimum standards for offsets or adopt one of the many existing voluntary standards as a benchmark,[49] it did support the

introduction of a national standard, and passed its concerns regarding the difficulty it faces in assessing offset quality on to the Department of Climate Change and Energy Efficiency.[50] The resulting National Carbon Offset Standard ('NCOS')[51] may go some way to assisting the ACCC, but only if an offset provider has been certified. If a company's offsets fail to meet the NCOS criteria, the ACCC has a clear standard to apply. Unfortunately, the NCOS is voluntary and therefore, until it gains widespread acceptance and use, or the ACCC adopts it as its standard,[52] the ACCC will only have this standard to refer to when a company has chosen to be accredited. Indeed, companies may even wish to avoid accreditation so they can continue to make vague claims and avoid the need to adhere to a rigorous standard that is easily susceptible to the ACCC's scrutiny.

The ACCC notes, "the lack of a standard definition disadvantages businesses that use the term only after a rigorous carbon accounting and auditing process or follow one of the internationally recognised voluntary standards" because other companies may be less rigorous and so place genuine traders at a competitive disadvantage.[53] Furthermore, it has been argued that the absence of a standard damages consumer perception of the VCM, as the lack of quality of some offsets encourages scepticism and damages the legitimate claims of businesses genuinely striving to make an environmental impact.[54]

This difficulty has by no means been unique to Australia. The US Bureau of Consumer Protection ('BCP') has also grappled with the question of whether it should regulate offset quality. In consulting for proposed changes to its green claims guide, it received submissions both urging the adoption of a mandatory offset standard and submissions to the contrary.[55] Ultimately, like the ACCC, the BCP noted, "the Commission has authority to combat deceptive and unfair practices. It does not have authority to develop environmental policies or regulations".[56] The UK Advertising Standards Agency ('ASA') has faced this problem more directly because, unlike the ACCC and BCP, the ASA itself adjudicates on whether claims are misleading, and so has had to decide how to determine whether offsets are genuine. The ASA has called on expert advice to determine what the "generally accepted" standard for the industry was at the time, and whether the calculation methodologies used were "sound and used by reputable experts in the field".[57] This illustrates how the consumer protection agencies may deal with issues of offset quality absent a mandatory standard for offsets: the use of an expert to determine the current accepted standard may be a useful tool in an area where the science and consensus moves quickly.[58]

Conclusion

Overall, while the ACCC clearly has an important role in protecting consumers, educating businesses, negotiating compliance and initiating legal action, its role as a regulator of the VCM reaches its limit at the point of regulating the quality of carbon offsets. Without a mandatory standard, or the ability to set one, the ACCC has had to make do with the vague notion that 'low quality' offsets may mislead customers and, as yet, there is little indication of how the ACCC would assess this. Until there is a mandatory offset standard, consumers, who may know little about the technical details of offsets, are not fully protected from being sold poor quality carbon offsets that do little to reduce carbon emissions.

1 ACCC, 2008, 'Carbon claims and the Trade Practices Act' p. 1.

2 Ribón and Scott, 2007, *Carbon Offset Providers in Australia 2007* (report) (RMIT University).

3 Australian Government, 2008, *National Carbon Offset Standard Discussion Paper*, p.4; ACCC, 2008, 'Carbon claims and the Trade Practices Act'.

4 BCP, 'Proposed Revisions to the Green Guides' available at: www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf (accessed 13 November 2010). See also ACCC, 2008, 'Carbon claims and the Trade Practices Act'.

5 ACCC, 2008, 'Carbon claims and the Trade Practices Act'.

6 Harris, 2007, *The voluntary carbon offsets market: An analysis of market characteristics and opportunities for sustainable development*, International Institute for Environment and Development, London (report) 12.

7 Hamilton et al. 2008, *Forging a Frontier: State of the Voluntary Carbon Markets 2008*, Ecosystem Marketplace & New Carbon Finance, (report) 4.

8 Hamilton et al. 2008, *Forging a Frontier: State of the Voluntary Carbon Markets 2008*, Ecosystem Marketplace & New Carbon Finance, (report) 67.

9 National Carbon Offset Standard Discussion Paper, 2008, Australian Government, 4; ACCC, 2008, 'Carbon claims and the Trade Practices Act', 3.

10 Ribón and Scott, 2007, *Carbon Offset Providers in Australia 2007* (report) (RMIT University), 4.

11 Hamilton et al. 2008, *Forging a Frontier: State of the Voluntary Carbon Markets 2008*, Ecosystem Marketplace & New Carbon Finance, (report), 43; Brazzale, President of the Voluntary Carbon Markets Association, presentation to Carbon Expo Australasia 2010. Available at: www.vcma.org.au/resources/voluntary-carbon-market-could-triple-size-2015 (Accessed 12 November 2010).

12 Hogarth, 2010, *Crunch Time for Offsets: Where to now for the voluntary carbon market?* Total Environment Centre, Sydney.

13 ACCC website, 'What We Do', available at: www.accc.gov.au/content/index.phtml/itemId/54137#h2_25 (Accessed 13 November 2010).

14 See Committee of Advertising Practice, 2010, 'Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing' (12th ed) s. 3.

15 *Trade Practices Act 1974* (Cth), s.52(1).

16 *Trade Practices Act 1974* (Cth), s. 53(a).

17 *Trade Practices Act 1974* (Cth), s. 53(c).

18 *Trade Practices Act 1974*ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper, p. 6.

19 ACCC, 2008, 'Issues paper: The Trade Practices Act and carbon offset claims'.

20 ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper, p. 6.

21 ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper, p. 6.

22 *The Age*, 'Tone down renewable claims: GreenPower' (August 5 2009). Available at: http://news.theage.com.au/breaking-news-national/tone-down-renewable-claims-greenpower-20090805-e8y7.html (accessed 10 November 2010).

23 *The Age*, 'Tone down renewable claims: GreenPower' (August 5 2009). Available at: http://news.theage.com.au/breaking-news-national/tone-down-renewable-claims-greenpower-20090805-e8y7.html (accessed 10 November 2010).

24 *Trade Practices Amendment (Australian Consumer Law) Act (No. 2)* 2010, Schedule 2, s. 224(3).

25 *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*, Schedule 2, s. 219.

26 *ABC News*, 'ACCC targets green claims' (October 29 2007). Available at: http://www.abc.net.au/news/stories/2007/10/29/2073330.htm (accessed 13 November 2010).

27 ACCC, 2008, 'Carbon claims and the Trade Practices Act' p. 2.

28 *Sydney Morning Herald*, 'Green claims attacked' (2 August 2007). Available at: http://www.smh.com.au/news/national/green-claims-attacked/2007/08/01/1185647979249.html (accessed 9 November 2010).

29 ACCC website, 'What are carbon claims?', available at: http://www.accc.gov.au/content/index.phtml/itemId/833200 (accessed 9 November 2010).

30 Global Green Plan, *Undertaking to the Australian Competition and Consumer Commission for the Purposes of Section 87B* (2009) Doc: DID/681.

31 *Trade Practices Act 1974* (Cth), s. 52.

32 *Trade Practices Act 1974* (Cth), s. 53(c).

33 *Trade Practices Act 1974* (Cth), s. 53(d) due to trading after it had been deregistered from the GP program.

34 Provided for by the *Trade Practices Act 1974* (Cth), s. 87B.

35 *ACCC v Prime Carbon Pty Ltd* (2010) FCA No: (P)QUD305/2009.

36 *Australian Competition and Consumer Commission v GM Holden Ltd* [2008] FCA 1428.

37 Total Environment Centre, 'Green Marketing: Snapshot on how to avoid greenwash', available at: http://greencapital.org.au/index.php?option=com_docman&task=doc_download&gid=135&Itemid=166 (accessed 13 November 2010).

38 For example, as of 10 November 2010, half of the links on the first page of a Google search for 'Prime Carbon' relate to the ACCC's action against the company.

39 Prime Carbon, 'Media Release: Prime Carbon program maintains integrity', 11 March 2010. Available at: http://primecarbon.com.au/what/docs/Prime_Carbon_Media_Release_110310.pdf (accessed 9 November 2010).

40 McCusker, 2010, 'Saab's 'green' Ads mislead buyers says ACCC', *PR Disasters*, available at: http://prdisasters.com/saabs-green-ads-dented-by-accc-legal-action/ (accessed 12 November 2010).

41 *Trade Practices Amendment (Australian Consumer Law) Act (No. 2)* 2010, s. 233.

42 ACCC website, 'Trade practices compliance program templates', available at: www.accc.gov.au/content/index.phtml/itemId/716224 (accessed 12 November 2010).

43 ACCC website, 'Trade practices compliance programs', available at: http://www.accc.gov.au/content/index.phtml/itemId/54418 (accessed 12 November 2010).

44 In any case, it seems patently obvious that 17 trees would not offset the lifetime emissions of a motor vehicle, so it is unlikely that the ACCC did any calculation or investigation into this, beyond merely pointing out the apparent falsity of the claim.

45 ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper,13.

46 ACCC, 2008, 'Carbon claims and the Trade Practices Act'.

47 ACCC, 2008, 'Carbon claims and the Trade Practices Act', p. 17.

48 ACCC, 2008, 'Carbon claims and the Trade Practices Act', p.10.

49 ACCC, 2008, 'Carbon claims and the Trade Practices Act', p. 9.

50 ACCC, 2008, 'Carbon claims and the Trade Practices Act', p. 14.

51 National Carbon Offset Standard, available at: http://www.climatechange.gov.au/government/initiatives/~/media/publications/carbon-accounting/revised-NCOS-standard-pdf.ashx (accessed 11 November 2010).

52 Watson et al., 2010, 'Introduction of a new national standard for the voluntary carbon trading market' *Lexology*. Available at http://www.lexology.com/library/detail.aspx?g=fc186d96-c49a-409e-8486-5b19cad4b02b (accessed 4 November 2010). "It remains to be seen whether the ACCC will also refer to the methodologies and standards deemed acceptable under NCOS to determine if other voluntary carbon products and carbon claims have made false, misleading or deceptive claims".

53 ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper, p. 8.

54 ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper, p. 8.

55 BCP, 'Proposed Revisions to the Green Guides' available at http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf (accessed 13 November 2010).

56 BCP, 'Proposed Revisions to the Green Guides' available at http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf (accessed 13 November 2010).

57 ASA Adjudication on Eurostar Group Ltd. Available at http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2008/6/Eurostar-Group-Ltd/TF_ADJ_44493.aspx (accessed 1 November 2010).

58 ACCC, 2008, 'Carbon claims and the Trade Practices Act'.

Environmental Labelling of Food Products

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With growing consumer awareness about the impacts on the environment of food production and harvesting, food labels increasingly provide information on the methods with which food products are grown, harvested and/or manufactured. This type of labelling is often referred to as "environmental labelling". Environmental labelling of food products informs the consumer about a food product's environmental impacts and empowers them to choose products produced in a way that is less harmful to the environment. Potentially, environmental labelling can drive change to more environmentally-friendly methods of food production and manufacturing by influencing consumers' choices. It is therefore of concern that Federal labelling laws fail to provide for environmental labelling and that there are barriers at the State level to bringing legal action to enforce environmental labelling requirements where they exist.

This paper looks at the inadequacies of Australia's food labelling regime and NSW's legal enforcement tools in the context of three case studies: tinned tuna, palm oil and genetically modified organisms. The paper analyses the *Food Standards Australia New Zealand Act 1991* (Cth) ('FSANZ Act'), *Food Act 2003* (NSW) ('NSW Food Act') and *Trade Practices Act 1974* (Cth) ('TPA') and assess the extent to which they provide for environmental labelling. Some options to remedy gaps in existing labelling law are also proposed.

Food Standards Australia New Zealand

Food Standards Australia New Zealand ('FSANZ') is a bi-national government agency and Australia's national body responsible for labelling issues. FSANZ's main responsibility is to develop and administer the *Australia New Zealand Food Standards Code 1991* ('the Code'), which contains standards for foods that deal with such issues as food safety, food additives, labelling and genetically modified foods. Food suppliers are responsible for complying with relevant food legislation, while enforcement and interpretation of the Code is the responsibility of State/Territory departments and food agencies within Australia and New Zealand.[1] Implementation and enforcement of the Code in New South Wales is discussed below in the context of the case study on genetically modified organisms.

FSANZ is established by the FSANZ Act, which is underpinned by one key objective, the protection of public health. Section 3 provides:

The object of this Act is to ensure a high standard of public health protection throughout Australia and New Zealand by means of the establishment and operation of a joint body to be known as Food Standards Australia New Zealand to achieve the following goals:

(a) a high degree of consumer confidence in the quality and safety of food produced, processed, sold or exported from Australia and New Zealand;

(b) an effective, transparent and accountable regulatory framework within which the food industry can work efficiently;

(c) the provision of adequate information relating to food to enable consumers to make informed choices; and

(d) the establishment of common rules for both countries and the promotion of consistency between domestic and international food regulatory measures without reducing the safeguards applying to public health and consumer protection.

It is clear that public health is FSANZ's driving objective. The Parliamentary Secretary to the Minister for Health has executive responsibility for FSANZ. Also, members of the Board of FSANZ, which conducts the affairs of FSANZ, are specialists in a range of subjects, including public safety and health, nutrition, primary food production, science, business, and consumer affairs. However, none appears to have expertise in environmental issues relating to food.[2]

FSANZ's stated aim is to achieve consumer confidence in food quality and safety, establish a transparent food regulatory framework, and enable informed consumer choices.[3] One of the objects of the FSANZ Act is: "the provision of adequate information relating to food to enable consumers to make informed choices".[4] It is therefore open to FSANZ to interpret this broadly in exercising its powers to amend standards or to make new standards, rather than constrain that object to refer only to adequate information relating to the protection of public health. However, to date FSANZ has expressed an unwillingness to extend the Act to environmental labelling.

FSANZ's narrow interpretation of its objects is evidenced through the case studies below concerning the labelling of tinned tuna to reflect sustainable fisheries, the labelling of palm oil in products to reflect the negative environmental impacts of palm oil plantations, and the labelling of genetically modified ('GM') ingredients in baby formula. To address deficiencies in food labelling requirements, non-government organisations ('NGOs') are attempting to harness provisions under the FSANZ Act to target issues not originally intended to be included within its scope.

FSANZ's reluctance to address wider environmental issues supports the argument that its decision-making premise is too restrictive in an evolving society where consumers have increasing environmental concerns about their food. This paper will conclude by recommending legislative reform of labelling requirements that reflect wider criteria upon which consumers can make more informed choices.

Labelling tinned tuna

Unsustainable fisheries and by-catch

Tuna is one of the world's favourite fish, providing a critical part of the diet of millions of people across the globe. The five main commercially harvested tuna are skipjack, yellowfin, bigeye, albacore and bluefin. Bigeye and yellowfin are fully exploited or over exploited in all oceans, and bluefin are on the brink of collapse. Not only is the rate of harvest of tuna unsustainable, but tuna fisheries also impact on other species in the ocean due to bycatch of a large number of other fish, sharks, turtles, seabirds, and dolphins.[5]

To allow consumers to purchase tuna with the least environmental impact, tuna labels need to contain information about the species and fishing method. While bigeye, yellowfin and bluefin tuna fisheries have reached unsustainable levels, skipjack is not (yet) overfished. Pole and line is the most environmentally friendly method of fishing for tuna, as it does not result in the high levels of bycatch of fishing methods using large nets. The environmental labelling of tuna may also include "dolphin friendly", although different dolphin friendly labelling schemes have different fishing standards to avoid the bycatch of dolphins. Currently there is no requirement in Australia to label tuna with any of this information.

Labelling requirements for tuna

The Code provides for food labelling standards.[6] One such standard requires that food for retail sale, with some exceptions, must bear a label setting out all the information prescribed in the Code.[7] Another standard requires that the label on a package of food

must include a statement of ingredients.[8] Ingredients must be declared using:[9]

(a) the common name of the ingredient; or

(b) a name that describes the true nature of the ingredient; or

(c) where applicable, a generic name set out in the table to the clause.

The table provides for the generic name "fish" which may be used subject to the condition that "(i) f crustacea, the specific name of the crustacea must be declared". "Fish" is defined as "any of the cold-blooded aquatic vertebrates and aquatic invertebrates including shellfish, but does not include amphibians and reptiles".[10] The standard does not define specific names for fish but refers to the *Australian Fish Names Standard*.[11] The *Australian Fish Names Standard* lists "tuna" and the various tuna species.

What this means is that labelling tinned tuna variously as "tuna", "chunky style tuna", "light meat tuna", "flaked tuna" or "tuna slices" rather than the species name does not constitute a false description.

The Code only requires the common name of a product on the label and tuna is the common name of the product tuna.

To constitute a false description of food under the NSW Food Act,[12] it must be evidenced that a product labelled "tuna" is in fact not tuna, or that a product labelled a particular species of tuna, such as skipjack tuna, is a different species, such as bluefin tuna. Thus, the labelling of canned tuna as "tuna" or "light meat tuna" etc would not create a false impression as to the contents of the can in the mind of a reasonable person under the Food Act.[13]

Likewise, the test for whether conduct is misleading or deceptive[14] or false and misleading[15] under the TPA is the "reasonable person" test. The average consumer is unlikely to be misled or deceived into thinking they are buying anything other than tuna when they purchase a product labelled "tuna", but will not know whether the tuna is sustainably sourced. Accordingly, non compliance with the *Australian Fish Names Standard* is unlikely to constitute a breach of the TPA (at least with regards to misleading or deceptive conduct, or false or misleading conduct), the Code, or the Food Act.

Problems with objectivity of sustainability claims

Currently, companies voluntarily provide information about the method of fishing and/or species of tuna on labels or on their websites. However, even where consumers are able to obtain more information about a tuna product from the label or by enquiry to food companies, it can be difficult to acquire objective information.

These issues only serve to emphasise the importance of an amended or new standard to provide for the environmental labelling of tuna. This would standardise company representations, provide a mechanism for enforcement and provide information to consumers to enable them to select sustainably sourced tuna.

New tuna labelling regulations needed

FSANZ may vary a standard or make a new standard upon application made under the FSANZ Act.[16] Standards and variations of standards may relate to any of a number of listed matters, including:[17]

- the production of food;
- any information about food, including labelling, promotion or advertising; or
- such other public health matters relating to food as are prescribed.

It is therefore possible that the standard relating to the labelling of ingredients[18] and the standard relating to fish and fish products[19] could be amended to require that tuna product labels include information about the species and fishing methods.

It is open to FSANZ to apply a broad interpretation of the FSANZ Act. If it considers that it is constrained by the overriding public health objective of the FSANZ Act, it is then perhaps time to reconsider the scope of Australia's food labelling regime which is failing to adapt to changing societal demands and needs with respect to environmental labelling.

Labelling palm oil in food

Unsustainable palm oil plantations deplete rainforests

A 2006 application to FSANZ sought to vary food standards[20] to prescribe the specific labelling of palm oil in food. The application intended "to stop the extinction of the orangutan and stop rainforest destruction due to unsustainable palm oil plantations".[21] The application argued that this variation would alert consumers to palm oil in products to enable informed choices, gradually change consumer behaviour by spreading awareness of the deforestation and extinction of species as a consequence of palm oil plantations, and facilitate eco-labelling such as 'orangutan friendly' or 'Roundtable on Sustainable Palm Oil ('RSPO') certified'.

Labelling requirements for palm oil

As discussed, the standard relating to the labelling of ingredients[22] requires every ingredient in the product to be listed using the common or generic name of the ingredient. For example, where the ingredient's generic name is a fat or oil, the label must state whether its source is animal or vegetable. Only peanut, soy or sesame vegetable oils must be specifically declared. Thus, the standard is complied with if food manufacturers use the generic name "vegetable oil" where palm oil is present. Therefore, consumers cannot distinguish when palm oil is present unless it is specified.

Application to label palm oil rejected

In 2008, FSANZ rejected the palm oil application on the basis that the intention of the application was ultra vires the FSANZ Act. FSANZ stated that the application went "well beyond anything envisaged by the FSANZ Act and its objectives" where "none of the objectives in developing or reviewing a standard are relevant to the issues raised in this Application".[23] However, arguably it was open for FSANZ to find that the application was consistent with the objective of the FSANZ Act to encourage the provision of adequate information relating to food to enable consumers to make informed choices.[24]

As noted above, FSANZ's capacity to develop and review food regulatory measures as sought in the application may relate to "any information about food, including labelling, promotion and advertising."[25]

FSANZ also rejected the application because "the objectives of the FSANZ Act do not extend to choices about international environmental issues".[26] However, this restrictive stance contradicts the FSANZ Act which requires FSANZ to consider certain criteria when developing and reviewing food regulatory measures, including: the promotion of consistency between domestic and international food standards; the desirability of an efficient and internationally competitive food industry; and the promotion of fair trading in food.[27] This demonstrates that the FSANZ Act does not solely require the consideration of supply, quality and safety of food to provide adequate information to assist consumer choices. As such, it is arguable that FSANZ does have the power to vary the Code to provide for the mandatory labelling of palm oil. Again, if public health is seen as an overriding purpose then it is time to amend the Act to enable it to deal with environmental labelling issues.

A review of FSANZ's rejection in the Federal Court or the Administrative Appeals Tribunal would test this opinion, but the limitation date for such proceedings has long past. Unfortunately, FSANZ has indicated that it will not accept a further application to vary the Code to prescribe mandatory labelling of palm oil.[28]

Labelling genetically modified organisms in food

Although genetically modified organisms ('GMOs') are now widely used in many countries to grow a large number of very common foods such as soy beans and chick peas, many people remain skeptical about GMOs and consider that there is a risk of negative consequences for both human health and the environment. In 2009, Greenpeace commissioned independent testing on Wyeth Australia's S-26 infant formula and discovered that the product contained GMOs in two tests, at 0.1% and 0.2% of the overall product respectively.[29] The product labels on the formula did not include the statement 'genetically modified' as required by *Standard 1.5.2 - Food Produced Using Gene Technology*.

Although it is lawful to sell food containing the GMO for which the S-26 infant formula tested positive, *Standard 1.5.2* requires that a product containing GMOs must be labelled 'genetically modified' corresponding to the ingredient's name.[30] However, where the GMO equals no more than 10g/kg, there is no requirement to label the product so long as the GMOs are 'unintentionally' present.[31] According to FSANZ, manufacturers are responsible to establish intent to purchase non-GM ingredients.[32] Without evidence of such intention, this exception is likely to apply due to the difficulty in arguing that the presence of the GMO in the product was unintended.

Knowledge on the part of a company that its product contains GMOs would mean the company could not avail itself of the exception nor the due diligence defence.[33] It is difficult in these cases to establish what a company knew and didn't know in terms of product contamination with GMOs. It may be arguable that a company did know that a product contained GMOs if the company sourced its ingredients from countries where genetic engineering dominates food production and cross-contamination of non-genetically engineered crops is problematic.[34] There is also an argument that if a product is repeatedly found to contain genetically modified ingredients, the exception should not apply because it reveals a lack of effort on the part of the company to respond adequately to previous positive test results.[35]

As discussed above, FSANZ is not responsible for enforcing a breach of a food standard. However, the Food Act provides important investigative powers, including the taking and analysis of food samples,[36] the auditing of food businesses according to risk management practices,[37] and inspection and seizure powers,[38] which would assist in proving the requisite intention required under *Standard 1.5.2*. Such powers are provided only to the NSW Food Authority and not to third parties. There is also no specific third party right to bring proceedings under the Food Act. This creates a barrier to the enforcement of *Standard 1.5.2* by third parties. There is a clear public interest in facilitating the ability of third parties to bring proceedings to enforce labelling laws and an amendment to the Food Act is recommended.

International perspectives

There is a lot of work being done overseas to provide for the environmental labelling of foods. For example, supermarket giants Walmart in the United States and Tesco, Morrisons, Sainsbury's, Asda, Waitrose, and Marks and Spencer in the United Kingdom, have decided to introduce 'eco-labels' for food, such as RSPO-certified. Walmart's proposed 'sustainability product index' requires suppliers to conduct product audits based on environmental criteria such as the reduction of greenhouse gas emissions, the reduction of waste, the use of natural resources and ethical production.[39]

The UK Department for Environment, Food and Rural Affairs has proposed a progressive standardised eco-labelling scheme called the 'Sustainable Food System' that indicates the carbon load in growing and transporting food.[40] This is an important development that builds on previous labelling schemes which only indicate a food's nutritional information, thus responding to consumer concerns

by providing adequate information about the food's environmental sensitivity. This ambitious project aims not only to apply proposed environmental criteria such as sustainable farming, animal health and welfare and biodiversity within the UK, but possibly to countries from which the UK imports its food.

However, this scheme is not without its challenges. Although it is an attempt to curb environmental impacts, it will be challenging to formulate a scheme incorporating the food's entire lifecycle, from production to distribution. Further, there will be carbon tradeoffs between local foods produced out of season and imported food produced without fossil fuels, as well as between organic and conventional farming practices. Nonetheless, Australia can still gain inspiration to propose similar innovative schemes.

Sweden is currently enacting a voluntary 'climate friendly' labelling scheme based on independent certification to encourage more environmentally sensitive food production and purchasing practices.[41] However, consumer 'greenwashing' may occur due to a lack of conclusive scientific data on carbon emissions.

It is recommended that Australia and New Zealand pursue similar innovative measures to demand accountability for environmental labelling, as a number of international jurisdictions are doing.

Advancing informed consumer choices – A way forward?

It is clear that the need to establish regulations for environmental labelling of food remains vastly overlooked in Australia. This continues to hinder the public's ability to make informed choices with respect to the environmental impacts of food production and harvesting methods. This is aggravated by FSANZ's inconsistent interpretation of the FSANZ Act. In the palm oil case study, FSANZ adopted a restrictive stance to exclude issues beyond the supply, quality, and safety of food. With respect to the GMO standard, however, FSANZ has clearly stipulated that labelling genetically modified foods was not a safety issue, rather, an initiative to enable informed consumer choices based on ethical, environmental, religious, or other reasons.[42] It is thus difficult to reconcile what is deemed to be within FSANZ's ambit.

FSANZ's narrow interpretation of its objects stems from the legislative constraints of the FSANZ Act, which was not originally designed to encapsulate environmental labelling. Arguably, it is open to FSANZ to apply a broad interpretation of the Act. If it considers itself unduly constrained by the public health objectives of the FSANZ Act then that legislation must be amended.

It is also vital that the enforcement legislation of the States and Territories facilitates third party proceedings. So-called open standing provisions are common in environmental laws and, arguably, should also be available to facilitate enforcement and good governance in the context of labelling laws.

The inadequacy of labelling laws to address environmental purposes in a credible and uniform manner erodes the power of consumer choice in an increasingly environmentally conscious world. For example, consumers are currently unable to identify products containing palm oil that are contributing to deforestation unless manufacturers voluntarily label the palm oil ingredient. Consumers can only make informed choices about sustainably sourced food to fuel economic and ethical motivation if FSANZ uniformly adopts a wider legislative interpretation of its objects to encompass labelling for environmental purposes or if the FSANZ Act is amended to provide for environmental labelling.

Senators Nick Xenophon and Bob Brown have recently proposed the *Food Standards Amendment (Truth in Labelling Laws) Bill 2009* to be reviewed by the Senate Economics Committee. The Bill requires FSANZ to develop and approve labelling standards that require food manufacturers and distributors to use the word "Australian" only if the product is 100% produced in Australia, and where one or more imported ingredients are present, they must be clearly labelled.[43] The Bill also proposes the labelling of palm oil and that FSANZ develop a labelling standard mandating the specific listing of palm oil and palm oil derivatives as an ingredient in packaged foods regardless of whether it is RSPO-certified. The intended result of the Bill is to

encourage the use of certified sustainable palm oil to promote environmental protection while providing consumers with accurate labelling information about the inclusion of palm oil in foods to enable informed choices.

The FSANZ Act must be more broadly interpreted or amended to meet the needs of a changing world, where the public has a need and desire to know about the environmental impacts and consequences of its foods choices. Labelling for environmental purposes appears to have been deemed to be beyond the FSANZ Act, with FSANZ showing reluctance to more broadly interpret the objects of the FSANZ Act. FSANZ's constraints must be met with broader legislative approaches that can help equip consumers to harness their collective purchasing power to manage urgent environmental challenges.

Although food safety, supply, and quality remain FSANZ's main priority, FSANZ must take guidance from the innovative measures of other governments to affect positive environmental change.

1 FSANZ website, at: www.foodstandards.gov.au

2 FSANZ website, *FSANZ Board* (2010), available at: www.foodstandards.gov.au/scienceandeducation/aboutfsanz/theboard/ (accessed 20 September 2010).

3 FSANZ website at: www.foodstandards.gov.au/scienceandeducation/publications/annualreport/fsanzannualreport20082009/ouraccountability09/ourrolesandpriorites.cfm

4 *Food Standards Australia New Zealand Act 1991* (Cth), s. 3(c).

5 *Tuna are in trouble* Greenpeace website at: www.greenpeace.org/international/en/campaigns/oceans/tuna/

6 *Australia New Zealand Food Standards Code 1991*, Part 1.2.

7 *Standard 1.2.1: Application of Labelling and Other Information Requirements*

8 *Standard 1.2.4: Labelling of Ingredients*, cl. 2

9 *Standard 1.2.4: Labelling of Ingredients*, cl. 4.

10 *Standard 2.2.3: Fish and Fish Products*

11 *AS SSA 5300 – 2007.* Available at: www.sydneyfishmarket.com.au/Portals/0/AFNS_AS_SSA_5300_1.pdf

12 *Food Act 2003* (NSW) s. 22(1)(f).

13 *Food Act 2003* (NSW), s.22(1)(e)

14 *Trade Practices Act 1974* (Cth), s. 52(1).

15 *Trade Practices Act 1974* (Cth), s. 53.

16 *Food Standards Australia New Zealand Act 1991* (Cth), s. 22.

17 *Food Standards Australia New Zealand Act 1991* (Cth), s. 16.

18 *Standard 1.2.4: Labelling of Ingredients*

19 *Standard 2.2.3: Fish and Fish Products*

20 *Australia New Zealand Food Standards Code 1991* (Cth), *Standard 1.2.4* regarding the Labelling of Ingredients, and *Standard 2.4.1* regarding Edible Oils; FSANZ, *Food Standards Code* (2010). Available at: www.foodstandards.gov.au/foodstandards/foodstandardscode/ (accessed 20 September 2010).

21 Amanda Enright, Application A593 Labelling of Palm Oil, 13 October 2006 at 3.

22 *Standard 1.2.4: Labelling of Ingredients*

23 FSANZ Rejection of Application A593 Labelling of Palm Oil, 16 July 2008 at 2.

24 *Food Standards Australia New Zealand Act 1991* (Cth), s. 3(c).

25 *Food Standards Australia New Zealand Act 1991* (Cth), ss.13, 16(1)(d). Not that these matters are the same as those outlined in the *FSANZ Act 1991* (s. 9) as it was in force when the application was lodged.

26 FSANZ Rejection of Application A593 - Labelling of Palm Oil, 13 October 2006.

27 *Food Standards Australia New Zealand Act 1991* (Cth), s. 18(2)

28 Letter from Steve McCutcheon, CEO of FSANZ to Jenny Gray, CEO of Zoos Victoria, 4 September 2009.

29 Eurofins laboratory report, 29 April 2010, S-26 infant formula tested positive for GS083 Roundup Ready soy, at 0.1% GMO of the overall product; Genetic ID (NA) Inc laboratory report, 10 August 2010, S-26 infant formula tested positive at 0.2% GMO of the overall product.

30 *Standard 1.5.2 - Food Produced Using Gene Technology*, Div 2, cl. 5.

31 *Standard 1.5.2 - Food Produced Using Gene Technology*, cl. 4(1)(f).

32 FSANZ, 2003, *Report on the Review of Labelling of Genetically Modified Foods*, p11, p28; FSANZ, 2005, *GM Foods: Safety Assessment of Genetically Modified Foods*, p42; FSANZ Fact Sheet, *Labelling Genetically Modified (GM) foods.*

33 *Food Act 2003* (NSW), s. 28(2)(a).

34 Thomas Net News, 2010, *Adoption of Biotech Crops by US Farmers Continue to Rise*, available at: http://news.thomasnet.com/companystory/U-S-Farmer-Biotech-Crops-Adoption-continues-to-rise-579746 (accessed 28 September 2010); Barboza D "Food Production: Pervasive spread of genetically modified crops can't be stopped, say agricultural experts, Non-biotech fields reveal contamination", *New York Times*, 10 June 2001.

35 FSANZ, 2003, *Report on the Review of Labelling of Genetically Modified Foods*, at 27-28.

36 *Food Act 2003* (NSW), Part 6.

37 *Food Act 2003* (NSW), Part 7.

38 *Food Act 2003* (NSW), Part 4.

39 Walmart, 2009 *Walmart Announces Sustainable Product Index*, available at: http://walmartstores.com/factsnews/newsroom/9277.aspx (accessed 10 Oct 2010); Walmart, 2009, *Sustainability Index*, available at: http://walmartstores.com/Sustainability/9292.aspx (accessed 10 Oct 2010); Joel Makower, 2009, *Walmart's Sustainability Index: The Hype and the Reality*, available at: www.greenbiz.com/blog/2009/07/16/walmarts-sustainability-index-hype-and-reality (accessed 10 Oct 2010).

40 Department for Environment, Food, and Rural Affairs, 2009, *UK Food Security Assessment: Our Approach*, available at: http://www.defra.gov.uk/foodfarm/food/pdf/food-assess-approach-0908.pdf (accessed 6 October 2010).

41 New Scientist, 2009, *First 'Climate Friendly Labels' Appear on Foods.* Available at: www.newscientist.com/article/mg20327173.700-first-climate-friendly-labels-appear-on-foods.html (accessed 5 October 2010).

42 FSANZ, 2003, *Report on the Review of Labelling of Genetically Modified Foods.* This report states that "On 28 July 2000, the Australia New Zealand Food Standards Council (ANZFSC) made it clear that the labelling of GM foods was not a safety issue".

43 Parliament of Australia, 2009, *Inquiry into the Food Standards Amendment (Truth in Labelling Laws) Bill 2009*, available at: www.aph.gov.au/senate/Committee/economics_ctte/food_labelling_09/index.htm (accessed 3 October 2010).

Case Study: The Debate Over Egg Labelling

Phil Westwood, Free Range Egg Farmer, Environmental Auditor, Former Egg Corp Assured Auditor, President Free Range Egg and Poultry Association of Australia Inc and spokesman for Free Range Farmers Association Inc

In the middle of 2010, the Australian Egg Corporation Ltd ('AECL') set a time bomb running when it revealed plans for new egg industry production definitions and standards. Few egg farmers, and no consumers, were aware at the time of the implications of these plans, which were first revealed in a series of industry workshops which started to trundle around the country in May 2010.

The notification to AECL members simply referred to production systems and labelling workshops and read:

Based on results obtained from AECL's recent consumer research, workshops will be held for Australian egg producers to discuss current challenges that are confronting our industry, potential resolutions to the misconceptions held by the general public and proactive measures that could be adopted by the egg industry.

The key issues to be discussed include:

- *Awareness, and definitions of egg production methods, and how this relates to purchasing habits;*
- *Integrity & ethics of egg producers and egg production;*
- *Perceptions of on-pack labelling and production/brand statements made by egg producers;*
- *Attitudes toward bird husbandry practices (actual and perceived); and*
- *Significance and value of a robust Quality Assurance scheme.*

There was no mention in any of the notices sent out by AECL that new draft standards had been prepared and would be presented at those meetings.

The standards for cage and barn egg production that were revealed at these workshops showed little change and have caused no comment. But the draft standards drawn up for 'free range' production galvanised the industry into action and sparked a request to the Federal Agriculture Minister, Senator Joe Ludwig to establish a clear national definition for 'free range' egg production.

At the core of the proposed changes was the allowable stocking density for free range egg production which sets the maximum number of birds per hectare.

The proposal took the current maximum allowed from 1,500 birds per hectare[1] to a potential 20,000 birds per hectare. At this figure, the nutrient load would be likely to have significant off-site impacts and would not be environmentally sustainable.

The AECL claimed that it had conducted consumer research involving 5000 people that demonstrated that egg buyers were happy with the higher stocking density – but has refused to supply details of the questions and the methodology used in its survey.

From the limited information which AECL has revealed, it seems that selected consumers were provided with an electronic device which showed a patch of green, and by moving a cursor, were able to select the number of chickens which they felt was suitable as a stocking density on that patch of green.

There was no attempt to select consumers who were existing buyers of free range eggs; in fact there was a clear bias to ensure that free range egg purchasers were a small minority of the sample.

Since the AECL survey, the Free Range Farmers Association Inc. ('FRFA') conducted its own survey of consumers who actually bought free range eggs. The results demonstrated complete opposition to the AECL proposal.

Information was sought from consumers on-line and face to face with customers at Farmers' Markets attended by members of the FRFA during July and August 2010.

The responses were to the statement:

The Australian Egg Corporation has revealed plans to change 'free range' standards to allow egg farms to beak trim their hens and to increase the maximum farm stocking density to 20,000 chickens per hectare. We believe that the maximum stocking density should remain at 1500 chickens per hectare and that beak trimming should be prohibited in free range flocks.

As sponsor of the on-line survey, FRFA also had the following statement on the survey site:

We are a group of free range egg farmers with strict standards - such as a stocking density of just 750 chickens per hectare, a maximum of 1000 birds per shed and de-beaking (or beak trimming) is prohibited.

2396 people responded via the online survey and 1254 people responded via the paper survey. All participants disagreed that the draft standard reflected their views of the term 'free range' and believed that the proposal was unacceptable.

Precise information was not gathered about all participants in the survey but the overwhelming majority were regular purchasers of free range eggs. More than 1000 responded to the survey at Farmers' Markets while they were purchasing eggs.

The results of the consumer survey were sent to the AECL and to Senator Joe Ludwig to demonstrate clear opposition to the proposed labelling changes but there has been no indication that the AECL is having second thoughts.

The latest comment on the issue from James Kellaway, Managing Director of the AECL was that he expected the new stocking density level to come into effect by January 2011.[2]

Mr Kellaway also suggested that existing free range farmers were not commercial. He said that he didn't "believe producers working to the current stocking density could be commercially viable".[3]

"The stocking rate needs to be high enough so it is achievable, but low enough that it is clearly differentiated from the other two standards - barn and cage. It needs to be obtainable on a commercial scale."

There are many existing commercial free range egg farmers in Australia who are perfectly happy with the stocking density limits imposed and restrictions on de-beaking or beak trimming birds.

It is true that some accredited free range farms are small operations with less than 1000 laying hens, but that doesn't mean they are not commercial. There are others throughout Australia with up to 80,000 birds, providing significant employment in their local communities. On any test they are commercial farms designed to operate as businesses.

There is no link between commercial egg production and the stocking levels being pursued by the AECL. The only driver for this proposal is the demand by major cage egg producers who want to branch out into a form of 'free range' production which will enable them to capture higher prices from consumers without the additional costs of genuine free range production.

Supermarkets such as Coles have added to this clamour by announcing a phasing out of its home

brand cage eggs and a cut in the price of its home brand 'free range' product.

The industry believes that consumers will be seriously misled if stocking density limits are raised significantly and have called for any intensive production system which does not meet the current standard to be labelled as 'cage free' or 'barn laid' rather than misuse the term 'free range'.

In preparing its draft standard, AECL has ignored its own environmental guidelines for egg farms which were released two years ago.

The guidelines state:[4]

In accordance with the Egg Corp Assured Program and the Model Code of Practice for the Welfare of Animals – Domestic Poultry 4th Edition, the egg industry has agreed maximum stocking densities for birds.

Management practices include:

- *Not stocking birds at densities exceeding those prescribed in the Code;*
- *Not stocking birds at densities exceeding those prescribed in any relevant State regulations. This is a mandatory requirement; and*
- *Consider reducing stocking densities below the mandatory requirements if the specific conditions on the farm don't allow the prescribed densities to be used without unacceptable impacts on bird health and welfare or the environment.*

Sales of free range eggs have jumped from around 15% to 28% in just a couple of years, demonstrating a huge consumer swing towards the free range sector.

The rapid increase in demand has already led to problems with the current system but the proposed changes will make it worse.

Revelations in August 2010 by the respected industry body, the Poultry Co-operative Research Centre ('CRC'), that the term 'free range' didn't mean what people thought, shocked some in the industry. But it merely confirmed what many of us had been complaining about for years.

A project about enriching the range area for free range birds showed that on average, only 9% of birds on free range farms actually used the range area. The rest simply stayed in their sheds.[5]

The CRC revelation sparked some debate, and was probably one of the reasons for the Managing Director of the AECL, James Kellaway to tell The Land publication in December 2010 that allowing increased stocking densities on free range farms would 'improve' industry standards.

Mr Kellaway also revealed that some 'free range' egg producers currently have a stocking density of 50,000 birds per hectare. And he claimed that the majority of egg producers believed introducing the 20,000 cap would improve industry standards, not make them worse.[6]

"We need to moderate the whole process and take into account the science, effectively clipping the wings of those producers who are currently running with inappropriate numbers," he said.

"We don't want open slather, but we don't want to disenfranchise producers who are being put under increasing pressure to produce eggs at lowest possible costs."

The industry believes that if the AECL is aware of any farms breaching the existing maximum stocking density of 1,500 birds per hectare, it has an obligation to report those farms to the ACCC and to the relevant State authorities.

1 As allowed by The Model Code of Practice for the Welfare of Animals – Domestic Poultry version 4.

2 He made the statement in November to UK publications Farmers Weekly and Poultry World. See: Farmer's Weekly, 'Density Increase Shocks Australian Free Range,' 11 November 2010, available at: www.fwi.co.uk/Articles/2010/11/11/124351/Density-increase-shocks-Australian-free-range.htm

3 Farmer's Weekly, 'Density Increase Shocks Australian Free Range,' 11 November 2010, available at: http://www.fwi.co.uk/Articles/2010/11/11/124351/Density-increase-shocks-Australian-free-range.htm

4 6.3. Stocking Density

5 See: www.poultryhub.org/index.php/EChook_News/Enriching_the_range_to_reduce_feather_pecking

6 The Land, 'Egg fight comes to boil' 12 December 2010, available at: http://theland.farmonline.com.au/news/nationalrural/agribusiness-and-general/general/egg-fight-comes-to-boil/2022395.aspx
See also, The Land, 'Stocking rate cap for free range hens', 5 December, 2010, available at: http://theland.farmonline.com.au/news/nationalrural/agribusiness-and-general/general/stocking-rate-cap-for-freerange-hens/2016077.aspx

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