

Commerce Commission releases Guidelines on 'green' marketing

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Introduction

The Commerce Commission (the Commission) has made good on its promise to focus more intently on businesses who make 'green' claims with the publication of *The Fair Trading Act: Guidelines for Green Marketing* (the Guide). Individuals and businesses who have made green claims in the past, or plan to do so in the future, should read the Guide (<http://www.comcom.govt.nz/FairTrading/GuidelinesforGreenMarketing/Overview.aspx>) and seek legal advice in order to minimise the risk of contravening the Fair Trading Act 1986 (the Act).

The Guide is a response to the Commission's well documented concern over the amount of deceptive and misleading green claims being made by businesses. This proliferation of 'greenwashing' sparked the Commission's Director of Fair Trading, Adrian Sparrow, to say back in June of this year; 'the growing trend to greenwashing by businesses is cause for concern if the green, eco-friendly or sustainability claims are false or misleading. In fact, the Commission has identified this as a new focus area, due to the proliferation overseas of such claims in marketing hype.'

The Guide follows very closely the Australian Competition and Consumer Commission's paper *Green Marketing and the Trade Practices Act* which was released to assist Australian businesses in avoiding breaching the Australian version of the Act. The Commission wisely decided to follow this example and develop a Guide specifically for New Zealand marketers.

The purpose of the Guide is not to stop marketers from making green claims, but to help those who use green marketing to do so accurately and to avoid the often substantial penalties imposed by the Act. The Guide recognises that making green and environmental claims is an effective way for businesses to differentiate themselves from their competitors and to secure the loyalty of environmentally-conscience consumers. However, the rights of the consumer to be able to rely on claims that are 'scientifically sound and appropriately substantiated' also need to be protected.

The Guide is divided into three parts; an examination of the Act itself, an examination of the broad principles to consider when making green claims, and a checklist which businesses can use to help identify misleading material.

Part 1: The Fair Trading Act

Sections 9 to 12 of the Act contain broad prohibitions against misleading and deceptive conduct. The conduct in question does not actually *have* to mislead anyone - it just has to be *capable* of misleading. Intention to mislead or deceive is also irrelevant. According to the law in this area, silence can also amount to misleading conduct if there is a reasonable expectation that information should be disclosed in the circumstances.

Sections 13 to 16 deal with false or misleading representations about goods and services. False or misleading representations fall into two categories. The first category is false representations as to goods being of a particular 'standard, quality, grade, quantity, composition, style or mode or as having had a particular history or prior use'. This basically means that goods must comply accurately with any description that is provided in advertising or on labelling (one example is GM Holden claiming 'every Saab is green' when in fact this could not be substantiated). The second category is representing that a particular good or service has characteristic, benefit, sponsorship or endorsement when in fact it does not.

The penalties for breaching the Act can be quite severe, ranging from a declaratory order or interim injunction by civil action, to a hefty fine (of up to \$200,000 per offence for a company) imposed by the

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District Court under criminal proceedings. For this reason, it is vital that businesses avoid contravening the Act when making green claims.

Part 2: principles of making green claims

The Guide states that if a business wishes to make environmental or green claims, those claims need to be clearly and accurately explained. Generally, a claim should:

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

The Guide goes into further detail as to the principles that should be applied, as well as providing helpful examples, but the above list offers a good indication as to the level of accuracy the Commission expects from businesses when making green or environmental claims.

Part 3: avoiding a breach of the law

The Guide strongly recommends that an in-house compliance programme be implemented by businesses to ensure that any potential breaches of the Act are identified as early as possible. This is especially important due to the fact that an unintentional or non-deliberate breach of the Act still leaves the maker of the claim vulnerable to legal action under the Act. Also, the existence of such a programme is likely to be viewed favourably by the Court if action is ever taken against the business and may provide a full or partial defence if one of its agents or employees acts in contravention of the Act.

Finally, the Guide sets out a reasonably detailed checklist for businesses to check their proposed green claims against. However, the Commission does make it very clear that the Guidelines and checklist are not to be substituted completely for legal advice.

In regards to making 'carbon neutral' claims, the Commission is in the process of developing another Guide to deal with this which is set to be released in the coming months.

If you would like any advice on these Guidelines, please feel free to contact one of either Hayden or Greg at Kensington Swan. Both have considerable expertise in this area and would be well positioned to advise you on making green claims in an accurate and substantiated manner.

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