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GREEN WASHING – ARE YOU DOING IT?

Consumers are increasingly aware of environmental issues with many opting to make purchase decisions based on green claims. Businesses have adapted quickly to this type of consumerism and claims about sustainability, eco-friendliness, energy efficiency and carbon neutrality are becoming increasingly common in the market place. However the penalties for misleading consumers apply in this area as much as any other.

Green claims are used by those in business to distinguish their products from those of their competitors, making green claims a powerful marketing tool. In turn, consumers with little time and often limited knowledge of environmental issues rely on such claims to help make their purchase decisions. Where the claims made are clear and accurate this is a win – win situation. Unfortunately, not all businesses are making accurate claims and worldwide evidence indicates consumers are being duped by unscrupulous marketers.

The Commerce Commission has become increasingly concerned about the use of green claims which, when put to the test, are unable to be sustained. The practise of “green washing”, as it has come to be known, is just another form of misleading advertising and one which the Commission has stated is a “key focus” for it over the next two years.

In response to it’s concerns the Commission published Guidelines for “Green Marketing” last year, and more recently (February 2009) draft Guidelines for making “Carbon Claims”. Both of these documents highlight the Commission’s concerns over the ever increasing use of green and carbon neutral claims which have the potential to mislead consumers and may be in breach of the Fair Trading Act 1986 (the “Act”).

The aim of the Guidelines is to educate businesses about their obligations under the Act and to ensure that where such claims are made, they are accurate. The Commission does not at any point prohibit the use of green claims, but be warned, it has said that it will get tough on anyone using green claims which are false or misleading.

The Act contains two broad prohibitions which are relevant to green claims. First, the Act places an obligation on businesses not to engage in conduct which is misleading or deceptive or is likely to mislead or deceive (Sections 9-12). In practice this means that it is not necessary for a green claim to actually mislead or deceive anyone, it will be sufficient if the claim has a ‘real and not remote possibility’ of being misleading or deceptive.

The second prohibition is more specific and prohibits false or misleading representations in relation to goods or services (Section13).

A breach of the Act can result in a variety of civil remedies being sought including injunctive relief preventing a business from carrying on the conduct and/or representation in question, or criminal action where fines for individuals can be up to \$60,000 and \$200,000 per offence for a company.

These sums do not of course factor in the sunk cost of the original advertising campaign, the packaging and labelling that may need to be altered, the shelf-space that has been negotiated or the brand damage that may result from the bad press (which may be considerable). It is for these reasons, together with a potential breach of the Act, that we urge clients to consider all aspects of the products they produce and sell to ensure they are not green washing.

Below are a number of factors which businesses making green claims should consider:

- Misleading or deceptive conduct and/or representations may occur at any time during the life cycle of a product and you should not limit a review to advertising alone. The product, its packaging, labelling and advertising could each be at risk of green washing if statements are made (for example about the product formulation and its green qualities), which are not in fact true.
- Conduct by silence may also be misleading. Take for example a claim stating that a product is “made from recycled material” when only a small portion of the external packaging is in fact made from recycled material.
- Using a business name which implies green or environmental aspects to the business which do not exist, could be in breach of the Act.
- Use of words, logos or pictures which indicate environmental approvals that have not in fact been provided, could amount to deceptive conduct.
- Claims should not be made if there is no real benefit or advantage such as products which state they are “CFC Free” when the use of CFC’s is prohibited in most aerosols.

Advertisers must be aware that the Commission’s Guidelines are just that and do not replace the need to comply with the Act and all other relevant product specific legislation including the Advertising Standards Authority Code of Practice for Environmental Claims. The key to all green claims, as with any marketing is having a good compliance programme in place. Ensure there is free flow of information between product development and marketing and awareness that compliance programmes are not one off checks but periodic pre-requisites.

The question that businesses must ask themselves is “have we included statements about environmental benefits which cannot be substantiated”? If you feel that this may be the case or you have general queries the best way forward is to seek professional advice. The bottom line however is that if you are marketing a product in New Zealand all statements must be clear, accurate, truthful and capable of being substantiated.

For more information contact:

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