

Article Information

Authors: Tom Griffith, Zoe Underwood

Service: Competition & Trade, Corporate & Commercial, Dispute Resolution & Litigation

The Perils of Environmental Claims: The ACCC lodges appeals in disposable wipes, Eco Picnic-Ware Cases

Environmental claims were the central issue in two recent cases unsuccessfully brought by the ACCC against Woolworths and Kimberly-Clark. The ACCC has announced it will appeal in each case.

The ACCC has lodged separate appeals from two recent high profile cases in which it failed to persuade the Court that the conduct of the Respondents was contrary to the law.

The conduct in each case involved claims their products had certain environmental characteristics.

Disposable Wipes Case

In *ACCC v Kimberley-Clark Australia Pty Ltd* [2019] FCA 992, the ACCC alleged that Kimberley-Clark misled consumers in relation to a number of claims made about its Kleenex Cottonelle ‘flushable’ wipes (‘KCFC wipes’), namely that:

- the KCFC wipes had similar characteristics to toilet paper when flushed (‘characteristics representation’);
- the KCFC wipes would break up or disintegrate in a timeframe and manner similar to toilet paper (‘disintegration representation’); and
- the KCFC wipes were suitable to be flushed down the toilet and into sewerage systems in Australia (‘flushability representation’).

Characteristics and Disintegration Representations

Justice Gleeson held that there had been no representations made that the KCFC wipes had similar characteristics, or would disintegrate in a similar way to toilet paper. In particular, her Honour noted that the statement ‘for best results, flush one or two cloths at a time’ is not a recommendation that an ordinary, reasonable consumer would associate with toilet paper.

Flushability Representation

Justice Gleeson was also not persuaded that the representation that the KCFC wipes were ‘flushable’ was false, misleading or deceptive. Although her Honour accepted that there was ample evidence that collectively all ‘wipe’ products are a significant management problem for municipal sewerage systems, there was no evidence which established that the KCFC wipes had caused harm to, or inflicted cost on, any single municipal system in any particular instance.

The ACCC also contended that the KCFC wipes were not suitable to be flushed into sewerage systems in Australia. In the absence of any legislative standard in Australia, Justice Gleeson held that it was reasonable for Kimberley-Clark to rely on the International Nonwovens and Disposables Association and the European Disposables and Nonwovens Association guidelines to assess the KCFC wipes flushability.

Further, Justice Gleeson held that the flushability representation was not a representation as to a future matter under s 4 of the *Australian Consumer Law*, rather it was a representation about the characteristics of the KCFC wipes. Her Honour accepted the argument made by Kimberley-Clark that it would be a substantial mischaracterisation of claims such as ‘soluble’, ‘edible’, ‘dishwasher safe’, ‘water-proof’ or ‘scratch resistant’ to describe them as predictions, forecasts or representations as to future matters.

Eco Picnic-Ware Case

In *ACCC v Woolworths Limited* [2019] FCA 1039, the ACCC alleged that Woolworths made a number of misrepresentations in relation to its 'W Select eco' picnic range of disposable plates, bowls and cutlery. The ACCC alleged that there was insufficient basis for Woolworths to claim that those products were 'biodegradable and compostable' ('Representations').

When describing the Representations, Justice Mortimer held that a reasonable consumer would have understood the Representations to be:

- 'biodegradable': able to be broken down, because of what the products were made of; and
- 'compostable': the products were capable of being turned into something that could be used in the garden or to improve soil quality.

The ACCC contended that the Representations conveyed to consumers that the products would break down or compost within a 'reasonable period of time'. Justice Mortimer disagreed, finding that the Representations conveyed to consumers that the products were *capable* of biodegrading and *could* be composted.

Were the Representations as to future matters?

In deciding whether the Representations were as to future matters, Justice Mortimer noted that for the purposes of the *Australian Consumer Law* 'representations as to future matters' relate to claims that make a prediction, forecast, projection or otherwise convey something about what may (or may not) happen in the future.

Justice Mortimer found that the Representations were not in respect of a 'future matter' but rather described the inherent characteristics of the products and what the products were made from. Her Honour drew an analogy with the term 'recyclable', which also describes the characteristics of a product. Whether or not the product is in fact recycled, does not prevent it from being described as recyclable.

Considering the alternative, Justice Mortimer found that if in fact the Representations were as to future matters, Woolworths itself did not have reasonable grounds to make the Representations. Her Honour found that although there was evidence to support the Representations, at the time they were made, no person with the requisite authority had considered what claims could be made about the products.

Were the Representations false or misleading?

The ACCC argued that the Representations were misleading in that the products would not biodegrade or compost within a reasonable period of time. Justice Mortimer dismissed this argument finding that the Representations were in fact accurate.

The ACCC's announcement to appeal both of the above decisions shows the resolve of the ACCC as a regulator to seek to hold companies to account in relation to environmental claims about their products.

Expect regulator scrutiny of any environmental claims made about your products or services, especially those with respect to future matters.

Will your claims be able to stand up in Court?