

Article Information

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ACCC cracking down on businesses engaging in ‘greenwashing’

It is critical that businesses are in a position to substantiate their environmental and sustainability claims in light of enforcement action by the ACCC set to escalate.

On 20 September 2022 in a speech at the Sydney Morning Herald Sustainability Summit, ACCC Deputy Chair, Delia Rickard, emphasised that the ACCC will not hesitate to take enforcement action where they see consumers are being misled or deceived by green claims and that the regulator will be actively targeting greenwashing.

In March of this year, the ACCC listed environmental claims and sustainability, including greenwashing, as one of their 2022-23 priorities. After hearing growing concerns that some businesses are falsely promoting their environmental or green credentials to capitalise on changing consumer preferences, the ACCC announced they will be undertaking an internet sweep of environmental claims being made by Australian corporations.

What is ‘greenwashing’?

Consumers are increasingly demanding more ethical, sustainable and environmentally friendly practices from businesses and are often prepared to pay more for these products when making purchasing decisions. In light of this, more businesses are making environmental and sustainability claims which are designed to influence consumer behaviour.

However, some businesses falsely promote their environmental or green credentials and overrepresent the extent to which their practices are environmentally friendly, sustainable or ethical to capitalise on these changing consumer preferences. This practice is known as ‘greenwashing’.

Greenwashing detrimentally impacts consumers

False or misleading sustainability claims undermine and erode consumer trust and have the potential to distort competition in the market and the ACCC is determined to guard against this. Issues associated with greenwashing for consumers include:

- **Information asymmetry:** it is difficult for consumers to independently verify the accuracy of a green claim as consumers have less information than the business making the claim.
- **Broad terms:** claims such as ‘environmentally friendly’, ‘green’, ‘sustainable production’ and ‘compostable’ are prominent in corporate advertising. These broad, vague and generic claims have limited value and may mislead consumers because they rarely provide enough information about what it exactly means in terms of the product or service.
- **Trust:** green claims involve high levels of trust because consumers cannot usually tell by looking or using the product or service to determine whether the claims are true. Consumers rely on businesses to ensure that the claims made are truthful and accurate, increasing the likelihood of being misled.
- **Trust marks and trademarks:** consumers often rely on trust marks and trademarks to verify claims. These standards have the potential to be misused in a way which is confusing or misleading for customers.
- **Time constraints:** consumers are time poor and very few spend time researching and verifying environmental claims prior to purchasing, making them susceptible to misleading behaviour.

It is critical that consumers can trust environmental and sustainability claims at all levels of the market. The ACCC explained that sustainability covers a broad range of issues, for example:

- Reduced materials usage;
- Lower emissions;

- Improved disposal; and
- Increased circularity.

These benefits are all distinct and have their own impact upon the environment making it challenging for consumers, businesses and regulators to address problems relating to sustainability. Ms Rickard acknowledged that *"Many businesses have raised concerns with the lack of a common definition or standard for terms such as 'biodegradable', 'recyclable' and 'compostable' as there is no benchmark for which a product's performance should be measured against."*

In addition to protection for consumers, innovation and investment that reputable companies undertake to make their processes, products and services more sustainable should be protected from the dishonest and unethical behaviour of other businesses making green claims without incurring the same costs.

How does this impact businesses?

The ACCC may issue a substantiation notice requiring a business to give information or produce documents that could be capable of substantiating or supporting a claim. The ACCC has indicated that the preferred method of enforcement will be substantiation notices.^[1] If a business is unable to sufficiently substantiate its claims to the ACCC, further investigation and enforcement action may be taken to determine if there has been a contravention of the Australian Consumer Law (ACL).

Under the ACL it is illegal for businesses to mislead or deceive consumers in any way, including through greenwashing. Such conduct carries serious penalties for businesses that fail to meet these requirements.^[2]

Penalties that may be ordered by the court for contraventions of the ACL include up to the greater of the following per contravention:

- \$10 million;
- Three times the value of the benefit obtained from the conduct; or
- Where the benefit cannot be determined, 10% of annual turnover.

Draft exposure legislation recently released by the Federal Government proposes to increase these maximum penalties respectively to \$50 million, three times the benefit or 30% of annual turnover per contravention.^[3]

In addition to substantial financial penalties, if the ACCC determines a business has made misrepresentations about sustainability practices the reputation of the business can be damaged.

Businesses must be prepared to substantiate any environmental or sustainability claims they are making about their products or services. Unqualified statements and claims are risky and it is important that advertising used by businesses does not inadvertently mislead consumers.

The ACCC Crackdown

The ACCC has seen many businesses making claims about their products without providing any information to consumers to substantiate their claims. The crackdown will affect environmental claims across the entire economy from electric vehicles to everyday consumer purchases.

The ACCC will be conducting an internet sweep of various environmental claims made by Australian businesses. A similar review undertaken by the International Consumer Protection Enforcement Network in 2020 found that 42% of environmental claims were potentially false or misleading and required further investigation.

"The ACCC won't hesitate to take enforcement action where it sees that consumers are being misled or deceived by green claims – just as it did against Volkswagen for false representations about compliance with Australian diesel emissions standards. In that matter, the Court ordered Volkswagen to pay A\$125 million in penalties."^[4]

Information obtained from the sweep will be used for investigation purposes and to update guidance for consumers and businesses to introduce clearer standards and regulations regarding green claims. In looking at claims the ACCC are concerned with what an **ordinary consumer** would understand a claim to mean. The ACCC will use focus groups, surveys and work with other regulators, including ASIC and Clean Energy, to better understand how consumers perceive and understand express and implied environmental representations.

How can businesses prepare?

Businesses need to prepare for substantiation notices and be able to verify environmental and sustainability claims that they make. The ACCC has provided the following guidance for businesses when making claims:

1. **Use clear and specific language:** businesses should avoid using vague language (such as 'green') to describe their products/services. Any claims that are being made should be easy to understand and avoid technical language where possible.
2. **Back-up claims:** businesses need to be able to substantiate the claims they are making. This may be done through:
 - Reliable scientific records;
 - Transparent supply chain information;
 - Reputable third-party certification; or
 - Other forms of evidence.
3. **Consider the entire lifecycle:** if the claim only relates to one aspect of the product lifecycle then this specific part of the product or process should be made clear to consumers.
4. **Be transparent:** businesses should be transparent about their products and environmental policies to allow consumers to make an informed choice. This means ensuring that information is publicly available and presented in a creative and understandable way (for example QR codes on packaging, summaries and infographics) to avoid requiring consumers read large volumes of information to substantiate the claim.
5. **Step into the shoes of the consumer:** before making environmental claims businesses need to consider what an ordinary consumer would understand the claim to mean.
6. **Collaborate with third-party certification bodies:** these bodies assist consumer decision making and provide guidance for businesses on how to improve their practices. Trust marks or trade marks should be used with caution to ensure they are not misused. Clarifying or qualifying information on a website will not displace the overall impression created in the mind of a consumer as a result of misleading advertising, slogans or trademarks used.

Conclusion

Businesses need to review their environmental and sustainability claims and ensure they are able to substantiate their green claims with credible evidence and avoid breaching the consumer law.

[1] ACCC Chair, Ms Gina Cass-Gottlieb opening address on 9 September 2022 to the Law Council Annual Competition and Consumer Law Workshop.

[2] *Corporations Act 2001* (Cth) ss 1041E, 1041G and 1041H; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA and 12DB.

[3] *Treasury Laws Amendment (Competition and Consumer Reforms No.1) Bill 2022: More competition, better prices*, Exposure Draft (17/08/2022).

[4] Ms Delia Rickard speech to The Sydney Morning Herald Sustainability Summit on 20 September 2022.