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# Environmentally Safe or Environmentally Friendly - Defining the Legal Boundaries of Green Marketing

## **Abstract**

It is perhaps an understatement to say that, in Australia, it has become fashionable these days, especially in the last twelve months or so for a whole range of products and materials to be labelled 'environmentally friendly', 'environmentally safe' or some other labels or marks which identify them with 'peace', 'purity' or what is now generally regarded as 'green'.

However, it does not seem to be generally known that there are legal limits which would land those making certain assertions in hot water, or at any rate, something impure or not quite user-friendly. The purpose of this article is to explore the nature of these 'green' marketing strategies and analyse them in the context of current Australian legislation.

## **Keywords**

environmental marketing, legislation, environmentally friendly

# ENVIRONMENTALLY SAFE OR ENVIRONMENTALLY FRIENDLY - DEFINING THE LEGAL BOUNDARIES OF GREEN MARKETING



by  
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## Introduction

A recent issue of the *New Scientist*<sup>1</sup> carried the following items:

An authoritative sounding PR person phoned one of our editors last week. 'We are representing an American inventor who has devised a screen to protect people from the harmful effects of radiation from their VDUs,' he said. 'He is in this country for just 48 hours, and he can come up to your office with a detector to show you how much radiation your VDU is giving off. Then, with the screen in place, he will demonstrate how it cuts out 100 per cent of non-ionising radiation.'

Our quick-witted editor pointed out that if it cuts out 100 percent of non-ionising radiation, you won't be able to see what is on the screen, since light is a non-ionising radiation.

'Oh...' said the PR person. 'Well, maybe it was 99.9 per cent'

and

Cheeky stuff from British Rail as it attempts to couple itself to the 'greener than thou' bandwagon. Reader Vassili Papastavrou bought himself some refreshments from BR the other day, and they were given to him in a paper bag with 'Food and Drink for your Journey - Intercity' printed on it. On the bottom of the bag were the words "Recyclable Paper".

Yes, you read that correctly: not 'Recycled', which is what people are likely to think the words are, but 'Recyclable' - just like any other paper that may or may not be recycled.

It is perhaps an understatement to say that, in Australia, it has become fashionable these days, especially in the last twelve months or so for a whole range of products and materials to be labelled 'environmentally friendly', 'environmentally safe' or some other labels or marks which identify them

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1 Vol 128 No 1737, 6 October 1990 at p 52.

with 'peace', 'purity' or what is now generally regarded as 'green'.

However, it does not seem to be generally known that there are legal limits which would land those making certain assertions in hot water - or at any rate, something impure or not quite user-friendly. The purpose of this article is to explore the nature of these 'green' marketing strategies and analyse them in the context of current Australian legislation.

## The Nature of 'Green' Marketing in Australia

'Green' marketing takes on various forms - from the subtle to the outlandish. For the purpose of this article, we will look at a sample only.

### *Lets Go Shopping*

When one takes a quick look through any supermarket shelves or even the local green grocer, one is confronted with a number of choices. On the one hand, there are products which remain in the 'olden days', which say nothing about the environment. They sell themselves, so to speak - there are well known brand names, plain labels and the others. On the other hand, there are products which carry specific statements on the environment on their containers or packaging .

The claims vary from product to product, and from manufacturer to manufacturer. Whilst some of the claims are modest or even meaningless, others are extravagant or even outlandish. Also in this group, are products which simply carry what may be described as the indicia of being 'green', such as doves, dolphins, trees, rainforests and other flora or fauna which in very recent times have come to be identified or associated with the international 'green' movement.

So as to not overstretch our limited financial resources, we selected the following items from a suburban supermarket in Melbourne.

### *\*\*Item 1*

BIONOMICS Aware<sup>2</sup> has on the front of its 1.5kg package the following: 'The [dolphin]<sup>3</sup> first high performance laundry detergent [gum tree] for today's [banksia] environmentally Aware family. Aware is biodegradable, non [seagull] polluting [penguin] and phosphate free to protect our waterways, [fish] [stream/river with trees] plant and animal life'. On the bottom left hand side of the package is a green symbol with gold arrows on it with the statement '100% recycled unbleached packaging'. And on the bottom right hand side is a logo showing the Southern Cross with the words 'Authentically Australian, Environmentally Friendly'.

On the back side of the package is the following:

[ ]<sup>4</sup> Aware is a totally new type of laundry detergent, developed out of

2 BIONOMICS Aware TM is a product of BIONOMICS AUSTRALIA PTY LTD of Keilor, Victoria, Australia.

3 [ ] indicates a photograph appears.

4 [ ] indicates a photograph of a leaf

concern for the world's environment.

[ ] Aware is based on natural, renewable resources - coconut and palm oils. They're 100% biodegradable, to quickly break down and disappear.

[ ] Aware is totally phosphate-free. It is the phosphates in most detergents which feed the unpleasant green algae you see polluting our waterways.

[ ] Aware has a delightful natural fragrance, a pleasing combination of orange blossom and oil of lemongrass.

[ ] Aware is safe\* for those who are allergic to detergents. The formula was developed in co-operation with a leading Medical Allergy Specialist.

\*Risk of allergic reaction is negligible.

[ ] Aware is a full strength detergent. It handles the entire family wash, from delicate woollens to grimy overalls, in warm or hot water.

[ ] Aware makes your ironing simpler by leaving your wash softer and easier to handle.

[ ] Aware was developed without any animal testing and without animal based ingredients!

The symbol and logo that appear at the front are repeated on the back. But in between them is a larger version of the stream/river with trees on the front.

On one side of the package, the following lengthy statement appears:

[ ] A responsible, positive way for you to help reduce pollution. Aware does not contain phosphates, optical brighteners, chlorine bleach or any bleach, fluorocarbons, formaldehyde, artificial colours, petrochemical perfumes/fragrances, petrochemical surfactants, Aluminium complexes, Sodium nitrilotriacetate (N.T.A.), Zeolites, Animal based ingredients.

Ingredients: coconut/palm oil surfactants (cleaning agents), sodium carbonate (washing soda), sodium metasilicate (improves detergency) sodium caroxymethyl cellulose (prevents scum build-up), sodium citrate (softens water), lemongrass essential oil (fragrance), neroli (orange blossom fragrance).

The other side of the package contains instruction on 'How much to use'.

## **\*\*Item 2**

A twin packed toilet roll manufactured by an Australian company under the trade name Merino, makes a number of claims: On the fronts what looks like the smiling sun in the top right hand corner overlooking a large arrowed circle in which is written, '100% Recycled Paper'. In the top left hand corner, is written, 'Environmentally Friendly, Safe'. On the bottom part are two tall trees, between which stand two extremely happy children - hand in hand. Naturally, the trees are smiling too. The tree on the left hand side says, 'we're saved' whereas the one on the right says, 'we're safe'. Appropriate colours have been used to represent each item.

On the back of the package is the following personal message from the Managing Director of the Paper Converting Group in Queensland:

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5 [ ] indicates a photograph of a leaf.

'Dear Valued Customer  
Congratulations!

Your purchase of 'Safe 100% Recycled' environmentally friendly toilet tissue is one small step by you to improve the environment.

We are proud to announce that 'Safe' is made from 100% recycled paper, therefore saving the rainforest from further destruction.

'Safe' is completely biodegradable, has not been de-inked or rebleached and that's good news for us all.

'Safe' is an hygienic, natural tissue and is completely suitable for all systems. Many small steps taken by us to improve our environment will mean a better world for us all. And our children.

Thank you.

...signed'

That message is appropriately written in green with a green box. Below that box are: 'Save our Environment' and 'Recyclable packaging'.<sup>6</sup>

*\*\*Item 3*

Airozone Classic (Pot Pourri), an air freshener, has a small colourful sign with the following statements: 'No Fluocarbons' on top; and on the bottom, 'Friendly to our Environment'.<sup>7</sup>

*The objective of 'green marketing' generally*

It is not difficult to tell what the objectives behind these colourful and 'earth-saving' claims are. First, they tell the world, or purport to do so, that they promote an environment that is safe for all to live in. In particular, the product or its packaging does little or no damage to the environment. The actual extent of each claim varies. Second, these 'green' products are better than, or at least should be preferred to, the non-'green' products.

Whatever, the objective of a particular manufacturer may be, there is no denying the fact that essentially 'green' labelling is a marketing strategy designed to catch the eye of the environmentally aware person, the freshly converted and those who are not so sure, but are willing to make their small contribution towards making our planet safe for our children. No matter how well-meaning the manufacturer or the distributor might be, at the very minimum his purpose is to sell and so make profits. Contributing to the environment may well be incidental to that aim.

It is generally believed that products which claim to be environmentally friendly are more expensive, although a recent Victorian survey has cast doubt on that belief.<sup>8</sup> Green products are a growth industry. In April 1990, one writer observed: 'At the moment, green marketing is more a 'trendlet' than a trend, but its importance is building fast.'<sup>9</sup> K mart, the giant discount

6 Manufactured by Merino, an Australian owned company based in Brisbane.

7 Airozone Classic Pot Pourri is made by Samuel Taylor of NSW, Australia.

8 A survey carried out by the Office of Prices in August 1990 found most environmentally friendly products to be cheaper. See *Price Action*, November 1990.

9 Shoebridge N, 'Business Seeks a Way to Board the Green Bandwagon', *Business Review Weekly*, April 27, 1990, 36 at p 37.

chain, launched its own 'K Green' products in November 1989. Others can be expected to follow. It has been estimated that about \$175 million worth of non grocery items are sold annually in Australia as environmentally friendly, that is, about 5 per cent of the total market worth \$3.5 billion.<sup>10</sup>

## Defining the Legal Boundaries

In Australia, there is currently no body of law which directly regulates green marketing. To the knowledge of the author there is also no official guideline relevant to the area, although one is currently in the process of being formulated by the Trade Practices Commission.<sup>11</sup>

That means, in defining the legal boundaries of green marketing, one has to draw upon aspects of law which regulate marketing conduct generally - laws that were in place long before the green revolution was conceived and staged. In so defining, one has to be legally imaginative and adaptive but not dogmatic. Australia being a federal system, one is compelled to look at both the federal and state legal systems in order to determine the relevant law.

## Federal Law

The legislation which contains provisions that regulate marketing generally is the *Trade Practices Act* (1974). We will endeavour to deal with the relevant provisions below.

### *Section 52 - Misleading or Deceptive Conduct*

Section 52 is a general provision prohibiting 'unfair practices'. It states:

1. A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
2. Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

Whilst the terms, 'corporation', 'trade or commerce' and 'engage in conduct' are defined in s 4 of the Act, the other significant terms in the provision, namely, 'misleading', 'deceptive', 'mislead' and 'deceive' are not defined anywhere in the Act. For our purposes, the latter group of words is more

10 Richard Brass quoting national director of Environmental Choice, Kevin Doyle, 'Green Products to face far Greater Scrutiny of Claims', *The Age*, 25 September, 1990. According to data from AGB Brandscan, by August 1990, sales of environmentally friendly toilet paper had captured 28 per cent of the \$300 million toilet papers market. Cited by Hudson S, 'Top-line Toilet Papers fight Dwindling Sales', *The Australian Financial Review*, 28 August, 1990 at p 42.

11 *Trade Practices Commission Bulletin No 54, May-June 1990* at p 7. Guidelines on Deceptive Packaging prepared by the Commission in consultation with the industry and other interested persons were not accepted by the *Standing Committee of Consumer Affairs Ministers* (SCOCAM) and so were not released to the public. See *Trade Practices Commission, Annual Report 1989-90* at pp 37-38. Another one, 'Draft for discussion: Environmental Claims in Marketing' is dated July 1990.

important. In order to make sense of the provision, it is appropriate to briefly discuss its main elements, especially the latter group of words.

The word 'corporation' is stated by s 4(1) to mean: (a) a foreign corporation; (b) a trading or financial corporation formed within the limits of Australia; (c) a body corporate incorporated in a Territory; or (d) a holding company of a kind in (a) to (c).<sup>12</sup> Although s 52 primarily applies to corporations, it extends in its application to conduct of certain natural persons by virtue of s 6. They are, persons engaged in overseas or interstate trade or commerce; trade or commerce inter, or intra, Territory; trade or commerce between a State and Territory, or in the supply of goods or services to the Commonwealth or any of its instrumentalities. The section also extends s 52 to apply to the use of postal, telegraphic or telephonic services or by way of radio or television broadcast.

The term 'trade or commerce' has been given wide interpretation in trade practices cases - according to the same meaning as in ss 51(i) and 92 of the Australian Constitution.<sup>13</sup> In *Lawrence O'Hara Larmer v Power Machinery Proprietary Ltd*,<sup>14</sup> Nimmo J. stated:

I do not think that the expression 'in trade or commerce' should be given the narrow interpretation contended for by Counsel for the company. On the contrary, I think the provisions of the *Trade Practices Act*, including the definition given to the expression in s 4, demand that a very wide meaning be given to it. In my view, the expression is intended to cover the whole field in which the nation's trade or commerce is carried on. I reject the view that it is confined to any particular event which may occur in the conduct of a business which operates within that field.<sup>15</sup>

'Engaging in conduct' is given wide meaning in s 4(2) to cover both the doing of an act and omissions (refusing to do, or refraining from doing an act). It means that representations, statements or even silence, as long as they relate back to 'trade or commerce', will amount to relevant conduct.<sup>16</sup>

In *Finucane v New South Wales Egg Corporation*,<sup>17</sup> the corporation was held to have contravened s 52, by silence, in that in the course of interviews with

12 The Federal Parliament's power to legislate with respect to corporation (a) and (b) is contained in s 51 (xx); with respect to corporation (c) the power is in s 122. See eg, *Strickland v Rocla Concrete Pipes Pty Ltd and Ors* (1971) 124 CLR 468; *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282.

13 See eg, *Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at pp 139 & 167; *Menhaden Pty Ltd v Citibank NA* (1984) 1 FCR 542 at p 544

14 (1977) ATPR 40-021.

15 Above at 17,313.

16 However, a review of the case law reveals two competing views eg, in *Taco Company of Australia Inc & Anor v Taco Bell Pty Ltd Ors* (1982) ATPR 40-303, Deane and Fitzgerald JJ, said that for the purposes of section 52, conduct must convey 'in all the circumstances of the case, a misrepresentation'; see also, *Global Sportsman Pty Ltd & Anor v Mirror Newspapers Ltd & Anor* (1984) ATPR 40-463. *Contra: Rhone-Poulenc Agrochimie SA v UIM Chemical Services* (1986) 12 FCR 477 and *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83. The Full Federal Court of Australia concluded in both cases that conduct goes beyond representation.

17 (1988) ATPR 40-863.



the applicant for the purpose of a purchase of a milk run by the applicant, the corporation's officers had not disclosed certain relevant facts.

Although in attempting to fathom the meaning of s 52, one cannot consider words in isolation, there is no doubt that 'misleading' and 'deceptive' are the critical words. There does not seem to be much by way of Australian case law which directly deal with the issue. In *Hans Dieter Weitmann v Katies Limited & Ors*<sup>18</sup> where Franki J. had to decide whether the importation by the respondent of several thousand T-shirts into Australia with the name 'Saint Germain' (a registered trade mark of the applicant) offended s 52, he resorted to the *Oxford Dictionary* for help. He said:

The most appropriate meaning for the word 'deceive' in the Oxford Dictionary is: 'To cause to believe what is false; to mislead as to a matter of fact, to lead into error, to impose upon, delude, take in...'

The most appropriate definition in that dictionary for the word 'mislead' is: 'To lead astray in action or conduct; to lead into error, to cause to err'.<sup>19</sup>

In the recent case of *Crocodile Marketing v Griffith Vintners*,<sup>20</sup> the plaintiff company incorporated in Canada placed two orders for a range of de-alcoholised wines from the defendant company for sale in Canada and the United States. The Supreme Court of New South Wales held that the defendant company had infringed s 52 of the *Trade Practices Act* by the labelling of wine as having an alcoholic content of less than 0.5 per cent by volume, and a calorific content not exceeding 13 calories per 100 ml, together with the delivery of such products to the plaintiff company. The statements on the label were found to be false.

It is important that some consistent criteria be used to determine whether conduct is deceptive or misleading. A useful guide was provided in *Taco Company of Australia Inc. & Anor v Taco Bell Pty Ltd & Ors*.<sup>21</sup> The Full Federal Court had to consider whether s 52 was applicable in a situation where a United States company opened two restaurants in Sydney and was about to start trading under the name 'Taco Bell'; the respondent already owned a restaurant in Bondi called 'Taco Bell's Casa'. The majority of the Court (Deane and Fitzgerald JJ) identified four criteria:

1. first, those members of the public to whom the conduct is directed must be identified;
2. next, is to consider the conduct by reference to all persons who come within that class;
3. where the evidence establishes that a person has in fact formed an erroneous conclusion, such evidence is admissible and may be persuasive but is not essential. Such evidence does not itself conclusively establish that conduct is misleading or deceptive or likely to mislead or deceive. The Court must determine that question

18 (1977) ATPR 50-041.

19 Above at 17,444.

20 (1990) ATPR 41-000.

21 Summarised here; see above note 16, at 43,751-52.

- for itself. The test is objective; and
4. it is of fundamental importance that an investigation be carried out to determine why any proven misconception arose and if it was due to the respondent's misleading or deceptive conduct.

## The Person Protected by Section 52

The remaining issue is what standard is to be used in determining who gets the benefit of s 52? At the outset, it should be stated that it is not only consumers who are protected - the section has been used frequently by trade rivals. One would have thought that the standard would be set according to the target audience of the particular conduct.

In *Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd*,<sup>22</sup> Lockhart J set the threshold at the gullible person. In determining the class, he will consider all 'including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocation'.<sup>23</sup> This standard was endorsed by the majority in the *Taco Bell* case.<sup>24</sup> Similarly Brennan J set the consumer I.Q. quotient at gullibility. In *World Series Cricket Pty Ltd v Parish*,<sup>25</sup> His Honour referred to 'the knowledgeable and those who are not, the superficial reader..as well as the profound, the gullible as well as the cautious'.

When the *Puxu* case got to the High Court of Australia, Gibbs C J sought to lift the standard. In *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*,<sup>26</sup> the majority of the Court did not find misleading or deceptive, the conduct of the appellant company in manufacturing its 'Rawhide' range of lounge suites, properly labelled but which closely resembled the distinctively designed 'Contour' range already sold by Puxu. His Honour said: 'Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion be regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests'.<sup>27</sup>

However, Gibbs CJ's view has not generally been followed, leading us to safely conclude that in Australia the standard used to determine who is protected by s 52 is the gullible person standard.<sup>28</sup> On the other hand, Australian courts have made it clear that they are not prepared to lower the

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22 (1980) 31 ALR 73.

23 Above at 93.

24 Above n 16, at 43,751-52.

25 (1977) ATPR 40-040.

26 (1982) ATPR 40-307.

27 Above at 43,783.

28 See eg *McDonalds System of Australia Pty Ltd v McWilliam's Wines Pty Ltd (No 2)* (1978) ATPR 40-140; *Craig Jackson Henderson v Pioneer Homes Pty Ltd & Anor* (1980) ATPR 40-168; cf *CRW Pty Ltd v Sneddon* (1972) AR (NSW) 17.

consumer I.Q. quotient to protect 'an extraordinarily stupid person'.<sup>29</sup>

*The Approach in New Zealand, the United States and Canada*

It is worthwhile to make a brief detour to find out what standard is used in other jurisdictions.

It would seem that the New Zealand standard is similar, if not identical, to that of Australia. Many of the key provisions of that country's *Fair Trading Act 1986* which came into force on 1 January 1987, are based on the consumer protection provisions in Australia's *Trade Practices Act*. One lawyer who recently studied the operation of their Act put the New Zealand standard in the following terms: 'If one were expressing the view in a Middle Eastern cultural setting, one might say that one's duty is not only to look after AB but to look after his dull brother (Abdul) and his slightly duller brother (Abdullah)'.<sup>30</sup>

In the United States, there has recently been a shift from a standard similar to that in the Antipodes to a higher threshold, prompting one scholar to pronounce 'the death of the gullible consumer'<sup>31</sup> in the country. The traditional standard was set in *Aronberg v FTC*<sup>32</sup> in which the petitioner had marketed a drug called 'Triple X Compound' which purportedly induced menstruation in women. The Federal Trade Commission found the advertisements deceptive because the company had failed to disclose that use of the drug had side effects. The Court of Appeal upheld the commission's finding, stating that the *Federal Trade Commission Act 1914* protects,

the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.<sup>33</sup>

The gullible consumer standard reigned supreme for decades until 1983. In

29 Above n 17, per Lockhart J (at p 49,344) endorsing the view of Franki J in the *Taco Bell* case, above n 19 at 43,736; *McDonalds System of Australia Pty Ltd v William's Wines Pty Ltd*, above n 26, per Franki J 'Broadly speaking it is fair to say that the relevant persons are those not particularly intelligent or well informed, but perhaps of somewhat less than average intelligence and background knowledge, although the test is not the effect on a person who is quite unusually stupid' (1979) ATPR 40-140 at p 18,518; *Craig Jackson Henderson v Pioneer Homes Pty Ltd & Anor*, above n 26, at p 42,249 and *World Series Cricket Pty Ltd v Parish* (1977) ATPR 40-040 per Brennan at p 17,437.

30 Dean M, *The Commerce and Fair Trading Acts - The Must Knows*, 'Part B at p 21 cited in Dean M, *The Impact of the Fair Trading Act: Some General Observations to Date*', (1990) NZLJ 78.

31 Schechter R, *The Death of the Gullible Consumer : Towards a More Sensible Definition of Deception at the FTC*, (1989) U ILLR 571.

32 132 F2d 165 (7th Cir 1942) See also *Stanley Laboratories Inc v FTC* ( 1943) 138 f2d 388.

33 Above at 167 quoting *Florence Mfg Co v JCDowd & Co* 178 F73 (2d Cir 1910) at p 75. In *Doherty, Clifford, Steers & Schenfield, Inc v FTC* (392 F 2d 921 (6th cir 1968)), the court said that 'the Commission is bound to protect the public in general, the unsuspecting as well as the skeptical' (at p 926); see also *Exposition Press Inc v FTC* (295 F 2d 869 (2d Cir 1961)) where it stated that 'in evaluating the tendency of language to deceive, the Commission should look not to the most sophisticated readers, but rather to the least' (at p 872).

that year, James C. Miller III, the President Reagan-appointed Chairman of the Federal Trade Commission, publicly advocated a statutory definition of deception. After unsuccessfully lobbying Congress to amend s 5 of the FTC Act, his Commission issued its *Deception Policy Statement* in October 1983 which lifted the American consumer standard to that of the reasonable person. It stated: 'The Commission will find deception if there is a misrepresentation, omission, or other practice, that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment'.<sup>34</sup>

The new reasonable consumer test was introduced into the case law through *Cliffdale Associates, Inc.*<sup>35</sup> In that case the majority of the Commission upheld an Administrative Laws Judge's decision that the company had made deceptive advertising. It had marketed a gasoline saving device known as the 'Ball-Matic Gas Save Valve' and claimed that it would yield significant fuel savings to motorists who attached the device to their cars. The evidence established that the claims were grossly exaggerated.

The gullible consumer is not only dead in the United States but the estate has now been inherited and is being managed by a consumer 'acting reasonably under the circumstances'. The new reasonable consumer standard has since been reaffirmed by the Commission in a number of cases<sup>36</sup> and by implication by one appellate court.<sup>37</sup>

In Canada, false advertising is a criminal offence under s 52(1)(a) of the *Competition Act*, 1986.<sup>38</sup> A recent study of the case law showed that there is no consistent standard used by the Canadian courts. Three discernible standards were found. Some have applied the gullible consumer standard;<sup>39</sup> others have applied the reasonable (or average) consumer standard<sup>40</sup> and still others have lifted the sophistication of the consumer well beyond the average. An example of the last mentioned standard was applied by the Ontario Court of Appeal in *R v International Vacations Ltd.*<sup>41</sup> In dealing with an advertisement for overseas flights, the Court stated: 'The average reader interested in making an overseas trip can be taken to be literate, intelligent and unlikely to make a relatively large monetary commitment without carefully reading the advertisement. It seems to me that the import

34 Federal Trade Commission Enforcement Policy letter dated 14 October, 1983 to John D Dingell, Chairman, House Comm on Energy and Commerce. It is reprinted at 5 Trade Reg Rep (CCH) 50,455 (Oct 31 1983). It is also an appendix to the *Cliffdale Associates* case, *infra* n 36. For commentary, Dale Pollak & Bruce Teichner, 'The Federal Trade Commission's Deception Enforcement Policy', 35 DEPAUL LR 125 (1985) and *supra* note 32.

35 103 FTC 110 at p 165 (1984).

36 Eg *Removatron Int'l. Corp.* 5 Trade Reg Rep (CCH) 22,619 (FTC No 9, 1988); *In re Figgie Int'l. Inc.* 107 FTC 313 (1986).

37 *Southwest Sunsites* affirmed by the Court of Appeals for the Ninth Circuit, 105 FTC 7 (1985) affirmed, 785 F 2d 1431 (9th Cir 1986).

38 Formerly the *Combines Investigation Act*, RSC 1985, C-34, and Am SC 1986, 26, s 19. Eg *R v Michaud* (1978) 41 CCC (2d) 139 (Ont Dist Ct) and *R v Marlo Homes Ltd* (1980)

39 51 CPR (2d) 73 (Alta Prov Ct).

40 *R v Robin Hood Multifoods Ltd* (1981) 59 CPR (2d) 57 esp at p 60 (Ont Co Ct); *R v Total Ford Sales Ltd* (1987) 18 CPR (3d) 404 (Ont Dist Ct).

41 (1980) 33 OR (2d) 327, 124 DLR (3d) 319 (CA).

of the advertisement would be absolutely clear to such a discerning reader'.<sup>42</sup>

The study therefore concluded: 'Clearly then there is no uniformity in the standard of deceptiveness, though the average-person test seems ascendant in recent years.'<sup>43</sup>

Going back to the Australian Act, it becomes clear then, that s 52 is a catch-all provision which is capable of regulating new types of conduct that may fall within its definition, but which were not contemplated by the Parliament in the early 1970s. This provision, a model of drafting simplicity, has produced a wealth of precedent; some of the cases going well beyond the field of consumer protection.<sup>44</sup> In fact, s 52 has been described as 'a plaintiff's new exocet missile'.<sup>45</sup>

### Section 53 - False or Misleading Representations in relation to the Supply of Goods or Services

The section is intended to have wide application, prohibiting false representations made 'in connexion with the 'supply' or 'possible supply' of goods, services or both. The relevant parts of the provision are: 'A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services,

- (a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- (aa) falsely represent that services are of a particular standard, quality, value or grade;
- (c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
- (d) represent that the corporation has a sponsorship, approval or affiliation it does not have; and
- (f) make a false or misleading representation concerning the need for any goods or services.'

Thus, representations will include statements, oral or written, pictorial brochures, media advertisements and of course, product packaging. A pertinent issue in this area is when did the alleged misrepresentations take place? In *Lawrence O'Hara Larmer v Power Machinery Pty Ltd*,<sup>46</sup> the

42 Above at 91 Contra: *R v Irving Oil Ltd* (1978) 47 CPR (2d) 179 (NB Prov Ct) where the court applied the gullible consumer test to car travellers who use gasoline.

43 Black V, 'A Brief Word About Advertising', 20 Ottawa LR 509 at p 532.

44 'The simplicity and strength of the language of s 52 has been reflected in its wide application as a norm for commercial conduct which applies in dealings with the public: at large, with individuals and between traders. Whatever course it takes in the future, it is clear that the story of s 52 is a long way from its conclusion' French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 ALJ 250 at p 268.

45 Pengilley W, 'Section 52 of the Trade Practices Act: A Plaintiff's New Exocet?', (1987) ABLR 247.

46 Above n 14.

defendant company was found guilty of contravening s 53(c) despite the fact that only two investigating officers of the Trade Practices Commission and no one else had seen a brochure which contained a false advertisement, namely, that electric welding machines supplied by the company had the approval of the State Electricity Commission.

Where a consumer purchases an item, there will be no issue as to when the representations were made. It has been held that misrepresentations were made to the general consuming public where goods were displayed in a shop. In *Barton v Croner Trading Pty Ltd*,<sup>47</sup> Croner supplied a number of plush koala and kangaroo toys to Woolworths. The toys were labelled 'Made in Australia', 'Advance Australia' with a representation of the Australian flag. The toys had been imported from Korea. The Full Federal Court did not have difficulty finding Croner in breach of s 53(a) or (c). More significantly, the Court held that the representations were made to the consuming public in every case that the toys were offered for sale to a possible purchaser or sold to an actual purchaser by Woolworths.

Another issue that is of importance to us is the composition of products. In the *Magnamail*<sup>48</sup> cases, a mail order company was held to be in breach of s 53(a) for advertising goods for sale by claiming that the goods were composed of particular metals. The evidence showed that they were not. In the recent case of *Crocodile Marketing Ltd v Griffith Vintners Pty Ltd*<sup>49</sup> the defendant company was found to have infringed s 53(a). The New South Wales Supreme Court found that the aspects of alcohol content, calorific content, and sulphur dioxide content were each the subject of representations by the defendant company and that they were false, and were representations in respect of, at least, quality and composition of goods, and were made in trade or commerce.

## Section 55 - Misleading Conduct to which Industrial Property Convention applies

This section prohibits conduct which misleads the public as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of any goods. Unlike the other two sections already discussed, s 55 is not confined to corporations.<sup>50</sup> It states, 'A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods'.

Other than the fact that this section is not confined to corporations, one is left to wonder whether 'conduct that is liable to mislead the public' prohibited in s 55 is different from conduct that 'is likely to mislead or deceive' already prohibited in s 52. It may be argued that the latter is general whilst the former is specific in scope. Be that as it may, one can safely say that, for a s

47 (1984) ATPR 40-470 See also *Hans Dieter Weilmann v Katies Ltd & Ors* (1977) ATPR 40-041.

48 *Thompson v Magnamail Pty Limited (No 1)* (1977) ATPR 40-032 and *Thompson v Magnamail Pty Limited (No 2)* (1977) ATPR 40-033.

49 Above n 20.

50 S 55A deals specifically with corporations and relates to services rather than goods.

s 55 offence to be proved, actual deception is not required.

For our purposes, matters that will be caught by s 55 include misrepresenting the volume of contents of a package by way of statements on the label and misrepresentations as to weight or number in the container.

### **Enforcement and Remedies Available to the Consumer**

A breach of s 52 is not a criminal offence. In fact it is the only prohibition in Division 1 Part V which does not carry a criminal penalty.

An injunction is available to restrain a breach of s 52. Under s 80 of the Act, the court may grant either an interim or permanent injunction to restrain a person who has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention of the section. An application may be brought by any person as well as the Minister or the Trade Practices Commission. An injunction may also be granted to restrain a person attempting to contravene; aiding, abetting, counselling or procuring a person to contravene; or inducing or attempting to induce others to do so; being in any way, directly or indirectly, knowingly concerned in, or party to the contravention; or conspiring with others to do so.

Section 80A gives power to a court to make an order for affirmative disclosure or corrective advertising. Consumers cannot make such applications themselves; that being the preserve of the Minister or the Commission. The purpose of corrective advertising is to rectify the damage already done. Affirmative disclosure, on the other hand, aims at ensuring that by disclosing certain information ('that is, tell the truth') the likelihood of consumers being subjected 'to strategic behaviour (that is, lie)<sup>52</sup> in the future is avoided.

In *HCF Australia Ltd v Switzerland Australia Health Fund Pty Ltd*<sup>53</sup> the Full Federal Court held that the section gave the court power to make a mandatory order requiring publication of corrective advertising. The point was also stated that the power is to be used protectively and not by way of punishment. The sole consideration for the court in deciding to make an order is the protection of the consumer.<sup>54</sup>

A person who has suffered loss or damage as a result of a breach of s 52 may bring an action to recover damages pursuant to s 82 against the person committing the breach or any other person involved in it. Such an action has to be instituted within three years. It would seem that the court has no discretion in assessing the quantum of damages once a person has established their entitlement. In one recent case, it was stated that the court has an 'the obligation to award the amount which quantifies the applicant's actual loss'.<sup>54</sup>

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51 Black V, above n 44 at 509.

52 (1988) ATPR 40-834.

53 Per Wilcox J, above n 53 at 49,005 to 49,006.

54 Above n 21 at 49,346.

Further, s 87 provides the court with discretion to make various miscellaneous orders for breach of s 52. A person making an application should have suffered, or is likely to suffer, loss or damage. The orders can be made against the person contravening the section or against a person involved in the contravention. The s 87 orders include declaring a contract void, an order for variation of a contract, refund of money, payment for loss or damage, return of property, repair of goods, provision of parts for goods and the supply of goods. There is, however, one proviso: the court must consider that the orders will compensate an applicant for the loss or damage or will prevent or reduce the loss or damage.

With regard to the other sections discussed above, s 79 provides that a person who contravenes; aids, abets, counsels or procures a person to contravene; induces or attempts to induce a person to contravene; is in any way directly or indirectly, knowingly concerned in or party to the contravention; or conspires with others to contravene, is guilty of an offence punishable on conviction. The penalty in the case of bodies corporate is a fine not exceeding \$100,000 and in the case of a natural person, a fine not exceeding \$20,000.

The practice is for the Trade Practices Commission to investigate any alleged breaches. The consent of the Minister (or a delegate) is required in writing before a prosecution can be launched. Prosecutions which have to be instituted within three years, can only be brought in the Federal Court.

## State Legislation

The States have uniform state consumer protection legislation which mirrors the provisions of the *Trade Practices Act*. As we have noted, the provisions of the federal Act deal, in the main, with corporations. The *Fair Trading Act* of the States on the other hand, covers any person, including individuals and partnerships.

For convenience of discussion, we use the Victorian *Fair Trading Act* 1985. Section 52 of the federal Act is mirrored by s 11 of the State Act.<sup>55</sup> The striking difference is that the state Act uses the term 'a person' in place of 'a corporation' in the federal Act. Similarly, s 12(a) and (d)<sup>56</sup> mirror the relevant sub-sections of s 53 of the Federal Act. Again, the difference is as in the previous section. Finally s 55 of the Federal Act is reproduced word for word by s 16 of the State Act.<sup>57</sup> The Northern Territory and the State of Tasmania do not as yet have 'mirror' legislation, but are expected to soon.

In addition, there are specific provisions in some States which prohibit false advertising for the purpose of inducing another person to enter into a contract or to take any payment in cash or kind. Section 4 of South Australia's *Misrepresentations Act* 1972, makes it an offence for a person

55 See s 42 of the *Fair Trading Act* (No 68) of 1987 (NSW); s 38 *Fair Trading Act* (No 84) 1989 (Qld); s 10 *Fair Trading Act* (No 108) 1987 (WA); s 56 *Fair Trading Act* (No 42) 1987 (SA).

56 See s 44 (a) and (c) (NSW); s 40 (a) and (e) (Qld); s 12 (1) (a) and (e) (WA); s 58 (a) and (e) (SA).

57 See s 49 (NSW); s 44 (Qld); s 17 (WA); s 63 (SA).



conducting a business, and a person acting on behalf of such a person, to make misrepresentations for the purposes of inducing a person to enter into a contract or to pay a pecuniary amount or transfer property. The penalty is a fine not exceeding \$500 but any prosecution has to be consented to by the Attorney-General.

A defence is provided for an innocent misrepresentation or where a defendant took all reasonable precautions to prevent the commission of the offence by a person acting on his or her behalf; or where the defendant did not know or could not be expected to know that the representations had been made or that they were untrue. Section 6 of the Act removes certain bars to the rescission of contracts and s 7 provides an entitlement to sue for damages as if the misrepresentation was fraudulent and an actionable tort. The action may be brought against the person, his or her agent or any person who received a direct or indirect consideration or material advantage as a result of the contract. Again, defences are available where the defendant believed the representation was true or had reasonable grounds to believe so. The second defence is where the defendant did not know or could not be expected to have known that the representations had been made, or that they were not true.

Similarly, the Australian Capital Territory's *Law Reform (Misrepresentation) Act, 1977* contains provisions prohibiting false advertisements. Section 7 makes it an offence for a person in the course of trade or commerce to make a misrepresentation for the purpose of causing or inducing another person to enter into a contract or pay any pecuniary amount or transfer property. A conviction for an offence carries a fine not exceeding \$1000. A defence is available if the person believed on reasonable grounds that the representation was true. Section 3 removes certain bars to a rescission of a contract induced by a misrepresentation.

Like the South Australian provision, s 4 gives a right to sue for damages against the other party to the contract, his or her agent or a person who receives any direct or indirect material advantage from that contract. The section enables the action to be brought as if the misrepresentation was fraudulent. Two defences are available. First, where the defendant has reasonable grounds for believing, and did believe up to the time the contract was made, that the representation was true. Second, where the representation was made by a person acting for or on behalf of the defendant, when both the defendant and his or her agent had reasonable grounds for believing, and did believe up to the time the contract was made, that the representation was true.

## Which way to go - Federal or State?

By virtue of s 109 of the Australian Constitution, where there is any inconsistency between a federal law and a state law, the former is to prevail over the latter. Two main bases have been formulated for determining whether there is inconsistency: 'direct inconsistency'<sup>58</sup> and 'textual

58 Per Mason J in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation of Australia* (1976-1977) 137 CLR 545 at p 563. This is where the federal and States Acts have contradictory provisions and it is therefore not possible for both to be obeyed at the same time.

collision'.<sup>59</sup>

In the field of consumer protection with which we are concerned in this paper, there should be no problem. The reason being that s 75(1) of the *Trade Practices Act* makes it clear that Part V which is headed 'Consumer Protection' 'is not intended to exclude or limit the concurrent operation of any law of a State or Territory'. Logically, sub-section (2) provides against double jeopardy.

An inconsistency in the constitutional sense was alleged in the recent case of *Grace Bros Pty Ltd v Magistrates of the Local Court of New South Wales & Anor.*<sup>60</sup> An information was laid against Grace Bros by the New South Wales Department of Consumer Affairs that on or about 18 March, 1987, Grace Bros had caused to be published a statement which was intended to promote the supply of certain specified goods which, to its knowledge, was false in a material particular. It was argued on behalf of Grace Bros that s 32(1) of the *Consumer Protection Act*, 1969 (N.S.W.) was directly inconsistent with s 53(eb) of the *Trade Practices Act* and so the former did not have a 'concurrent operation'. The reasoning was that the State Act creates a liability or a duty where the federal Act does not, thus creating a textual collision - the state Act thereby altering, varying or impairing the federal liberty. The Full Federal Court of Australia did not find any inconsistency. It held that as the *Trade Practices Act* expressly provides that it does not 'cover the field', State legislation in the same field is not prima facie inconsistent. In this case, the federal Act deals with specified conduct only; but it is not intended to grant or withhold immunity from legal process, civil or criminal, in respect of the other conduct. Consequently, the conduct prohibited by the state Act was not permitted, impliedly or otherwise, by the federal Act. As the latter was silent on the matter, there was no constitutional inconsistency between the two Acts.

## Common Law

The common law provides the foundations upon which Australian law, federal or state, is based. Thus, the common law operates where it has not been expressly changed by statute. Even where there is a statute, the common law may be relied upon in attempting to determine the exact meaning of a legislative provision where there is no guide in that particular statute. In short, the common law is very much relevant to our discussion here.

There is no common law rule dealing with advertising or marketing strategy

59 Per Barwick CJ in *Miller v Miller* (1978) 141 CLR 269 at p 275.

60 (1990) ATPR 40-999 In *General Motors Acceptance Corporation of Australia v Credit Tribunal & Ors* (1977) ATPR 40-022, Mason J, stated 'there is to be gathered from [sub-section 75(1)] a very clear expression of intention that the *Trade Practices Act* is not an exhaustive enactment on the topics with which it deals and that it is not intended to operate to the exclusion of State laws on those topics. As such it does not avoid any instance of direct inconsistency which may occur between the *Trade Practices Act* and the two South Australian Acts, but in accordance with all that I have said, it eliminates any suggestion of inconsistency otherwise arising' (at p 17,323). In that case the High Court did not find any inconsistency between the provisions of South Australia's *Consumer Credit Act* 1972-73 and the *Trade Practices Act*.

as such. Rather, there are various rules in contract and tort law which impact on the subject. For our purposes, whether a consumer will have a remedy against a retailer (or even in certain cases a manufacturer), depends on the categorisation of the representation made at the point of sale.

To start with, the common law draws a distinction between 'puffing' or superlative opinions and representation of specific facts. Imaginative advertising or exaggeration which is self-evident is not generally actionable at law. In one case, a claim of a 'residence fit for a respectable family'<sup>61</sup> was held to be puff. This may be contrasted with the well known case of *Carlile v Carbolic Smoke Ball Company*.<sup>62</sup> In that case an advertisement that the company would pay a certain sum to anyone who contracted influenza after using a carbolic smoke ball in a specified manner and for a specified period, was held by the English Court of Appeal to create a binding contract between the company and the purchaser and was not mere advertising puff.

It would seem that the courts will draw the line at representations that are capable of an objective test. Therefore, the more factual the character of the claim, the more likely it is to be held as actionable. For example, a claim that a cricket bat is the heaviest, is one that can be objectively verified. It should be pointed out that neither federal nor state law prohibits puffery.<sup>63</sup> Some scholars have severely criticised the continued recognition of puffery as a legitimate marketing strategy. For example:

The 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk.<sup>64</sup>

On the other hand, the common law provides remedies for different types of false representation. In contract law, the critical requirement is whether the representation by one party induced the other into entering into the contract. A misrepresentation which does not induce the other party is not actionable. But an innocent misrepresentation which induces entry into a contract, must also be a term of contract before it would be actionable; the term may be a warranty or a condition.<sup>65</sup> In tort law, there are remedies for deceit or fraudulent misrepresentation<sup>66</sup> and negligent misstatements.<sup>67</sup>

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61 *Magennis v Fellon* (1829) 2 Mol 589.

62 (1893) 1 QB 256.

63 In *Given v Pryor* (1980) ATPR 40-165 it was said that a representation that a piece of land was 'a wonderful place to live' would normally be regarded as puff. See generally, Trade Practices Commission: Advertising and Selling (1981) para 206. The Swanson Committee took the position that 'mere puffery and artistic devices' were not within s 52 of the Act 'unless they genuinely alter the context of the representation' *Report of the Trade Practices Act Review Committee (Swanson Committee)*, August 1976 at para 953.

64 Keeton W, et al (eds), *Prosser and Keeton on Torts*, (5th ed 1984) cited in *Black V*, above n 44 at p 547. Black himself says: 'The big, obvious lie is permitted' (at 548).

65 Eg *Oscar Chess Ltd v Williams* (1957) 1 WLR 370. On the issue of damages, see eg, *Gould & Anor v Vaggelas & Ors*, (1984) 56 ALR 31 esp per Dawson J at p 68.

66 Eg *Derry v Peek* (1889) 14 AC 337. As to damages, see *Toteff v Antonas*, (1952) 87 CLR 647 esp per Dixon J at 650.

67 *Hedley Byrne and co Ltd v Heller and Partners Ltd* (1964) AC 465 and *L Shaddock and Associates Pty Ltd v The Council of the City of Parramatta* (1981) 36 ALR 385.

## Common Law or Statute Law

There are definite advantages in using the statutory provisions, especially the all-conquering s 52, in preference to the common law. Lets take for example, the common law tort of negligent misstatements. Under s 52 of the *Trade Practices Act*, there is no necessity to prove: (a) a relationship giving rise to a duty of care; (b) that the defendant knew, or ought to have known, that the plaintiff would rely upon the statement; and (c) that the statement was made negligently. Under s 52, mere falsity is sufficient.

Apart from the difficulties of proof with the common law, as we saw earlier, the statutory standard of consumer is placed on the lower scale of the gullible person. Of course, the common law has always used the reasonable person standard. One lawyer has put it interestingly:

It is clear, therefore, that an action under s.52 is evaluated by standards different from those of common law. Not only the man riding in the Clapham omnibus must be considered. He who just missed the Clapham omnibus must now also be taken into account.<sup>68</sup>

Further, some of the statutory remedies are not available at common law. However, it would seem that remedies at common law would still be available to a statutory plaintiff in appropriate situation. Section 75(3) of the Federal Act expressly provides that nothing in Part V which deals with 'Consumer Protection' shall be taken to limit, restrict or otherwise affect any right or remedy a person would have but for the enactment of that Part of the Act. It follows then, that that Part operates concurrently with common law remedies except where the contrary is stated. In relation to s 52, no such contrary intention is stated.

## Analysing the Claims

To be able to make sense of the green claims, one needs to have either scientific knowledge or be in a position to test the products or packaging or both. Unfortunately, the average shopper like you or I may not be able to do so. The result is that the majority to whom the green claims are directed, would probably never be able to test them. Most therefore would simply have to rely on the integrity of the manufacturer or retailer or both.

However, some of the claims do not require scientific testing before consumers (or at any rate some of them) can tell whether a green marketing claim is suspect or inaccurate. The consequences of false or misleading conduct as we have seen can be quite severe.<sup>69</sup>

In the second example mentioned at the beginning of this paper, British Rail claimed that its paper was recyclable. Apart from the fact that some consumers may easily misread it as being recycled, the impression created is that the particular paper used in question is capable of being recycled whereas other types of paper may not be so. Such a claim is not false and yet is clearly misleading as all paper can be recycled. Similarly, a claim by

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68 Pengilly W, above n 46 at 255; see als 273.

69 Above n 70.

'Puren' that its dishwashing liquid and surface products are 'CFC free' is misleading because such products have never contained chlorofluorocarbons (CFC).<sup>70</sup>

Therefore, a claim that a product or packaging has special attributes when in fact all products of that type have the same attributes, although it may be true, is misleading and is a breach of the law. Thus in *Keehn v Medical Benefits Fund of Australia Ltd.*<sup>71</sup> the Federal Court of Australia found the defendant company guilty of three breaches of s 53(f) of the *Trade Practices Act* in respect of statements concerning the need for services. The defendant had stated in a pamphlet issued to the public and in a newspaper advertisement that: 'If you want to be treated by your own doctor [surgeon or physician] in hospital - contribute to Hospital Tables 10 or 12'. But the choice of table does not affect the contributor's right to choose a doctor. Contributors or potential contributors were misled to believe that if they did not contribute to Tables 10 or 12 but contributed to the cheaper Tables 2 or 3, they would not have the right to a doctor of their choice in hospital.

Another way in which green advertisements can run foul of the law is to make claims which are not really meaningful but are designed to attract consumers. The first example we quoted at the beginning of the paper is a case in point. Even the representative of the American inventor had trouble making sense of the technology he was promoting for sale. If the quick-witted editor had lowered his or her guard a little bit, bingo! - the American inventor would probably have clinched a sale, and yet the claim was totally meaningless.

To take an example closer to home, it is commonplace these days to find an item on the supermarket shelf with the label 'biodegradable'. The *Macquarie Dictionary* defines the word thus: 'capable of being decomposed by the action of living organisms, especially of bacteria'.<sup>72</sup> It means that substances will break down at different rates through stages. We all know how the soap we use at home can degrade rather quickly. A claim that detergent is biodegradable without more is meaningless at best and can be misleading. The claim will be more meaningful and accurate if the consumer was informed as to how long the product would take to break down, the various stages it would go through and whether at the end of the process, it would have undergone total or partial degradation. It is a requirement in Australia anyway, that laundry detergents sold here must be biodegradable to about 80%.<sup>73</sup> A claim that a product was 'made without solvents' without more,

70 *Choice*, September 1990, at p 11. There are three other examples given there. The magazine is published by The Australian Consumer's Association.

71 (1977) ATPR 40-047 In *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) ATPR 40-067, Stephen J gave the following example: 'To announce an opera in which a named and famous prima donna will appear and then to produce an unknown young lady bearing by chance that name will clearly be to mislead and deceive. The announcement would be literally true but nonetheless deceptive, and this is because it conveyed to others something more than the literal meaning which the words spelled out.' (at p 17,690).

72 Published 1981 at p 208.

73 *Choice*, February 1990 at pp 8-9. There is a 21 day period within which the biodegradability must take place. There is no requirement as to the other 20%.

falls into the same category.<sup>74</sup>

Thirdly, there are claims which can be described bluntly as false. To claim that a product promotes the environment in which we live when in fact there is no such thing is false advertising. For example, a product which claims to be 'pH neutral' (not acidic nor alkaline) has been found to be less harsh to the human skin.<sup>75</sup> But how does this product lay claim to be green and contribute to making the earth we live in a better place? Similarly, a product that claims to be 'safe for septic systems' is one that should appeal to us all, if not for all places that we happen to visit or frequent, at least for our homes. Even if one stretches one's imagination very far, one is still at a loss to find the contribution made by this product to the green revolution. In *Barton v Croner Trading Pty Ltd.*, one of the claims made by Croner on the toys was that: 'this item exceeds all Australian Safety Regulations including the Inflammability Act'. There was no such Act in Australia at the time whether at the Federal or the State level. The Federal Court held that Croner had engaged in false advertising contrary to s 53(a) of the *Trade Practices Act* by implying that legislation existed requiring a specific standard.<sup>76</sup>

Finally, there are products which are labelled with the vaguest but the most extravagant claims. These are products which directly and expressly hold themselves out as green or rather greener. Lets take some examples from the three items mentioned on our shopping lists. On the first item, there are inter alia, references to 'non-polluting' and 'developed out of concern for the world's environment'.<sup>77</sup> From item two comes, 'environmentally friendly safe', 'environmentally friendly toilet tissue' and 'safe 100% recycled environmentally friendly toilet tissue'.<sup>78</sup> The last item on our shopping list says, 'friendly to our environment'.<sup>79</sup>

Another technique used, as it is obvious from our items above, is the colourful decoration of the packaging with flora or fauna. Dolphins, doves, pandas, rainforests and beautiful waterways are just five examples. The message from these images is that the products are either safe for the environment or are contributing positively to it. However, most of the claims do not state how the product contributes to the environment. For example, item 1 on our shopping list contrasts sharply with the other two items. Item 1 sets out the ingredients in the products and how they contribute to the environment. Whether the assertions are valid or not is a separate matter, but surely, they are capable of being objectively tested.

In short, claims that a product is environmentally safe or friendly, without any indication of how the product contributes to the safety or friendliness of the environment, raises serious doubt. On the other hand it may be difficult to demonstrate the falsity or misleading nature of such green marketing strategies, principally because of their vague character. At this juncture, consumers need to bear in mind that, 'puffery' is recognised as a legitimate

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74 See *Choice*, September 1990 at p 11.

75 Above at 10. An example is given of 'Down to Earth, All Purpose Cleaner'.

76 Above n 45.

77 Item 1, above n 2.

78 Item 2, above n 6.

79 Item 3, above n 7.

technique for advertising imaginativeness.<sup>80</sup> The more general or loosely worded the labelling is, (or the mere presence of green images), the more likely it is that the claim will fall into the category of puffery. In respect of such products consumers ought to be wary.

After analysis of a number of household cleaners claiming to be 'environmentally safe' or 'pollution free', Choice Magazine concluded:

All manufactured products will have an effect on the environment. Any foreign substance added to the environment disturbs its purity and so, by definition, pollutes it. Claims that products 'do not contribute in any way to the pollution of our environment' (TRI NATURE) or are 'completely harmless to the environment' (NUTRI-METICS) are excessive. These products may not contain ingredients known to cause serious environmental damage, but they are inherently polluting the ecosystem to which they are added.<sup>81</sup>

### Closing Remarks

From a virtual unknown a little over a year or so ago the green marketing strategy has well and truly dawned upon us. From hereon, one can only predict that it will gather momentum; and no doubt, those who use the technique, in time, will sharpen and refine their newly acquired marketing tool. Consumers will be in for an unceasing barrage of colourful imagery and bombast. Three types of green consumers have already been identified: 'dark-green consumers, who are already committed to an alternative lifestyle; pale-green consumers, who base some of their shopping decisions on environmental factors; and 'greenless' consumers, who are only starting to think about environmental issues'.<sup>82</sup> The latter two groups of consumers will be especially targeted by green marketers.

Although there is no legislation in Australia directly regulating the subject, we have attempted in this paper to set out a number of existing provisions at both the Federal and State level, which generally regulate marketing conduct. We have also referred to common law rules which are relevant in determining what law is applicable to green marketing. In a number of cases a consumer will have a choice between proceeding under Federal law and State law, and throwing in the common law as a dessert.

In this area of the law, there is a tendency to regard State legislation as 'little Acts'<sup>83</sup> or 'baby Acts',<sup>84</sup> which play second fiddle to their Federal counterpart. However, the potential of the state Acts should not be underestimated. They have a wider application than the Federal Act in relation to false or misleading conduct within a particular State. Moreover, the Director

80 Above n 59 to 61 and accompanying text.

81 Above n 75.

82 Shoebidge N, 'Business Seeks a Way to Board the Green Bandwagon' *Business Review Weekly*, April 27, 1990 at p 38. Shoebidge cites British environmentalist Julia Hails.

83 Borrowed from Jack E Karns, 'State Regulation of Deceptive Trade Practices Under 'Little FTC Acts': Should Federal Standards Control?', 94 *Dickinson Law Review* 373 (1990). All 50 states and the District of Columbia have an FTC Act. Twenty-three states have provisions requiring the state courts to adopt the interpretations reached at the federal level in false advertising cases (at p 379).

84 Schechter R, above n 29 at 585.

of Consumer Affairs (Commissioner for Consumer Affairs in some States) is more likely to provide advice and act quickly on behalf of consumers in the State. Naturally, the Trade Practices Commission tends to focus on matters of interstate or federal significance.

At the time the Acts were enacted, Parliament could not have foreseen the green revolution. But the provisions we have discussed here are capable of meeting the task. For consumers to make meaningful use of the legislation, however, it is necessary in many cases to subject the product in question to testing to determine if it lives up to its claim. This is outside the reach of individual consumers. In March 1989, the Victorian Government became the first in Australia when it launched its 'Green Spot' consumer awareness programme to promote products considered environmentally sound.

An Advisory Panel subsequently appointed by the Victorian Government to examine the feasibility and design of a scheme for labelling made a number of recommendations.<sup>85</sup> They included, the development of an environmental labelling scheme; the publication of draft criteria in each product category and the method of evaluation for each product category; two year licensing agreements to label and market products using the 'Green Spot' for successful applicants; and the payment of a licence fee. All Environment Ministers in Australia as well as New Zealand have since adopted the Victorian initiative into a National Labelling and Education Programme which is in the process of being developed. In June 1990 the name 'Green Spot' was changed to 'Environmental Choice' (the same name used in Canada).<sup>86</sup>

With time, consumers through their representative groups, will be more vigilant. A combination of the law and consumer muscle will be employed to weed out entrepreneurs who just ride the green bandwagon. Recent developments overseas have lessons for Australian manufacturers and retailers. In the United Kingdom, British Petroleum was forced to apologise for claiming that its newly launched brand of unleaded petrol caused 'no pollution'.<sup>87</sup> In the United States, Mobil Chemical Company had to make the embarrassing admission that it had succumbed to pressure from its competitors. The company had advertised its Hefty Trash Bags as photodegradable. A study conducted by a New York University for Greenpeace attacked the claim. Mobil was forced to remove the claim from the bags when it conceded that they were unlikely to degrade as they were generally buried in landfills where there was no sunlight to trigger the process. After the admission in March 1990, the company's shares fell in value.<sup>88</sup>

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85 Report of the Green Spot Advisory Panel, December 1989. The Panel released an interim Report in July 1989.

86 See 'Environmental Choice' Information Bulletin No 7, November 1990 at p 1. In the first week of December 1990, the European Community unveiled plans to introduce a system similar to the 'Blue Angel' system already operating in Germany. See 'Green Label' Products for EC in Australian Financial Review, Tuesday December 4 1990 at p 31. This may be contrasted with the Japanese approach. The Japanese Government's Environment Association judges products as pollution-free and then awards them an 'eco-mark' for a fee ranging from \$250 to \$660; some 513 products have so far been awarded the 'eco-mark'. But there are no scientific standards for judging. See 'Environment Proves Big Seller' in The Australian Financial Review 23 August, 1990 at p 42.

87 *Choice*, August 1990 at p 31.

88 The Australian Financial Review, 15 March, 1990 at p 45.