

The Self-Declared Marketing Claims and the Trade Practices Act

**A report prepared for the
Airconditioning and Refrigeration
Manufacturers Association
(AREMA)**

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This report, outlines principles to be considered when making environmental statements in advertising and promotional material. This report is intended to assist companies review their advertising and promotional material, to ensure compliance with the Trade Practices Act.

Please note this is not legal advice, but a 'common sense' approach to the issue. This report uses material from the ACCC and AS/NZS ISO 14021:2000

The Trade Practices Act-'Deceptive and Misleading'

There are three relevant Sections of the Trade Practices Act. These are:

- Section 51(i): A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- Section 53: A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply of goods or services
 - a) Falsely represent goods are of a particular standard, quality, value, grade, composition, style or model or have a particular history or particular previous use:
 - c) Represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
 - f) Make a false or misleading representation concerning the need for any goods or services.
- Section 55: 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.

It is important to note that the offence is 'deceptive and misleading conduct'- the issue is not whether or not anyone was deceived or misled, but rather whether the conduct itself is deceptive or misleading. The issue is, is the claim likely to deceive or mislead?

The intention behind the conduct is not regarded as relevant. Deceptive and misleading conduct need not be deliberate, the offence can occur when there was no intention to deceive or mislead.

In making a decision on these matters, the ACCC will consider the target audience, and the level of knowledge that audience would be

likely to have. In the case of potential purchasers of airconditioning equipment, this throws up the likelihood of two different benchmarks. In a domestic situation, such as mini-splits, it is likely the ACCC would consider the target audience as having a low level of scientific and engineering knowledge. However, in other areas, where the target audience is industry professionals such as consulting engineers, this obviously would not be the case.

The ACCC Position.

A wave of environment-based marketing in the early 1990's prompted the ACCC to publish a document entitled 'Environmental Claims for Marketing', setting out guidelines for compliance with the Trade Practices Act. This document has been superseded by AS/NZS ISO 14021:2000, 'Environmental labels and declarations- Self-declared environmental claims (Type II environmental labelling)'.

While the Standard is not mandatory, the ACCC recommends that companies comply with its provisions.

The cost of taking matters to court means that, except for significant matters, the ACCC will often seek alternative solutions. While the Trade Practices Act provides for severe penalties, in practice the ACCC often attempts to have a company rectify the situation in cases where there is evidence the offence was inadvertent, and where there is a willingness to correct any deceptive or misleading information and ensure it does not re-occur.

Nevertheless, it is wise for companies to take a conservative attitude in these matters.

The Australian/New Zealand Standard: AS/NZ 14021:2000 – 'Environmental labels and declarations-self-declared environmental claims (Type II environmental labelling)'

The Standard sets out a number of general requirements for self-declared environmental claims. These include:

- Vague or non-specific claims should not be used. Examples include 'environmentally safe' and 'environmentally friendly';
- Due to the complexity of concepts of 'sustainability, claims of sustainability should not be made;
- Where claims are not necessarily valid in all circumstances, an explanatory statement should be included.

The Standard also includes a number of specific requirements, in that all claims and explanatory statements:

- Shall be accurate and not misleading
- Shall be substantiated and verified
- Shall be relevant to the particular product and used in an appropriate context
- Shall clearly communicate whether the claim applies to the entire product, a component of the product or other aspect
- Shall be specific as to the environmental benefit claimed
- Shall not be restated to imply multiple benefits for a single instance
- Shall be unlikely to result in misrepresentation
- Shall take into consideration the whole product lifecycle
- Shall not falsely imply any endorsement or certification
- Shall not in any way suggest an environmental improvement that does not exist, or exaggerate the characteristics of such an improvement
- Shall not be made if, even though literally true, is likely to be misinterpreted or misleading through the omission of relevant facts
- Shall only relate to an environmental aspect that either exists or is likely to be realised during the life of the product
- Shall be specific about the basis for any claims of environmental superiority or improvement. Claims must be relevant in terms of how recently improvements were made.
- Shall not create an impression that any improvements are recent if this is not the case
- Shall not be based on the removal of an ingredient or feature that was not there in the first place
- Shall be reassessed and updated as necessary; and
- Shall be relevant to the area where the corresponding impact occurs.

The Standard also contains information on the use of symbols, in particular noting that natural objects should only be used where there is some relevance or verifiable link between it and the claimed benefit.

The Standard sets out quite stringent evaluation and claim verification requirements. The responsibility for the verification of claims is the responsibility of the claimant. Claims should not be verified retrospectively- prior to making the claim, an evaluation should be undertaken, be updated appropriately and this data kept for the

period of time the product is on the market and for a reasonable time after manufacture of the product ceases.

Environmental claims are not considered valid if they can only be substantiated by reference to commercial-in-confidence information.

The Standard also sets out definitions of frequently used environmental claims, such as 'degradable' or 'recyclable'. Of particular relevance is the definition for 'reduced energy consumption', which is: 'reduction in the amount of energy associated with the use of a product performing the function for which it was conceived compared with the energy used by other products performing an equivalent function'.

Compliance

The ACCC recommends that companies wishing to ensure they comply with the Standard implement a compliance program.

According to the Commission, such a program would include:

- ' Making a senior manager responsible for compliance with the Trade Practices Act and the Standard
- Ensuring that proper verification processes are in place and that these have been followed;
- Appointing someone with expertise in the Standard to audit manufacturing processes and labelling to identify any areas of risk and to recommend appropriate changes and verification procedures to ensure that all promotional claims are accurate and comply with the Standard;
- Establishing a mechanism to ensure that any changes to the processes and/or labelling and other promotional material made after the audit have been cleared by the compliance expert and the senior manager responsible for compliance; and
- Ensuring that contracts/order forms from other suppliers stipulate that the product complies with the Standard and regular tests are conducted to ensure that those stipulations have been met.'

Summary

The Standard sets down a very stringent regime in regard to self-declared environmental claims, and it is the personal view of the writer that a significant amount of advertising material in the general marketplace would fall short if measured against AS/NZS ISO 14021:2000.

The nature of marketing airconditioning and refrigeration equipment means that breaches are more likely to occur where domestic products are marketed to consumers, rather than advertising in industry journals. This is due to the different nature of the marketing, and the differing levels of knowledge that could be expected in each target audience.

Nevertheless, companies should be aware of the Standard, and ensure their marketing departments/agencies are also familiar with its requirements.

In the current environment of increased scrutiny, AREMA members can expect that their marketing material is being read by more than just potential customers, and be prepared to substantiate environmental claims if called upon to do so.