

THE FAIR TRADING ACT

GUIDELINES FOR GREEN MARKETING

PURPOSE OF THESE GUIDELINES

These guidelines will help those wanting to use green claims in marketing to better understand how to comply with the Fair Trading Act. These guidelines should be used as a guide only and are not a substitute for legal advice.

While one of the Commerce Commission's functions is to educate through the dissemination of information, the Commission does not provide legal advice about specific representations or specific promotions. Ultimately only a court can decide whether a representation contravenes the Fair Trading Act.

INTRODUCTION

Environmental claims can be a powerful marketing tool. Companies are increasingly using environmental claims in an attempt to differentiate themselves and their products or services from those of competitors. These claims come in a wide range of forms, including statements about environmental sustainability, recycling, carbon neutrality, energy efficiency, use of natural products or impact on animals and the natural environment.

Companies realise that consumers today have an increased awareness of the environmental impact that modern goods have. Environmental claims are now relevant to a larger product range, from small household items such as nappies, toilet paper, cleaners and detergents to major whiteware goods and appliances. Many consumers consider environmental claims as a major factor when evaluating products to purchase.

Therefore, it is essential that consumers are provided with accurate information in order to make informed decisions.

Businesses making environmental or 'green' claims should ensure that their claims are scientifically sound and appropriately substantiated. Consumers are entitled to rely on any environmental claims you make and to expect these claims to be truthful and not misleading.

Not only is this good business practice; it is law.

The Fair Trading Act 1986 (The Act) states that those in trade must not mislead or deceive consumers in any way, and it carries serious penalties for businesses and individuals in trade that fail to meet these requirements.

GREEN MARKETING AND THE FAIR TRADING ACT

The purpose of this guide is to educate businesses about their obligations under the Act. It aims to assist manufacturers, suppliers, advertisers and others to assess the strength of any environmental claims they make and to ensure the accuracy and usefulness to consumers of their labelling, packaging and advertising. This guide is divided into three parts:

Part 1 examines the law - the Fair Trading Act - and how it applies to environmental claims.

Part 2 examines some of the broad principles you should consider when making environmental claims. It provides a framework for examining your existing or upcoming advertising to ensure it complies with the law. It also includes a quick reference for some common and problematic claims. If your advertising contains any of these claims you should assess it against this part of the guide and seek legal advice if you still have any concerns about claims.

Part 3 is a checklist for marketers against which you can check your claims to help identify any misleading material or claims likely to create a misleading impression.

THE FAIR TRADING ACT

The Act applies to all forms of marketing, including claims on packaging, labelling and to advertising and promotion across all mediums (print, TV, radio and internet). This means that any environmental claims you are considering need to be assessed against the requirements of the Act. Failure to abide by the Act can result in serious penalties.

WHAT DOES THE LAW SAY?

A green claim can contravene the Fair Trading Act in one of two ways, either as misleading or deceptive conduct or as a false or misleading representation.

MISLEADING AND DECEPTIVE CONDUCT

Sections 9 to 12 of the Act contain broad prohibitions against misleading and deceptive conduct. Businesses have an obligation not to engage in any conduct that is misleading or deceptive or is liable or likely to mislead or deceive consumers. Note that it does not matter whether the conduct actually misled anyone, or whether the business intended to mislead – if the conduct was liable to mislead or deceive, the Act is contravened.

Broadly speaking, it will be considered liable to mislead or deceive if there is ‘a real or not remote possibility’ that members of its target audience may have been misled. Plainly put, if part of the audience to which it is directed could be misled, there may be a contravention of the Act.

The class of people likely to be affected by your advertising can be relatively wide. Therefore it is important to carefully consider your audience when making environmental claims. You should not assume that members of your audience have any particular degree of knowledge, so claims should be clear and unambiguous. This makes the use of technical or scientific jargon especially risky.

The nature of the product is an important consideration. A consumer may be unlikely to go through a lengthy decision-making process when buying a small household item. Instead, consumers may rely on first impressions obtained from advertising and marketing, so you should consider the immediate impression made on them by your environmental claims.

Misleading conduct can include silence if in all the relevant circumstances there is an obligation to say something if a reasonable expectation is created that matters will be disclosed if they exist. For example, putting ‘made from recycled material’ on a product when only a part of the product (such as the packaging) is made from recycled material could be misleading.

Misleading conduct can include predictions if the maker had no reasonable ground for making it, or if the prediction should have been qualified and was not. A marketer making a statement about something that will happen in the future, such as ‘by 2010 this product will be made entirely from wood pulp from plantation trees’, could be found to be misleading if the marketer could not show there were reasonable grounds for making the statement at the time it was made.

Misleading conduct can also include advertising. The law will allow a degree of latitude when statements are clearly puffery on the basis that most reasonable consumers are aware that some vague or generalised exaggeration occurs in advertising. However, you should still exercise caution when making such claims, as you may be in breach of the law if consumers could be misled by your statements.

Business names could be misleading if they imply green credentials that do not exist. For example, a business that promotes itself as an environmentally responsible energy company using a name such as ‘Completely Clean & Green Energy’ may be at risk of misleading its customers if it in fact produces energy from an unclean source.

When naming your business care should be taken that the name does not draw on environmental terminology to imply reduced or no environmental impact if this is not correct. The mere use of a business name, in certain circumstances could be a breach of the Act. An example of a fictitious name of this nature is ‘EcoProtect’ which may falsely imply that the company’s products or services protect the environment, either reducing harm to it or making no impact on it.

FALSE OR MISLEADING REPRESENTATIONS

In addition to the general rule against misleading or deceptive conduct, the Act prohibits a variety of false or misleading representations about specific aspects of goods and services.

There are two specific forms of prohibited misrepresentations that are especially relevant to environmental claims.

The Act requires that a business must not falsely represent goods as being of a particular standard, quality, grade, quantity, composition, style or model or as having had a particular history or particular previous use.

Put simply, goods must comply with any description that is provided in advertising or labelling. This is especially relevant to claims regarding recycled and recyclable content or the environmental impact of components used in the product, such as refrigerants.

The Act also requires that a business must not represent that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses or benefits they do not have. Those most relevant to environmental claims are:

- **Sponsorship** - this connotes some form of backing by another party. The unauthorised use of a trademark may breach this provision.
- **Approval** - this provision is mainly misused when a business claims to have approval from a government agency or licensing board for its products when no such approval has been given.
- **Performance characteristics** - companies should not falsely claim that their goods or services have certain capabilities or effects they do not have.
- **Benefits** - companies should not claim that a particular good or service has certain environmental benefits if these claims cannot be substantiated.
- **Endorsement** - This provision will be breached if it is claimed or implied that a product or service is endorsed by someone well known or by some company or organisation when that is not true. This would also include the use of a logo that denotes a form of endorsement but is in fact crafted by the advertiser itself and has no objective authority.

MAKING ENVIRONMENTAL CLAIMS

As discussed in the previous section, the Act applies to all forms of advertising, including claims on packaging, labelling and to advertising and promotions in all mediums.

Special care must be taken when you refer to characteristics of the product that will probably be very important to your customers, such as environmental claims.

Not only do questionable advertising practices disenchant consumers; they carry serious legal risks. It is vital that businesses ensure any messages promoted in their advertising to consumers give the whole picture and will not mislead or deceive them.

You should be careful that the overall impression you create about the products you sell is not misleading. In other words, it is not enough for each representation to be technically or narrowly correct.

It is just as important to look at the overall impression created in the minds of average consumers in the target audience.

If you wish to make environmental claims about your business or your product, they should be clearly and accurately explained. Generally, a claim should:

- be honest and truthful;
- detail the specific part of the product or process it is referring to;
- use language which the average member of the public can understand;
- explain the significance of the benefit; and
- be able to be substantiated.

PRINCIPLES TO CONSIDER

As long as claims concerning environmental benefits are accurate, able to be substantiated and stated in plain language, they will assist consumers to purchase products in accordance with their principles and to distinguish between other comparable products.

Competition in environmentally friendly products benefits the environment too – if manufacturers see the market share of a product with environmental advantages increase, it will encourage them to minimise the environmental impact of their own products in order to compete.

However, vague, unsubstantiated, misleading, confusing, false or deceptive claims reduce consumers' confidence in environmental claims, disadvantaging ethical traders.

Therefore the Commerce Commission will vigorously pursue businesses which breach the law.

CLAIMS MUST BE ACCURATE

Any claim you make must be accurate and not mislead consumers in any way. Whether a representation is false or misleading is a question of fact, and it does not matter if there was intent to mislead.

A manufacturer of washing machines claims that their new model reduces water usage by 75 per cent. In fact it only reduces water usage by 25 per cent in most normal households. This claim is almost certain to be misleading.

CLAIMS SHOULD BE ABLE TO BE SUBSTANTIATED

You should be able to substantiate any environmental claim you make, whether on your packaging, in your advertising or through your representatives. Being able to substantiate claims you make is a good way to show you have a good faith basis for making the representation.

A dishwasher manufacturer claims that their new model is '60 per cent more water efficient'. Without scientific or test data to back this up, the manufacturer may not have a good faith basis for making this claim. This may risk misleading consumers and breaching the provisions of the Act.

CLAIMS SHOULD BE SPECIFIC, NOT UNQUALIFIED AND/OR GENERAL STATEMENTS

Unqualified statements are risky because they may not adequately explain the environmental benefits of your product or service to your target audience. This risks misleading consumers, even if you did not mean to. It is not the intent of the person making the claim that will determine whether it is considered misleading; it is the overall impression given to the consumer that is important. It is important that your advertising does not inadvertently mislead consumers through vague or ambiguous wording.

As with unqualified claims, it is also risky to make

claims about the environmental benefits of a product without adequately explaining those benefits. Providing only partial information to consumers risks misleading them. Generally a claim should refer to a specific part of a product or its production process such as extraction, transportation, manufacture, use, packaging or disposal.

For example, the statement 'safe for the environment' could have many meanings depending on the audience – some may believe this means your product is biodegradable, others may infer that it contains no toxic components or ingredients. Without further explanation consumers may not know what you mean and you risk misleading at least some portion of the audience.

CLAIMS SHOULD BE IN PLAIN LANGUAGE

The use of scientific language or technical jargon can confuse average consumers who are not familiar with it. Consumers who are unfamiliar with technical terms will often make assumptions and may be misled.

CLAIMS SHOULD ONLY BE MADE FOR A REAL BENEFIT

Environmental claims should only be made where there is a genuine benefit or advantage. You should not advertise environmental benefits where they are irrelevant, insignificant or simply advertise the observance of existing law.

Claims for absence of a harmful chemical or damaging effect are unacceptable if other products do not contain that chemical or have that effect.

A claim which may be relevant at one time can become less relevant and ultimately meaningless over time and therefore potentially misleading.

Where a trader claims that their product is CFC – free this would likely risk misleading consumers because authorities now prohibit their use in almost all aerosols, therefore no other competing products contain CFCs.

CLAIMS MUST NOT OVERSTATE A BENEFIT

You should not make claims that expressly or implicitly overstate an environmental benefit. When producing your marketing material, avoid implications of significant environmental benefits if the benefit is negligible. Remember, it is the overall impression that counts.

A claim of 'now 50 per cent more recycled content' is of no real benefit if a product was previously only 1 per cent recycled content. It is likely to convey the false impression that you have significantly increased the use of recycled material and is likely to mislead consumers.

CLAIMS BASED ON TESTS OR SURVEYS

There is nothing wrong with stating a product has been scientifically tested if that is the case, or using test results or surveys in advertising favourable to a product or service. However, care should be taken when relying on scientific or other test claims that:

- the test results are not distorted to make them appear more favourable than they are, or used to mislead eg. by claiming a product has been scientifically tested but omitting to include that the testing did not support the claim; or
- the 'testing' used to support the claim is not misleading - because, for example, a clear factual basis for the 'testing' claim does not exist, or the type or significance of the testing is not accurately described in your advertising; eg. by not describing whether it was truly scientific, or clinical, or was by way of independent testimony of an authority in that field.

You should be able to provide evidence of the accuracy and relevance of any test results you rely on in your advertising.

PICTURES CAN ALSO BE REPRESENTATIONS

Images such as those of forests, the earth or certain endangered animals can also be representations. The use of environmental images may be capable of making a sweeping claim of environmental benefit that may be misleading. Particularly, some images may suggest environmental benefits or advantages to consumers and must be used with care.

Using a symbol that is widely accepted as having a particular meaning or affiliation when no such link exists can be misleading and should only be used with qualification and authorisation.

A picture of a dolphin on a tuna product may be taken by consumers as a symbol to mean the tuna has been fished in a manner that does not harm dolphins. If this is not the case then the use of the picture risks misleading consumers

CLAIMS SHOULD MAKE IT CLEAR WHETHER CLAIMED BENEFITS REFER TO PACKAGING OR CONTENT

You should specifically refer to the part of a product or its production process that claims the environmental benefit if the benefit is limited to that part of the product.

This has particular relevance where a non-recyclable (or non-recycled) product has been packaged in recyclable (or recycled) materials. You should ensure that your claims specifically explain this distinction to consumers – a simple 'packaged in recyclable material' could prevent you misleading your customers.

CLAIMS SHOULD CONSIDER THE WHOLE PRODUCT LIFE CYCLE

Consider the whole product life cycle when making claims about a particular characteristic or part of a product. The manufacturing use, recycling, treatment and disposal process should be taken into account before making any environmental claims regarding the relevant characteristic or part. If the environmental benefit you are claiming is only relevant to one part of the life cycle you should specify the part of the life cycle to which the claim relates, to ensure consumers are not misled.

A car is manufactured to be extremely fuel efficient and advertised as 'green' or 'eco-friendly'. This does not take into account the harm to the environment of the production process or the disposal of the car at the end of its life cycle, which may have a large environmental impact. Advertising the car as being 'fuel efficient' rather than 'green' could help avoid misleading consumers.

CLAIMS USING ENDORSEMENT OR CERTIFICATION SHOULD BE USED WITH CAUTION

Consumers may be unfamiliar with local or international environmental endorsement schemes and the certification on your product. You should be aware that, when using a logo from such a scheme, consumers may make assumptions and consequently be misled. Offering consumers details of further information on the scheme may help alleviate these concerns.

A logo depicting a red panda is used on paper and stationery products. Consumers unfamiliar with the logo may believe that the production of the products do not harm the natural habitat of red pandas. In actual fact the red panda logo represents a scheme that plants trees to offset those logged in the production of the paper products. Without some kind of qualification or further information given, the use of this logo on the paper products risks misleading consumers.

CLAIMS SHOULD NOT OVERSTATE THE LEVEL OF SCIENTIFIC ACCEPTANCE

Where the scientific basis for your claim is under dispute or not conclusive, you should be especially careful not to present your claim as being universally accepted.

BROAD OR UNQUALIFIED CLAIMS THAT CAN BE PROBLEMATIC

Broad or unqualified claims can be risky as they are ambiguous and do not explain any specific environmental benefit. Below are some common claims that may raise concerns.

'GREEN'

This statement is very vague, and conveys little information to the consumer other than the message that your product is in some way less damaging to the environment than others. This term invites consumers to give a wide range of meanings to the claim, which risks misleading them.

'ENVIRONMENTALLY FRIENDLY' OR 'ENVIRONMENTALLY SAFE'

These claims are also vague and could potentially mislead consumers into thinking that the product causes no harm to the environment in its production, usage and disposal. Few, if any, products could make this claim. Almost all products have some adverse impact on the environment in their manufacture, packaging, use or disposal.

Making comparative claims of being environmentally friendlier/safer/kinder, without explaining what product or service it is being compared with could also mislead.

'ENERGY EFFICIENT'

Energy efficiency claims should be quantified by comparison to existing benchmarks or rating systems, or otherwise explained in more detail. Simply claiming that a product is 'energy efficient' makes it difficult for consumers to compare products and they may be misled into drawing incorrect conclusions by your material.

'RECYCLABLE'

These claims can be potentially dangerous if the product is not recyclable or if the facilities to recycle it are not readily available in New Zealand. Manufacturers and retailers should verify that their product can actually be collected and recycled across most of New Zealand before using such claims.

Consumers are likely to understand the term 'recyclable' or recycling symbols on products to mean that the product is likely to end up in a recycle facility.

The use of the term or symbols may be misleading if there are very few or no facilities, facilities are not available to the public or they exist only as pilot plants.

'RECYCLED'

When making a claim that your product contains recycled material, consumers may take this to mean that the product has been through a previous life cycle or that it has been recycled by another consumer.

If, however, some of the material has been recovered from the waste stream during manufacture and reused, you should specify the amount of pre-consumer and post-consumer waste included in your claim.

'CARBON NEUTRAL'

Increasingly, companies are making claims regarding the 'carbon neutrality' of their products and services. Any claims you make about carbon neutrality should be factually based, transparent and not overstated.

When advertising participation in a carbon-offset programme or other similar programmes, you should be careful to distinguish between past activities and those that are planned for the future.

It could be misleading to claim a product as neutralised by a forestry carbon-offset programme but not distinguish between offsets that had already been planted and trees that you pledge to plant in the future as carbon-offsets.

NB: The Commission intends to produce a separate guide for carbon neutral marketing, which will cover this area in more detail.

'RENEWABLE' OR 'GREEN' ENERGY/ ELECTRICITY

Sustainable or renewable energy sources are important to many consumers and so it is essential they have accurate information on which to base their purchasing decisions. You should be careful when advertising renewable or green energy that any representations made about cost, amounts supplied or the associated benefits are truthful and correct.

For example, a company advertising their energy as 'green' or 'renewable' should disclose the percentage of energy which is obtained from renewable sources if it is less than 100 per cent.

PENALTIES AND REMEDIES FOR BREACHING THE ACT

The Commission may take criminal or civil action under the Fair Trading Act. Anyone can take private action under the Act.

Civil action is taken in relation to declaratory orders and other relief for a variety of unfair trading practices under the Act; and may include the Commission seeking interim injunctions during the course of an investigation to prevent or stop unlawful activity.

The Commission may seek permanent injunctions at the conclusion of an investigation.

Under sections 9 (which covers misleading and deceptive conduct generally), 14(2) and 23 of the Act only civil proceedings are possible.

Such proceedings cannot result in fines, but may result in injunctions, orders to pay money and other remedies. Civil proceedings under the Act can take place in the High Court, the District Court, the Disputes Tribunal or the Motor Vehicles Disputes Tribunal, depending on the type of order sought and the amount of the claim.

Criminal action is taken in relation to offences under the Act. Criminal proceedings are taken in the District Court. Criminal court action may result in fines of up to \$60,000 per offence for an individual and \$200,000 per offence for a company. Both a company and the individuals involved in a breach can be prosecuted by the Commission.

The Commission also has the right to apply to the courts for corrective advertising orders.

Where it is satisfied that a business has contravened the Act, the court may order the business to:

- disclose information to the public generally, or to an affected section of the public;
- publish corrective statements.

The business has to bear the costs of this remedial action.

The court may grant a number of other remedial orders, including orders that:

- a contract be altered or made void;
- money be refunded;
- payment of the amount of any loss or damage;
- goods be repaired or services supplied.

An application can be made to the court for these orders up to three years after a contravention was discovered or ought reasonably to have been discovered. The court may order that money be refunded to a consumer even if that consumer is not party to the proceedings before the court.

AVOIDING A BREACH OF THE LAW

A compliance programme is an in-house checking system designed to ensure that businesses and their staff do not breach the Fair Trading Act.

The Fair Trading Act applies to both accidental and deliberate conduct, so a compliance programme can pick up mistakes and oversights which could breach the Act. Remember also that a business is responsible for the actions of its staff and agents. The existence of an effective compliance programme may in some circumstances also assist a business in establishing a legal defence to any prosecution under the Act. The court may also view favorably the existence of a compliance programme

when imposing penalties for breaches of the Act which occurred despite the diligent supervision of the business.

There are other good reasons for a business to have a compliance programme including:

- improved customer service from better informed staff; and
- better customer relations as the company will be identified by customers as a good business.

Dealing with complaints appropriately can also provide valuable information that will help management identify problems and deal with them before they become big issues.

In deciding what action to take against a possible breach, the Commission will take into account whether the breach was an isolated event and whether the company has a compliance programme that effectively eliminates systemic breaches of the Act.

CHECKLIST FOR MARKETERS

When making environmental claims for your products and services, you should check the following:

- Avoid using terms like ‘safe’, ‘friendly’ and ‘green’ and unqualified pictures or graphics. At best they are unhelpful and encourage scepticism, at worst they are misleading.
- Spell out exactly what is beneficial about a product in plain language that consumers can understand.
- Link the environmental benefit to a specific part of the product or its production process, such as extraction, transportation, manufacture, use, packaging or disposal.
- Make sure any claims you make about your product can be substantiated. Think about how you would answer a query regarding the environmental benefits you are claiming about your product. For example, what scientific authority could you use to justify the basis of your claim?
- Explain how a product’s characteristic is beneficial to the environment. For example, explain that a phosphate-free product is less damaging in river systems because phosphate promotes algal growth, which can clog up rivers.
- Avoid giving the impression that your product is completely environmentally benign if it is not.

- Use the claim only in an appropriate context or setting. For example, do not claim that a product is not tested on animals if it is a product that would never be tested on animals anyway.
- Avoid using technical or industry-related terms where possible and if you do use them, ensure their meaning is clearly explained.
- If you rely on scientific or other testing to support your claim make sure such testing is accurate. If you include reference to testing in your advertising, explain the relevance of the testing and be prepared to provide test results to any enquirers.

Testing your claims against these guidelines may help remove any misleading impressions. Having someone with legal expertise in trade practices law check the promotional material can further reduce the risk to your business of breaching the Act and misleading your customers.

MAKING A COMPLAINT

To contact the Commerce Commission about potential breaches of the Fair Trading Act:

Telephone our Contact Centre during office hours on: 0800 94 3600,

Write to us at:

Contact Centre,
Commerce Commission
PO Box 2351

Wellington,
or

email us at:
contact@comcom.govt.nz

Prepare your query or complaint with as much relevant detail as possible – including your contact details, information about the trader or individual, and evidence of any suspected breach.

FURTHER INFORMATION SOURCES:

Ministry for the Environment
www.mfe.govt.nz

Ministry of Economic Development
www.med.govt.nz

Sustainability Webpage
www.sustainability.govt.nz

Environmental Choice New Zealand
www.enviro-choice.org.nz