

PREDICTING THE FUTURE FOR “GREEN” CLAIMS: THE FULL FEDERAL COURT PROVIDES GUIDANCE ON REPRESENTATIONS AS TO FUTURE MATTERS (AUSTRALIA)

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Legal Briefings - By **Patrick Sands, Sue Gilchrist, Anna Vandervliet, Laura Simonds and Claire Dorse**

Marketing products as ‘environmentally friendly’ is an increasingly popular way for businesses to capture consumer attention. As the popularity of such ‘green’ marketing claims has increased, so has the ACCC’s scrutiny of these claims.

In two recent decisions in cases commenced by the ACCC in relation to ‘green’ marketing claims, the Full Federal Court in Australia has provided guidance as to when marketing claims will be considered a ‘representation with respect to a future matter’ under section 4 of the *Australian Consumer Law (ACL)* and when a claim will be a representation as to a product’s inherent characteristics. This matters, because for a representation with respect to a future matter, the Court will assess whether there were reasonable grounds for making such a representation. In *Australian Competition and Consumer Commission v Woolworths Group Limited (formerly called Woolworths Limited)* [2020] FCAFC 162, the Full Federal Court recently upheld the decision of the Federal Court that representations as to the biodegradability and compostability of Woolworths ‘Select Eco’ product range were not misleading or deceptive. This decision followed hot on the heels of the Full Court’s decision in *Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd* [2020] FCAFC 107, upholding that claims that certain wipes were ‘flushable’ were also not misleading or deceptive.

Although the ACCC failed to establish that the claims at issue were representations with respect to future matters in both *Kimberley-Clark* and *Woolworths*, the ACCC is likely to continue to pay close attention to 'green' marketing claims in the future. These decisions also highlight the role that section 4 of the ACL will continue to have in relation to representations that relate to future predictions, including regarding performance and results. This is likely to be particularly relevant to health and therapeutic claims, business performance and financial products (which may also be subject to oversight by other regulators such as the TGA or ASIC).

KEY TAKEAWAYS

- Whether a representation is one 'with respect to a future matter' will depend on the words used and the context. However, generally speaking, where a claim is not capable of being proved true or false at the time it is made (because it lies in the future), it will be considered a representation with respect to a future matter. Examples of this include predictions, promises, forecasts and opinions as to future events.
- In contrast, representations as to the nature, quality, character or capability of a product based upon its inherent characteristics will generally not be representations with respect to a future matter.
- Where representations are predictive in nature, businesses should ensure that there are reasonable grounds for making the claim. This may require evidence that a business evaluated and relied on relevant information prior to making a representation. In light of this, businesses should ensure adequate record keeping policies and practices are in place in relation to evidence to support the claim being made and the decision-making process.
- 'Green' marketing claims, as well as health and nutritional claims, are examples of types of claims that have the potential to involve representations as to future matters. These types of marketing claims continue to be popular and effective, and as a result, also continue to attract close scrutiny from regulators such as the ACCC, as well as competitors. The ACCC specifically identified health and nutritional claims as a priority focus for 2020.

BACKGROUND

REPRESENTATIONS AS TO FUTURE MATTERS UNDER THE AUSTRALIAN CONSUMER LAW

Under section 4(1) of the ACL, a representation is taken to be misleading if:

- a person makes the representation with respect to a future matter; and
- the person does not have reasonable grounds for making the representation.

Section 18 of the ACL then prohibits a person from engaging in conduct in trade or commerce that is misleading or deceptive.

Procedurally, if a representation with respect to a future matter is established, an evidentiary burden is placed on the party making the representation to establish that they had reasonable grounds for doing so. Effectively, this shifts the burden and costs associated with proving that the representation was made on reasonable grounds to the party making the representation.

ACCC V KIMBERLY-CLARK AUSTRALIA

In 2016, the ACCC commenced proceedings against Kimberly-Clark Australia (**KCA**) alleging that KCA had breached sections 4, 18, 29 and 33 of the ACL by making false and misleading representations on both product packaging and its website about the suitability of its wipes to be flushed down toilets. The ACCC unsuccessfully appealed other aspects of this decision, but the findings in relation to section 4 were not the subject of any appeal. The following discussion relates to the Court's decision at first instance on the question of representations as to future matters.

The Representations

The ACCC alleged that KCA had made a number of false and misleading representations as to future matters about the wipes, including that they were "flushable". The ACCC contended that the representations:

- comprised predictions or forecasts as to how the wipes would behave when flushed and upon entering the wastewater network; and
- related to the benefits and characteristics of the wipes that would be exhibited once they were used.

The ACCC argued that the representations could be characterised as relating to a performance characteristic of the product that only manifest at a future point in time after purchase and use and in the context of an external and variable environment.

Findings

At first instance, Justice Gleeson held that an ordinary and reasonable consumer would have understood the description “flushable” to mean that the wipes were intended and were suitable to be flushed down the toilet, and into sewerage systems. The expression was used to describe a characteristic of the wipes’ manufacture and suitability for flushing.

Her Honour noted that the fact that a consumer needs to first use the wipes did not give the representations a futuristic quality. Otherwise, any representation about the characteristics of goods sold in Australia, in respect of their intended use after sale, would be taken to be with respect to a future matter. Further, this would mean that claims such as “soluble”, “edible”, “dishwasher safe”, “water-proof” or “scratch resistant”, would be mischaracterised as predictions, forecasts or, representations as to future matters. Her Honour highlighted that an expression in the form ending “-ble” means “able to be” and, as a matter of grammar and substance, is an assertion in the present tense, which is true or false whether or not the product was ever used.

Her Honour also held that, in any event, KCA had discharged its evidential burden, and established that it had reasonable grounds for making the representations. The Court found that it was reasonable for KCA to rely on guidelines developed by industry as these represented a “conscientious and scientific effort [by KCA] to establish an appropriate framework for assessing flushability”, that was sufficient in the circumstances, and supplemented by KCA’s own additional testing on its wipes. To the extent the ACCC sought to undermine this evidence with its own expert evidence, the Court held that this evidence was not directed to “flushable” wipes but, rather, to wipes generally, and therefore did not support the inference that the KCA wipes solely caused damage and blockages to drainlines and wastewater networks.

ACCC V WOOLWORTHS

The ACCC instituted proceedings against Woolworths in 2018. Among other matters, the ACCC alleged that Woolworths had made misleading representations to consumers about future matters without reasonable grounds by labelling its Select Eco products “Biodegradable and Compostable”. In 2019, the Federal Court dismissed the ACCC’s claims and in late September 2020, the Federal Court dismissed the ACCC’s appeal. In doing so, the Full Court provided further guidance on the meaning of “future matters” in section 4 of the ACL.

The Representations

The ACCC contended that Woolworths’ statement that the products were “Biodegradable and Compostable” were “representations with respect to future matters” which contained an “element of prediction” namely, they contained a representation about the “likely performance” of the products; or the ability of the products “to do something in the future” with no reasonable basis for making such assumptions. In the alternative, the ACCC contended the representations were false or misleading or deceptive, because the products did not biodegrade and compost within a reasonable period of time.

On appeal, the ACCC also submitted that the representations were not only representations about existing facts (as found by the primary judge) but were also statements in relation to future matters, such that the representations were that the products were capable of biodegrading and composting, and additionally, representations were also made that the products would biodegrade and compost in the future if appropriately disposed of and treated.

Findings

The Full Court agreed with the finding of the primary judge that the references to “biodegradeable and compostable” were representations generally to the inherent qualities of the products, rather than a representation with respect to a future matter. In particular, the Full Court agreed that the intuitive reaction of ordinary and reasonable consumers to the labelling should be considered, rather than any overly scientific consideration of the words “biodegradable” or “compostable”. Considered from this perspective, the Full Court agreed with the primary judge that consumers understand that the term “recyclable” only applies where a product is properly disposed of and treated, and this understanding was equally applicable to the terms “biodegradable” and “compostable”. The Full Court also considered relevant the short time spent by consumers considering whether or not to purchase products of this nature and the fact that most consumers lack a detailed knowledge of the composting process. These factors reinforced the Court’s view that the representations were referring generally to the inherent qualities of the products.

The Full Federal Court held that, generally speaking, a representation about the nature, quality, character or capability of a product based upon its inherent characteristics will not be a representation with respect to a future matter and would therefore fall outside the ambit of section 4 of the ACL. A representation will only be with respect to a future matter if it is in the nature of a promise, forecast, prediction or other like statement about something that will only transpire in the future — that is, a representation which is not capable of being proven to be true or false when made.

Despite the Full Court’s decision, some uncertainty remains in relation to the evidence required to establish that there are reasonable grounds for making a representation with respect to future matters. In the earlier case of *Sykes v Reserve Bank of Australia* [1998] FCA 1405, Heerey J held that in the case of future matters, the question is not simply whether reasonable grounds existed for the making of the representation. Rather, the person or entity making the representation must have actually “had” or possessed information (including information that is implicit or inferred from the circumstances), which assessed objectively, gave a reasonable basis for making the representation. At first instance, the primary judge held that, applying the criteria from *Sykes*, there was no evidence that any person to whom Woolworths’ state of mind could be attributed had considered and actually relied upon the information said to constitute ‘reasonable grounds’, and that Woolworths had in fact formed no opinion about the existence or otherwise of a reasonable basis for the claims. As Woolworths did not challenge this finding on appeal, it was unnecessary for the Full Court to resolve this issue. However, in doing so, the Full Court noted that this should not be taken as indication of the Court’s acceptance of the correctness of Heerey J’s decision in *Sykes*.

We predict the Federal Court will continue to be called upon to determine if marketing claims are claims as to the future, and whether those claims are misleading.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



SUE GILCHRIST
PARTNER AND HEAD
OF INTELLECTUAL
PROPERTY,
AUSTRALIA, SYDNEY
+61 2 9225 5221
Sue.Gilchrist@hsf.com



**ANNA
VANDERVLIE**
SENIOR ASSOCIATE,
SYDNEY
+61 2 9322 4868
anna.vandervliet@hsf.com



PATRICK GAY
PARTNER, SYDNEY

+61 2 9322 4378
Patrick.Gay@hsf.com

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