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Sorting out the Green From the Greenwash

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SORTING OUT THE GREEN FROM THE GREENWASH

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Greenwashing is corporate spin which involves making misleading or deceptive claims that a company’s products or services are environmentally sustainable or friendly.

The problem of greenwashing requires a robust, integrated approach to law reform to discourage the practice that makes it harder for legitimate voices to be heard.

The consultancy group, TerraChoice, had identified seven sins of greenwashing – including claims involving hidden trade-offs; lack of proof; vagueness; false labelling; irrelevant claims; false comparisons; and false statements.

Such conduct is putting consumers at a disadvantage and giving some businesses an unfair advantage in a market increasingly concerned about the environment and climate change. Greenwashing also undermines government regulations in respect of energy, the environment, and climate change.

There are a number of new challenges in respect of the problem of greenwashing.

First, there have been concerns that companies have been making misleading and deceptive claims not just in respect of advertising, but also in corporate social responsibility statements.

Second, there have been new developments in clean energy law and climate law. In anticipation of the introduction of the carbon tax on July 1 this year, some companies are
running marketing campaigns that boost their environmental credentials – particularly with regard to climate change.

Third, there are significant new developments in respect of information technology law. In regard to domain names the Internet Corporation for Assigned Names and Numbers (ICANN) is about to auction the top level domain dot eco. There is a need to ensure that the winning bid is truly driven by community concerns for environmental sustainability, and has a clear plan to address the problem of greenwashing.

In light of these new developments, law reform and tougher legal sanctions to stop greenwashing are critical. There is a need for a robust, integrated approach to law reform. There is a need to update and reform advertising law, consumer law, and trade mark law to discourage companies from engaging in greenwashing.

**Advertising Standards**

In regard to advertising law, the Australian Advertising Standards Bureau has developed a Green Code. The Green Code is certainly a significant document – but it is limited in its jurisdiction (it does not address packaging) and enforcement.

Moreover, to date, the Bureau has not effectively enforced this code. The majority of the Bureau’s work focuses upon complaints about ‘sex, drugs, and rock n roll’, as it were.

There have only been a score of environmental complaints to the Bureau which have all been dismissed.
Also, the Bureau has not been proactive in seeking out and challenging instances of
greenwashing. There have been concerns that the regime is sympathetic to the Mad Men of
Madison Avenue (ie. the advertising industry) – rather than necessarily consumers or
businesses concerned about the environment.

**Consumer Law**

The Australian Competition and Consumer Commission established guidelines on green
marketing and carbon offset claims in 2007; and updated its guidelines on green marketing in
2011. It has taken enforcement action in respect of misleading and deceptive claims about the
environment and carbon offsets.

For instance, the Commission took action against GM Holden in 2008 over representations
that it made about the Saab range of vehicles. The car company published newspaper and
magazine advertisements across Australia, with the headline statement "Grrrrrreen",
contained the words and phrases, "Grrrrrreen", "Every Saab is green. With carbon emissions
neutral across the entire Saab range" and "Shift to Neutral". GM Holden represented that the
carbon dioxide emissions from any Saab motor vehicle would be neutral over the life of that
motor vehicle. The Federal Court of Australia declared that GM Holden contravened sections
52 and 53(c) of the Trade Practices Act by engaging in misleading conduct.

However, the Commission needs to redouble its efforts, particularly in light of the new clean
energy regime in Australia. It should use its new powers under Australian consumer law to
issue substantiation notices – to require companies to any questionable substantiate environmental claims.

**Trade Mark Law**

There has been a notable increase in trade mark applications to IP Australia using environmental signifiers. In 2010, the most popular terms in this field were ‘green’ with 372 applications; ‘eco’ with 290 applications; and ‘energy’ with 201 applications – followed by ‘clean’ with 193 applications, ‘nature’ with 139 applications; and ‘enviro-’ in 133 applications.

There has been a concern that the registers have become cluttered and crowded with trade marks, with environmental signifiers. More worrying still, there is a concern that some questionable trade marks are being used to engage in greenwashing, and mislead and deceive consumers.

In Australia, there has been much controversy over the oil company, BP, which rebranded itself from ‘British Petroleum’, with a Helios sunflower logo, and the slogan ‘Beyond Petroleum’. In a dispute with Woolworths, BP sought to trade mark the combination of green and yellow colours. The Full Federal Court of Australia held that the application lacked distinctiveness. The High Court of Australia considered and rejected leave to appeal by BP. Since that time, the company’s environmental credentials have become tarnished after the disaster of the Deepwater Horizon oil spill in the Gulf of Mexico.

There is a need for IP Australia and other trade mark offices around the world to take a stronger approach to greenwashing. Trade mark examiners need to take a much tougher
stance when assessing green trade mark applications, particularly when it comes to the question of distinctiveness. Trade mark examiners also need to reject applications which are contrary to Australian consumer law. The law should be updated, so that trade mark applications, which involve misleading or deceptive environmental claims, can be refused or revoked. Certification trade marks should have higher standards of transparency and accountability.

There has also been concern about the abuse of trade mark rights. Intellectual property owners have sometimes objected to environmental campaigns and spoofs. There is a need, though, to ensure that trade mark rights are not used to stifle political speech and artistic expression.

There should also be scope for consumers and their representatives to engage in criticism and analysis of the environmental credentials of trade marks.

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