

**Editorial****Green Marketing and Misleading Statements: The Case of Saab in Australia**

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**Abstract**

*This paper is a case study that provides an overview of The Deceptive and Misleading Advertising laws. It focuses on the case brought against GM Holden Ltd (Saab) in Australia in 2008 by the Australian Competition and Consumer Commission (ACCC) and highlights the trip wires that other advertisers must be aware of. It also compares the ACCC's Deceptive and Misleading Advertising Law with United States' Federal Trade Commission's laws on Deceptive and Misleading Advertising and provides insights for practitioners.*

**Key Words**

Green Marketing  
Saab  
Australian Competition and Consumer Commission (ACCC)  
Deceptive and Misleading Advertising Law  
United States' Federal Trade Commission's Laws

**Introduction**

This study uses the qualitative research technique to analyse Green Marketing claims of a holding company in Australia. More specifically, the paper is a case study that analyses the “misleading claims” charge that was brought in Federal Court in Australia against GM Holden Ltd.<sup>1</sup> by the Australian Competition and Consumer Commission (ACCC). It also discusses the implications of misleading advertisements and unfounded claims under the U.S. Federal Trade Commission's Unfair or Deceptive Practices Act and the potential fallouts that a business organisation could suffer from making misleading claims.

In Addition to the ACCC, we also analysed the case of misleading advertisements through the United States' Federal Trade Commission's guidelines for two reasons. First, because of its potential impact on many organisations since the United States serves as a nexus of world commerce. Second, because the Federal Trade Commission (FTC) has a long tradition, if not the longest, in the world of commerce, of regulating the content of commercial free speech, thus indirectly serves as an example for similar in different countries and jurisdictions.

It is hoped that the insights generated from these discussions, in addition to the GM Holden case itself, will serve as “lessons learned” and provide guidance to business organisations. It could also trigger further studies along similar lines of inquiry from other scholars.

The rest of the paper is organised as follows: first, we provide an overview of green marketing and the environmental movement. Secondly, we discuss the charge of deceptive and misleading advertising against GM Holden Ltd (actually Saab, a member of GM Holden Ltd. At that time, was the entity that violated the law) and resolution of the case. Thirdly, we discuss the laws on misleading advertisement in Australia and the United States, and finally conclude the paper by providing some implications of the case and its resolution.

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## Overview

From the warnings of popular documentaries such as the “Inconvenient Truth” which was co-produced by a former U.S. vice-president (see Rainier, 2006) and several other scientific reports on global warming or climate change (see Ratnatunga, 2007; Philander, 2008; Shermer, 2006; Oreskes, 2004), the world seems to have finally awoken to the realisation that changes in the climatic conditions may be harbingers of dire future conditions unless remedial actions are taken.

With climate change as a backdrop, many organisations now want to be perceived as environmentally friendly (Zimmer 1994). Being environmentally friendly amongst other things implies a firm’s activities leave fewer carbon footprints or are less destructive to the environment.

Green marketing or the claims of being green have become not only trendy in the business world but have also, according to many scholars, become a money maker for organisations for several reasons. First, many consumers now buy from organisations that claim to be green because it makes them feel good about themselves. By patronising green organisations, consumers feel that they are taking positive steps to protect the environment (Plonsky et al, 1998).

Furthermore, many consumers feel less guilty about powering their automobiles, equipment and appliances when they believe that the energy used has had no net impact<sup>2</sup> on the environment (Hilton, 2001; Ratnatunga and Balachandran, 2009). Secondly, claiming the green moniker is not only a good PR tool for many organisations, but it also creates tax savings as some governments have created tax incentives to encourage environmentally friendly measures to be taken (Camahan, 2011; Hilton, 2001).

While there are financial benefits for claiming green, the usage of the term has also opened the door to a new kind of fraud, i.e., some corporations free-ride at the expense of others and consumers by claiming “green” without

doing anything to deserve the use of the term (Schlossberg, 1993). Thus the need for some form of regulation that offers consumers protection became necessary.

The media is now so saturated with green claims that the term ‘greenwash’ has been coined to describe claims that are blatantly deceptive or cannot be substantiated (see Polonsky et al., 1998; Priesnitz, 2008; Dobin, 2009; Lippert, 2011). Thus a crucial question that needs to be asked is whether every green marketing claim is based on verifiable facts, and whether there is a protection to consumers from being misled by false claims? While this paper does not answer the first part of the question, it addresses the second and provides some insights that both practitioners and other researchers could find valuable.

The term “Green” has come to be synonymous with being environmentally friendly (Holcombe, 1990). However, “Green marketing” is a rather “malleable” term, and has been differently defined by different scholars. According to the American Marketing Association, green or ecological marketing “refers to the study of the positives and negative aspects of marketing activities on pollution, energy depletion and non-energy resource depletion” (Henoin and Kennear, 1976). Alternatively, Herbig, et al (1993) define ‘green marketing’ as referring to “products and packages that have one or more of the following characteristics: they (1) are less toxic; (2) are more durable; (3) contain reusable materials and/or made of recyclable materials”. Kirchoff, Koch and Nichols (2011) on the other hand, define ‘green marketing’ as “the holistic process of marketing activities within the firm that are aimed at reducing the environmental impact of products and their manufacturing process in a way that is profitable to them” (see also Isaak, 2002; Peattie, 1995).

These many and varied definitions seem to have created two things: One, a misconception in the minds of many consumers’ with regard to what green marketing really means, and two, a wide latitude for firms to claim that their offerings are “green”, and enjoy the benefits that such an image adduces.

<sup>2</sup> For example, if coal or petroleum is used to generate the power (thus emitting carbon); then adequate trees, etc, will be grown to capture a similar amount of carbon.

Even though some scholars date green consumerism to the last few decades (see Bartels and Hoogendam, 2011), according to Kinoti (2011), the Environmental Movement is nothing new, and goes back in the United States to as early as the 1830s when national parks were proposed to conserve wildlife. With proliferation of the “term”, some scholars argue that it has become necessary for firms to first understand how their relevant stakeholders perceive “being green” in order for them to really enjoy the competitive advantages that come from green marketing initiatives (Kirchoff et al, 2011).

### The Case against GM Holden

Launching its pioneering environmentally friendly programs in Australia in 2007, Saab, a subsidiary of GM Holden Ltd. in Australia at that time, introduced the Saab Bio Power which is powered by ethanol (Wade, 2008). This introduction, according to reports, made Saab the first and only car manufacturer to offer an ethanol-powered production car in Australia (Wade, 2008).

Also in January 2007, with the introduction of its E85 flex-fuel car, Saab launched its “Grrrrreen” advertising campaign (a carbon dioxide offset program) in which it touted its environmentally friendly innovations and credentials. The environmentally friendly message was not communicated to the media alone, but also through promotional items and through other promotional materials including letters to customers who purchased Saab vehicles.

To carry out its claim in the “Grrrrreen” campaign, Saab retained Greenfleet Australia, a company that has been approved by the Government of Australia as an abatement provider under the Australian government’s Greenhouse Friendly initiative program. According to statements released by Mr. Parveen Batish, the Director of GM Premium Brands, after it has been charged by the ACCC, Greenfleet was to plant 17 native trees for every new, approved used, and demonstrator vehicle purchased to offset one year’s worth of carbon dioxide emission from any automobile sold under the program (Wade, 2008).

However, it was the last part of the paragraph above that became Saab’s Achilles’ heel. According to the ACCC (Australia Competition & Consumer Commission ) the advertisements run by Saab between July 27, September 1, 2007 in newspapers and magazines all over Australia “contained the words phrases such as “Grrrrreen”, “Every Saab is green. With carbon emissions neutral across the entire Saab range” and “Shift to Neutral”. Furthermore, the ACCC alleged that Saab in accompanying statements indicated that it taken steps to ensure that “carbon dioxide emission from any Saab motor vehicle would be neutral over the life of the motor vehicle” (Australia Competition & Consumer Commission, 2008). Additionally, Saab allegedly represented in the same advertisement that it would plant 17 native trees on behalf of each vehicle purchaser and these trees would offset the carbon dioxide emissions for the life of the vehicle (we italicised for emphasis).

These statements, according to the ACCC, are untrue because planting 17 native trees would not offset a Saab vehicle’s carbon dioxide emission through the operating life of the vehicle, but would only offset the carbon dioxide emissions for a single year of operating the vehicle. Therefore Saab’s claims were in violation of sections 52 and 53(c) of the Trade Practices Act of 1974. Section 52 of the Trade Practices Act of 1974 is as follows:

#### Misleading or Deceptive Conduct.<sup>3</sup>

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 provision of this Division shall be taken as limiting by implication the generality of subsection (1)

Further, Section 53 of the Trade Practices Act of 1974 is as follows:

#### False or misleading representation:

A corporation shall not, in trade or commerce, in connection with the supply or possible

<sup>3</sup> Note: For rules relating to representation as to the Country of origin of goods, see Division 1AA (section 65AA to 65AN)

supply of goods or services or in connection with the promotion by any means of the supply or use of goods or service:

- a. falsely represent that goods are of a particular 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
- b. falsely represent that goods are new (bb) falsely represent that a particular person has agreed to acquire goods or services
- 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.

As evidenced above, Saab's claims in the "Grrrrreen" campaign would seem to have violated the language of section 52 (1) of the Trade Practices Act of 1974 which states that "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive," if indeed the 17 native trees planted would offset only a year's carbon dioxide emission.<sup>4</sup> Furthermore, the campaign would also seem to have violated, at least, the spirit of Section 53 subsection (a), and according to the ACCC section 53 subsection (c).

It is important to note that nothing in the relevant statutes cited above requires intent on the part of the corporation or an advertiser. This means that the ACCC does not need to establish that Saab, or any advertiser for that matter, sets out deliberately to mislead consumers by its claims. The catch with this aspect of the statute is particularly important to the practitioner because promotional messages would, by and large, be evaluated on their face value. Thus, whether a representation will be

<sup>4</sup> Interestingly, a tree freshly planted continues to sequester carbon dioxide whilst growing until it reaches maturity, which would be, depending on the tree, a point in time much longer than an average age of a Saab. Thus the 17 trees would planted in year 1 could arguably cover a Saab's emissions for its life. This argument does not seem to have been put forward in the case.

considered false or misleading becomes a question of fact.

## Commercial Speech in the United States

As stated earlier, because many companies in Australia and other parts of the world do business either directly or indirectly in the United States, they could also be easily caught by United State's regulations regarding claims in commercial speech. Therefore it would be beneficial for the practitioner that we provide, at least, a brief overview of the requirements in the United States' (Federal) government in terms of claims in advertisements.

The Federal Trade Commission (FTC) was established by an act of congress in 1914 as the United States government's agency to promote consumer protection and eliminate anti-competitive business practices. Similar to the ACCC, the FTC in the U.S. is responsible for regulating and or ensuring the accuracy of claims made by advertisers. Section 5 of the FTC Act, 15 U.S.C. § 45 grants the FTC investigatory powers as well as the power to prevent Deceptive and Unfair Trade Practices.

The FTC periodically, for the benefit of all stakeholders, releases explanatory statements on parts of its statutes. In its explanation on what truth-in-advertising rules apply to advertisers, the FTC states that "Advertising must be truthful and non-deceptive; advertisers must have evidence to back up the claims and advertisement cannot be unfair." (FTC, 1992).

An advertisement is considered deceptive if it contains a statement or omits something that is likely to mislead consumers acting reasonably under the circumstances. Further, it is important to note that the statement or mission must be material, that is, it must be important to a consumer's decision to buy or use the product. Aware of the fact that some businesses simply use "Green Claims" as a public relations and or marketing tool, the FTC has since 1992 been issuing a guide referred "Guides for the Use of Environmental Marketing Claims."

Notwithstanding the above, it is important to note that a consumer's reliance on claims made in an advertisement is not necessary for a business to be deemed to have violated the

Deceptive Advertising Act. Furthermore, similar to the ACCC's position, the FTC rules that the intent of the advertiser is irrelevant to a finding that an advertisement is misleading or deceptive. Two other points are worth noting for corporations that do business in the United States. One, the Deceptive Advertising laws also exist at the state levels and in some cases (e.g., The Miami-Dade County) even at the county level. The Federal Deceptive and Unfair statute does not pre-empt the county or state deceptive advertising laws, thus, it is plausible that a firm could find itself facing charges for violating the Deceptive and Unfair Trade Practices Act at more than one administrative level, e.g., in county and state, or from a state and the FTC. Two, the minimal contact law enunciated in the *International Shoe v. Washington* case holds that a corporation need not necessarily maintain an office in state in order for the state to have *personal jurisdiction* over the corporation (*International Shoe v. Washington*, 326 U.S. 310, 1945). Thus, foreign companies that conduct business in a state without necessarily maintaining an office in that state could still be held liable for violating the laws of that state.

## The Resolution

GM Holden (Saab) settled the case with ACCC in the Federal Court in September 2008. According ACCC's news release, the terms of the settlement include an agreement by GM Holden (Saab) to pay the ACCC's costs incurred in bringing the case to court and to undertake the following:

- Refrain from republishing the advertisement
- Retain all its Saab marketing staff in relation to misleading and deceptive conduct in the context of "green" marketing claims to make them aware of their responsibilities under the Act, and
- have the training reviewed by an independent third party and have the reviewer provide a report to the ACCC about the training." (The Australian Competition and Consumer Commission, 2008)

Furthermore, according to Mr. Batish, GM Holden (Saab), on its own initiative, and to show its "commitment to building and maintaining a relationship of trust and

honesty" with its customers, has decided to plant 12,500 native trees through Greenfleet (Swade, 2008). GM Holden Ltd. (Saab) believes that these trees are enough to offset the carbon dioxide emission during the life time of the vehicles purchased or sold during the duration that the (controversial) advertisement was first published and when it was replaced.

One could argue that GM Holden (Saab) paid a heavy price for its inattention to details, particularly with regard to the content of its advertisement, however, it also obvious that the price could have been much higher. Clearly, the case would have been more complex and more expensive had multiple jurisdictions been involved, or had it gone all the way through trial. Furthermore, multiple jurisdictions would have been involved had Saab run the ad in the United States as well as Australia in which case both the ACCC and the FTC would have gone after Saab for running a deceptive advertisement.

A different kind of multiple jurisdictions could also have been involved had the case been in the United States, where a state's attorney general and the FTC could have been after Saab.

## Lessons Learned and Conclusion

Several lessons could be learned from Saab's experience. The need to be familiar with the relevant laws and statutes before releasing a "commercial communication" directed at consumers is perhaps the most important lesson here. However, in the case at hand, familiarity with the so-called "Green laws" predominates. For companies that do business in several countries, familiarity with the laws in multiple jurisdictions is important. Because violating the laws regarding misleading advertising is a matter of fact which does not require intent, it would appear that the threshold for a possible breach is rather low, thus it would be wise for companies to engage the services of attorneys to research the communication laws before they release advertisements. The relevant admonition here is "look before you leap".

Before readers of this study start thinking that the law regarding deceptive advertising is draconian, we hasten to add that that might not

be the case because corporations are allowed to puff. Thus, a company can claim that it “makes the best pastry in the world” even if that is not the case without being found to have violated the Deceptive advertising laws by both ACCC and the FTC. In both Australia and United States, all the cases of deceptive advertising require *materiality* and interpretation of the advertisement using a *reasonable person’s standards*. Thus, according to the FTC, “the test is whether the consumer’s interpretation or reaction is reasonable.” (The Federal Trade Commission, 1983).

One could easily be perplexed by the GM Holden Ltd (Saab) case in the sense that several representations were made by the company and all of them were clearly not deceptive, and if that is the case, how then could GM Holden Ltd. (Saab) be found to have contravened the deceptive and misleading advertising law? The answer though is simple and lies in the fact that, the FTC and ACCC hold that if a corporation makes several different representations, or if a representation could have more than one interpretation by a reasonable consumer and of such interpretations is false, then the corporation is liable for making a deceptive and misleading advertisement.

Even though we focused on the case of green advertising here, the essential lesson goes beyond green advertising. It encompasses the entire field of corporate representation, thus the case is relevant to manufactures as it is to retailers and other service providers. While this is a case study and lacks, generalisability, the objective of the study is to provide an insight into the applications of the Deceptive and Misleading Advertising law. Further empirical study that examines the consumers’ perception of these advertisements will be useful, especially to law makers. This is of particular importance to since it was observed that not a single consumer who purchased a Saab automobile while the Grrrrreen campaign was in effect complained of being misled.

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