ARTICLES

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THE MORE DOLPHINS THERE ARE THE LESS I TRUST WHAT THEY'RE SAYING: CAN GREEN LABELLING WORK?

INTRODUCTION: THE ALTRUISTIC CONSUMER AND THE UNSCRUPULOUS ADVERTISER

SURVEYS in Australia and overseas confirm what anyone who has strolled down a supermarket aisle in the last ten years would have to suspect - many and perhaps most consumers are taking environmental considerations into account when they make purchasing decisions.[1] One recent Australian article stated that 60% of

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1 Accurate figures are difficult to obtain for two reasons: the first is that people "have a habit of professing high principles to the pollsters, then nipping down to the cash-and-carry." The second problem is one of definition - definitions of "green" vary from "a being in homemade clothes eating organic rice and vegetables bought through the local health food co-operative" to more conservative consumers who shop through department stores and supermarkets, but buy products which are (or claim to be) less harmful to the environment than their competitors. However, the inclusion of the more conservative buyers, as well as the people who mean to buy green but do not do so is a valid approach when examining green labelling, as they are part of the market which is likely to be captured by credible green marketing campaigns for quality products. Thus, the higher figures are again to be preferred: Anon, "Green concern plateaus out" *Foodweek* 12 June 1990.

consumers take this attitude, and in the UK there has reputedly been an increase from 40% of consumers in 1992 to 44% in 1994 who consider themselves green.[2] Indeed, "green" consumers may even be willing to pay more for products with environmental credentials.[3]

This evidence has important implications for environmental law and policy. At first sight, it might appear that if consumers "reward" manufacturers who supply "green" products (and by implication disadvantage those who do not) then market forces will provide appropriate incentives for the environmentally responsible manufacture of consumer goods - and that they will do this without need for direct, intrusive and costly government intervention in the affairs of business. All this sounds too good to be true, and it is.[4] Regrettably, the market imperfections (most notably insufficient or misleading information) are so profound that green consumer markets can only work with considerable outside intervention. This raises the possibility of an important role for environmental law.

There are many reasons why unassisted markets do not work in respect of green labelling. Most serious and most predictable is the evidence that many manufacturers try to give the impression they are "green" while giving away as little as possible about the environmental impact of their products.[5] In the UK, for example, BP claimed that its new brand of lead-free petrol caused "no pollution of the environment" a claim that was manifestly wrong and had to be withdrawn. There are numerous other well documented examples, no less

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2 Nicholson-Lord, "Tis the Season to be Green" *Independent* 20 December 1993.

3 In addition to European studies which have come to this conclusion, research by Finepak, a packaging company, found that 75% of Australian consumers would pay more for food packed in containers that did not hurt the environment: *The Spectator* "How Green was my Aerosol" 14 October 1989 p20. See also *Business Review Weekly* "Suddenly the Colour of Money is Green" 7 July 1989 p38. See also Burbury, "Ecophobia Can Turn Away Sales" *Sydney Morning Herald* 24 February 1994 p34. Ms Burbury places the percentage of consumers who take the environment into account at 60%: p34.

4 However, it is important to acknowledge that some manufacturers have responded positively to green consumerism. Cards and stationery are, for example, now commonly made from recycled paper. And some of those who have taken positive steps have often found that what's good for the environment is good for profit - McDonalds did a full cradle-to-grave analysis of its packaging requirements, and ended up discovering they did not need to use polystyrene. They "are actually able to do it better and cheaper and more environmentally friendly" using cardboard. McDonalds has "reduced its packaging volumes by 90 percent, delivering big savings in costs of warehouse and store space, transport, distribution and garbage disposal." Armitage, "Pack me a profit" *Sydney Morning Herald* 20 November 1991 p21.

5 For a detailed theoretical analysis of this phenomenon, see Cohen, "The Regulation of Green Advertising: The State, The Market & The Environmental Good" (1991) 25 *UBCLR* 225 at 238-239.

outrageous than this, which serve to generate a cynical response on the part of green consumers, as encapsulated in the title of this article.[6]

Even where manufacturers make accurate claims about an environmental benefit of one of their products, they are likely to stay quiet about more damaging characteristics of a product which may outweigh such advantages. For example, a detergent manufacturer might, quite accurately, claim that its packaging is made from 100% post-consumer recycled material while neglecting to mention that the product itself contains phosphates, which promote algal growth in waterways.

Moreover, there is evidence that advertising efforts are succeeding in confusing people about the relative environmental merits of available products. A recent UK study found that companies which received good ratings were less willing to give specific environmental information than those which had rated poorly, which in turn suggested that the guide reflected the marketing efforts, rather than the environmental performance of the companies within it.[7] If people who are compiling the Green Guide are getting it wrong, then chances are that consumers are too. As pointed out by Grodsky:

> Green marketing is more problematic than other forms of advertising because consumers generally cannot substantiate environmental claims on their own. Although people can compare the taste of Coke and Pepsi, and observe their laundry after using Tide or Cheer, they generally cannot verify recycled content claims or statements about the ozone layer.[8]

A further concern is that claims such as "environmentally friendly" will give consumers the impression that products help the environment, when, as pointed out by one author, "Green" consumerism is in fact an oxymoron.[9] However, it is easier to change people's choice of products than to discourage them from using certain products altogether. Whilst the effect of these claims in encouraging consumerism is unfortunate, the confusion they cause in consumers' minds, as to the relative merits of products, is a greater problem.

This article assesses current controls on green labelling in Australia, identifying their strengths, and more particularly their weaknesses, concluding that these controls fall far short of what is required to facilitate effective and efficient green consumer markets. It then draws on the overseas experience to identify the central features of a credible green

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6 See Murray, "Eco-labelling, environmental consuming or consuming the environment" (1993) 21(1) *Habitat Australia* 42. The title of this paper is based on a consumer's comment quoted in this article.

7 Basnal, "How Green Was my Supermarket?" *Independent* 5 April 1994. Note, this study covered 12 supermarkets.

8 Grodsky, "Certified Green: The Law and Future of Environmental Labelling" (1993) 10 *Yale J on Reg* 147 at 150.

9 Wynne, "'Defining Green': Toward Regulation of Environmental Marketing Claims" (1991) 24 *U Mich JLR* 785 at 820.

labelling strategy and how such a strategy might be implemented. Finally, it considers whether such an approach should be pursued in Australia, given its relative costs and benefits, and the very qualified successes achieved overseas.

The article is in two parts. Part one deals with the problem of manufacturers making specific claims about their product which are meaningless or misleading. This problem is currently dealt with by trade practices legislation, and will also be regulated by specific, "bright line" standards published by the Australian Standards Association. It will be argued that the latter standards should be given mandatory force. Such standards should also be sufficiently specific so as to enable consumers to make meaningful choices between products which make similar claims. Part Two deals with the more thorny problem of manufacturers extolling the environmental virtues of a product while staying silent on its (possibly greater) environmental drawbacks. To overcome this problem it is necessary for manufacturers to make an overall assessment of the environmental impact of their products and communicate it to the public. In Australia the Government has not heeded calls by consumer organisations to put in place a comprehensive certification program such as those used overseas to facilitate such assessments. Whether it should do so is the subject of the concluding section.

PART ONE: PREVENTING MISLEADING AND MEANINGLESS CLAIMS

There are two, and soon to be three, types of controls on misleading and meaningless environmental marketing claims in Australia. The most important of these is in the form of legislation designed to control misleading advertising generally. This legislation is supplemented by industry-specific self-regulatory codes, and will soon also be joined by much more precise standards created by Standards Australia. Environmental Choice Australia, a voluntary labelling scheme set up by the Federal Government, also once attempted to perform this function but was ineffective and has been abandoned. This part will review each of these controls, examining the effectiveness of each and putting forward reforms which are required for better regulation of specific green marketing claims.

Trade Practices Legislation

The most effective protection against misleading environmental claims in Australia is provided by trade practices legislation. The Federal *Trade Practices Act* and the various State *Fair Trading Act* copies (hereafter the legislation) prohibit misleading or deceptive conduct, conduct likely to mislead or deceive, and false representations in connection with the supply of goods or services.[10] Although the legislation does not explicitly address

10 See *Trade Practices Act* 1974 (Cth) ss52(1), 53, 55; *Fair Trading Act* 1985(Vic) ss11, 12, 12(a), 12(d); 1987(NSW) ss42, 44(a), 44(e); 1987(SA) ss56, 58(a), 58(e); 1987(WA) ss10, 12(1)(a), 12(1)(e); 1989(Qld) ss38, 40(a), 40(e); 1990(Tas) ss14, 16(a), 16(e). Also, *Consumer Affairs and Fair Trading Act* 1990 (NT) ss42, 44(a), 44(e); 1992(ACT) ss12, 14(a), 14(e). Hereafter this paper will refer only to the Commonwealth legislation.

environmental claims, it is clear that such claims fall within it. Restrictions placed on advertising claims by this legislation are stricter than those traditionally imposed by the courts in areas of the general law such as negligent misstatement.[11] For these reasons the legislation has come to dominate the general law in this area.

Relevant provisions fall into two categories. First, and most importantly, section 52 contains a general prohibition. It provides that a person "shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." The remedies for a breach of section 52 are civil. Second, sections 53 and 55 contain specific, narrower prohibitions on conduct which falls within section 52. In contrast to section 52, these provisions carry criminal penalties and have thus been interpreted more narrowly by the courts.

Section 52 has been given a broad interpretation by the courts. The test for a breach is whether,

> in an objective sense the conduct of the appellant was such as to be misleading or deceptive when viewed in the light of the type of person who is likely to be exposed to that conduct. Broadly speaking, it is fair to say that the question is to be tested by the effect on a person, not particularly intelligent or well informed, but perhaps of somewhat less than average intelligence and background knowledge although the test is not the effect on a person who is, for example, quite unusually stupid. The question is not whether the purchaser was deceived but whether the conduct was misleading or deceptive.[12]

In the case of household goods, it has been found that the "immediate impression that the article makes on the purchaser's mind" will fall within s52 if it is misleading, as "a decision to purchase is unlikely to be the subject of anxious consideration".[13]

Moreover, factually correct statements which would be misunderstood by the average consumer breach s52: In *Narhex Australia Pty Ltd v Sunspot Products Pty Ltd,*[14] it was found that the words "with 10% of cross-linked elastin CLR solution (approx 1 mg per ml active a-elastin)" was misleading, as consumers would tend to believe the product contained 10% elastin, even though scientists would correctly assume it had 0.05%. In the environmental area it is arguable that, for example, a correct statement that a product is 'CFC free' would breach s52 if CFCs are not generally used for that type of product.

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11 See Donald & Heydon (eds), *Trade Practices Law: Restrictive Trade Practices, Deceptive Conduct and Consumer Protection* Vols 1 & 2 (1978) Supplement (1982) (Law Book Co, Sydney, 1978) Vol 1 at [4.9.3].

12 *Annand & Thompson Pty Ltd v TPC* (1979)2 ATPR 40-116 at 18-272 per Franki J.

13 *Siddons Pty Ltd v The Stanley Works Pty Ltd* (1991) 13 ATPR 41-111 at 52-719 per Wilcox & Heerey JJ.

14 [1990] 12 ATPR 41-036.

Similarly, silence coupled with a specific (true) claim can fall foul of the section.[15] Section 52 was contravened, for example, when a manufacturer stated that a water compound contained lithia without stating that a person could only benefit from this fact by drinking over 1,000 gallons a day: *Bear Lithia Springs Co v Great Bear Spring Co.*[16] This is analogous to claims by battery manufacturers discussed below that their batteries were recyclable, which did not mention that there were no facilities for recycling them in Australia.

Sections 53 and 55 are narrower than section 52, but carry criminal as well as civil penalties. Section 55 is the most important of these sections, as it is directed at misleading advertising and packaging.[17] It prohibits 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". Section 53(a) prohibits *false* (as opposed to misleading) representations that "goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use" made "in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services." Clearly, false environmental claims which relate to the "quality" or "composition" of a product would breach this section.

Section 60 gives the Australian Competition and Consumer Commission and "any other person" the right to petition for an injunction, and section 82 provides for actions for damages by any person who suffers "loss or damage by conduct of another person" which breaches section 52. It is also possible for a court to order corrective advertising if an action is backed by the Australian Competition and Consumer Commission or a State Consumer Affairs Commissioner or Minister. Furthermore, section 67B enables the Australian Competition and Consumer Commission to obtain undertakings from companies which it can enforce in court. In addition to these civil remedies, fines can be imposed for breaches of s53 and s55.

In 1992 the Australian Trade Practices Commission (now known as the Australian Competition and Consumer Commission) published a Guideline containing its understanding of the legislation as it applies to environmental marketing claims.[18] The Guideline focuses on section 52. The Guideline warns that it considers the following conduct to be "misleading" within the meaning of section 52:

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15 See Donald & Heydon (eds), *Trade Practices Law: Restrictive Trade Practices, Deceptive Conduct and Consumer Protection* Vol 2 at [11.600]-[11.650].

16 71 A 383(1906).

17 See Donald & Heydon (eds), *Trade Practices Law: Restrictive Trade Practices, Deceptive Conduct and Consumer Protection* Vol 2 at [12.950].

18 Trade Practices Commission, *Environmental Claims in Marketing - a Guideline* (The Commission, Canberra February 1992).

- Statements about the future where the marketer cannot show there were reasonable grounds for making the statement at the time it was made;
- partial truths; it cites a statement that a product is "recycled" when in fact only its packaging is recycled as an example;
- the use of unqualified general statements of environmental benefit, such as "environmentally friendly" and environmentally safe;
- images, such as those of forests, the earth, or certain endangered or threatened animals, which incorrectly convey to the public that a product has environmental advantages;
- improper use of words such as recyclable or equivalent symbols; for instance where facilities needed to recycle the product are not generally available;
- improper use of the term "recycled", as where materials reclaimed from manufacturing rather than post-consumer materials are used;
- the use of scientific terms where consumers are unlikely to understand their meaning, but are likely to believe they describe an important attribute of the product;
- irrelevant claims; for example, stating that a product is phosphate free when it never contained phosphate; and
- claims of "biodegradability" unless the product exceeds the relevant Australian Standard and biodegradability is a benefit in relation to the normal means of disposal of the product.[19]

The Guideline also emphasises that claims must be capable of substantiation, and that advertisers should be specific about the environmental benefits of a product, using language that shoppers can understand.

The Australian Competition and Consumer Commission has made it clear that it considers prevention of misleading environmental claims a high priority. In addition to the Guideline it has distributed leaflets and held follow-up seminars on the topic.[20] In 1993, the Commission ran a "Dob in a Mean Green" campaign, in which the public were called

19 As above.
20 See Australian Trade Practices Commission, *Bulletin No 64* Jan-Feb 1992 p53.

upon to help quash those seeking to make a fast buck from people's legitimate concerns by making false or misleading "environmentally friendly" claims.[21]

Section 67B undertakings have been obtained by the Australian Competition and Consumer Commission from a number of companies that have made misleading claims, and one company has been prosecuted. The undertakings were obtained from nine dry cell battery manufacturers who were investigated by the Commission during 1993.[22] The Commission had found that most rechargeable batteries had been marked with the recycling symbol even though no facilities for their collection and recycling exist in Australia. Undertakings varied, but included commitments,

- not to sell batteries with the recycling symbol on them or describe them as recyclable unless recycling facilities are available;
- to place advertisements detailing recycling arrangements in the newspapers;
- to arrange the collection and recycling of spent batteries that bear the recycling symbol that have already been sold or may be sold in future;
- to issue recycling and collection instructions to past purchasers; and
- to insert recycling instructions in packaging of new goods.[23]

Two of the companies involved admitted breaching the *Trade Practices Act.* Twenty other companies provided formal written agreements in similar terms.

The Australian Competition and Consumer Commission has only prosecuted one company, Golden Australia Paper Manufacturers Pty Ltd, to date, but did so successfully. The company claimed that tissues were "100% recycled cotton" when in fact they had a significant wood pulp content. On 8 June 1994, the company gave undertakings to the Federal Court that it would no longer make this claim and on 15 July it pleaded guilty to three contraventions of s53(a) and one of s55. On 22 December 1994 Mr Justice Lee in

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21 Australian Trade Practices Commission, "TPC Success Against Mean Green" Press Release 22 December 1993.

22 Adeal Pty Ltd, Arlec Holdings Pty Ltd, Eveready Australia Pty Ltd, Hagemeyer (Australia) BV, Hitachi Sales Australia Pty Ltd, IBM Australia Ltd, Makita (Australia) Pty Ltd, NEC Information Systems Australia Pty Ltd, Powercell Australia Pty Ltd; Australian Trade Practices Commission, *Annual Report 1993-1994* (Australian Government Printing Service, Canberra 1994) p21.

23 Australian Trade Practices Commission, "TPC Success Against Mean Green" Press Release 22 December 1993.

the Federal Court Perth imposed penalties of $7000 plus costs on Golden Australia Paper Manufacturers Pty Ltd for contravening sections 53(a) and 55 of the Trade Practices Act.[24]

Thus, the Australian Competition and Consumer Commission has played a substantial role in preventing manufacturers from making misleading claims by enforcing the legislation. The Commission's ability to promote clarity in this area is, however, restricted because it must enforce provisions, which are expressed in general terms, on a case by case basis, and cannot simply tell manufacturers what claims they can use and when. For this reason, it may be desirable to supplement trade practices legislation with "bright line" standards. This measure has been taken by many American States. Before examining this matter in detail, it is useful to briefly examine various self-regulatory codes developed by Australian industry to date.

Self-Regulatory Schemes

There are a number of self-regulation schemes in Australia whose content varies significantly. None attempt to make an overall assessment of a product's environmental impact, or compel manufacturers to do so. Instead, they either commit companies to comply with the legislation discussed above (which they must do anyway), or are advertising schemes where logos are awarded on uncertain criteria. K Mart's K Green label provides an example of the latter type of scheme. K Green labels are allocated by K Mart's quality control department, which takes as its criterion that the product's end use, its packaging or the manufacturing process involved is more environmentally positive than other available alternatives.[25] The program has been criticised, as products approved under K Green are not independently tested, and the criteria on which the labels are awarded are far from clear.[26]

Examples of codes which lay down rules and do not involve a logo are the Grocery Manufacturers' Association Code (GMA Code) and the Code of Practice in the Personal Hygiene Products Industry (Personal Hygiene Code). Each of these codes are openly modelled on the trade practices legislation discussed above. The only additions they make to the Australian Competition and Consumer Commission guidelines are occasional examples of misleading conduct which are of particular relevance to their particular industries. For example, the Personal Hygiene Code describes in some detail the circumstances in which "chlorine-free" should be used.

The codes are essentially voluntary although they provide for complaint mechanisms. For example, under the GMA Code, complaints not resolved by companies are referred to

24 Australian Trade Practices Commission, *Annual Report 1994-1995* (Australian Government Printing Service, Canberra 1995) p174.
25 Australian Consumers' Association, "K Green Here to Stay" *Choice* August 1990 p31.
26 As above.

GMA employees, and then to a committee,[27] which may then write to the company asking that it change its practices. If the company refuses, the committee may approach the board. If the matter is still not resolved, then the Australian Competition and Consumer Commission is informed, and membership of the code or a relevant Association may be withdrawn. These processes may be useful as a supplement to Australian Competition and Consumer Commission investigation and enforcement procedures. Alternatively, however, they may merely serve to stall complaints, since the complainants would almost inevitably complain to the Australian Competition and Consumer Commission or local Consumers Affairs organisations in the absence of their process.

This is not to say, however, that self-regulatory codes which lay down rules are without merit. On the contrary, self-regulatory codes can perform a useful function by providing practical guidance as to how to comply with legal obligations. As will be discussed further below, the application of the legislation is far from certain, even with guidelines. Self-regulatory codes provide a cost-effective means of providing legal advice as to the probable application of these codes to whole industries. Moreover, self-regulatory codes are more flexible than regulations, and possibly also Australian Standards. If companies in a given industry are particularly progressive, they can adjust standards required by codes to cope with new environmental marketing claims, and to restrict further use of established claims. A precedent for this exists in the nutrient claims areas, where manufacturers have set restrictions for themselves which are tighter than those imposed by legislation.[28]

On the other hand, it would be naïve to believe that self-regulation working alone *necessarily* performs in the public interest. Companies and industries commonly succumb to the temptation to create the impression of socially responsible regulation, while continuing to operate in accordance with the self-interest of the company or industry itself. The regulatory literature is littered with examples where self-regulation has failed for this reason.[29] Overall, the optimal solution is often to combine self-regulation with legislative controls in ways that achieve more than either mechanism acting alone. In particular, if self-regulatory schemes were reformed so that they were sufficiently specific about the situations in which environmental marketing terms could be used, then self-regulatory codes could be incorporated by reference in the legislation so as to provide the certainty which is needed in this area.

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27 In the case of the GMA, to the general management committee for the code, in the case of personal hygiene, to a specific complaints committee. Both require the company complained about to temporarily withdraw from the committee (if indeed it was initially a member).

28 For example, while manufacturers can legally claim that a table spread is "low fat" if it contains no more than 300g fat, they have restricted themselves to making this claim only for products with no more than 30g/kg fat. See National Food Authority, *Code of Practice on Nutrient Claims in Food Labels and in Advertisement* (The Authority, Canberra October 1994) para 4.2.

29 See for example Gunningham, "Environment, Self-Regulation and the Chemical Industry: Assessing Responsible Care" (1995) 17 *Law and Policy* 55 at 55-57 and references therein.

The Need for Bright Line Rules

In this section, it will be argued that the legislation described above could usefully be supplemented by a set of "bright line" standards. These are standards which clearly define terms and regulate their use. Happily, the Australian Standards Association has already commenced the process of producing such standards.

Bright line rules containing definitions and restrictions on the use of environmental terms have been widely advocated by writers in the United States, who have pointed out that such rules have at least three fundamental benefits.[30] First, they provide manufacturers with certainty as to what environmental claims they can make. Second, they enable consumers to be sure that environmental marketing terms such as "recycled" mean the same thing in all contexts. Third, they reduce enforcement costs, as regulatory agencies are not compelled to show that all offending claims breach the general standards.

It is perhaps inevitable that use of a general criterion such as the "misleading" concept in the legislation described above will create some degree of uncertainty. The use of such a concept is a double-edged sword. On the one hand, it is useful because it catches novel types of misleading conduct and advertising material such as graphics, the misleading aspects of which cannot readily be encapsulated in legislation. However, such a standard is also problematic because clarification of the law as it affects specific areas, such as green marketing, can only occur through a long process of case by case enforcement.[31]

An example of uncertainty as to the application of section 52, in particular, can be seen with generic claims such as "environmentally friendly". In *Brown v Jam Factory Pty Ltd,*[32] Fox J held that "exaggerated salesman's talk, not to be taken as more than an expression of hope, and not something one could safely rely upon," commonly called "traders' puffs," do not fall foul of section 52. It could quite reasonably be argued that generic environmental claims fall within this rule, so as to be legally permissible. On the other hand, it could be argued that they make a substantive claim for the product, which is misleading if it is untrue.

Uncertainty is also likely to exist as to the precise definitions of terms. "Recycled", for example, may mean "100% post-consumer material" to some, but "partially from either post-consumer material *or* material diverted from the manufacturing waste stream"[33] to

30 Grodsky, "Certified Green: The Law and Future of Environmental Labelling" (1993) 10 *Yale J on Reg* 147 at 205.

31 See Wynne, "'Defining Green': Toward Regulation of Environmental Marketing Claims" (1991) 24 *U Mich JLR* 785 at 790.

32 (1981) 53 FLR 340 at 350.

33 Wynne points out that, in the paper manufacturing industry, for example, scraps produced during manufacture have always been used. He points out that the "recycled" claims often made for paper made from these scraps is thus analogous to claiming buns are "recycled" because "bakers, instead of disposing of pieces of dough scrap, mix them back into the

others. It will take a long time before issues such as this are comprehensively dealt with by the courts. Indeed, precise definitions may *never* emerge, as courts determine whether a word has been used in a misleading way in the past rather than telling parties exactly how it must be used in the future. A finding that use of "recycled" on a good with 10% post-consumer material is misleading does not necessarily resolve whether it is also misleading to use it on a good when the figure is 20%.

The Trade Practices Guidelines discussed in section one of this part contribute to certainty, but to a lesser extent than is possible using regulations or a mandatory code of practice.[34] While the Guideline is instructive as to the circumstances in which the Australian Competition and Consumer Commission may choose to pursue a manufacturer for making a misleading claim, it is not legally binding, so that companies may choose to make claims which their legal advice indicates may be within the bounds of section 52 even though they fall outside the guideline.[35] Furthermore, the guideline *cannot* provide really precise definitions such as "'recycled' means made from at least 50% post-consumer material unless otherwise stated", as it cannot be argued that use of "recycled" on a product with 49% post-consumer material is necessarily misleading.

This uncertainty has at least three detrimental effects. First, it means that consumers cannot be sure that one "recycled" product is as "recycled" as another, so cannot make accurate environmental assessments. Second, it means that manufacturers cannot be sure that they are complying with the law, even where they make a bona fide attempt to do so.[36] And third, the Australian Competition and Consumer Commission must show that each claim it challenges is "misleading" under s52, which may be more difficult and more expensive than enforcing specific rules, where breaches are likely to be less contentious.[37]

Bright line requirements, properly drafted, would go a long way towards resolving this uncertainty, and would do so much more quickly and with greater precision than the courts. Consumers could be assured that manufacturers were using terms in the same way so that it would be possible, for example, to tell where one good was *very* recycled as opposed to another which was hardly recycled at all.

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existing dough stock": Wynne, "'Defining Green': Toward Regulation of Environmental Marketing Claims" (1991) 24 *U Mich JLR* 785 at 794.

34 Fair Trading Acts in some of the States provide for mandatory codes of practice, which are codes of practice developed by consumer affairs agencies in conjunction with industry, to which special enforcement and amendment rules apply. See, for example, *Fair Trading Act* 1992 (ACT), Part III.

35 See for example Downs, "'Environmentally Friendly' Product Advertising: Its Future Requires a New Regulatory Authority" (1992) 42 *Am ULR* 155 at 182.

36 See, for example Welsh, "Environmental Marketing and Federal Preemption of State Law: Eliminating the 'Gray' Behind the 'Green'" (1993) 81 *Calif L Rev* 991 at 1000.

37 Grodsky, "Certified Green: The Law and Future of Environmental Labelling" (1993) 10 *Yale J on Reg*147 at 159.

While specific rules may sound like a radical departure from the general standards encompassed in existing legislation, there is a precedent for such rules in Australia, which exists with respect to nutrient claims. Like environmental marketing claims, such claims are subject to the legislation discussed in section one and to a self regulatory code.[38] In contrast to environmental marketing claims, however, they are also already subject to a mandatory code enforced through State and Territory legislation pursuant to a Federal agreement reached in 1992.[39] Such legislation responds to a need for uniformity and accuracy in the nutrient claims area. There is a similar need in the environmental claims area, since clarity and consistency are required if consumers are to be able to compare similar claims on competing products. Such comparisons must be possible if the benefits of green consumerism are to be obtained.

Australian Standards in Environmental Marketing

Standards Australia (SA) is a non-profit organisation set up under a Royal Charter with an established record in setting product standards. It has recently turned its attention to the environmental marketing area, and has set up committees to develop specific standards relating to the use of environmental marketing terms. The SA framework is an appropriate one through which to develop bright line requirements. It is important, however, that such bright line requirements be specific and it may also be necessary that they be given mandatory force.

There are two committees working concurrently on standards for first party environmental marketing claims. The International Standards Organisation (ISO) is a body consisting of representatives from standards organisations all over the world. The ISO recently set up a committee, TC/207, to oversee the development of environmental management standards internationally. One of its subcommittees, TC/207/SC3, has been set up to look specifically at standards in the environmental labelling area. Standards Australia has taken on the secretariat role for this committee. This committee released a draft standard in September 1995, which has not yet been adopted by Standards Australia. Standards Australia has also changed the terms of reference of one of its own committees, MS/1 Environmental Labelling, to include first party practices, as well as third party certification programs, which were previously its focus.[40]

In addition, some environmental labelling definitions are being produced by committees responsible for relevant industries. For example, a committee responsible for standards for the recycled paper industry has produced definitions for terms such as "recycled paper", and a committee looking at waste management terms and definitions will develop

38 National Food Authority, *Code of Practice on Nutrient Claims in Food Labels and in Advertisements* (The Authority, Canberra October 1994).

39 Information supplied to author by Peter Tough, 7 November 1994.

40 Information supplied to author by Meron Clark, Standards Australia, 9 November 1994; Australian Federation of Consumer Organisations, *Eco-Consuming 1994* p4.

definitions for terms including "waste minimisation", "waste collection", "sorting" and "recycling".[41] Overlap between Standards Australia committees' terms of references is resolved by referring to each related committee as a "liaison committee" in the draft standards, which means that those committees receive draft standards and have input into their final form.[42]

Until the draft standard is released it will be impossible to assess whether it meets the need for specific rules as to the use of environmental marketing terms in Australia. Hopefully, however, the standards will provide sufficiently precise definitions which restrict the use of relevant terms. Further, the standard should prohibit generic claims which, as noted above, may fall outside trade practices legislation. Such a prohibition is contained in proposed Federal legislation in the US.[43]

Definitions produced by industry-specific committees provide some hope that Australian Standards would require sufficient specificity in environmental claims. The Glossary of Terms for Recycled Paper, for example, requires specificity as to the recycled content of paper products and provides examples of which terms should be used, although it may leave too much leeway as to the claims that may be made.[44]

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41 MS/59 Waste Management Terms and Definitions: see Australian Federation of Consumer Organisations, *Eco-Consuming 1994* p5.

42 Information supplied to author by Meron Clark, Standards Australia, 9 November 1994.

43 See US Attorneys General, *The Green Report II: Recommendations for Responsible Environmental Advertising* May 1991 Washington DC.

44 Information supplied by Standards Australia, Sydney Information Centre, November 1994. Recycled Paper - Glossary of Terms. On page 7, the standard defines recycled paper as "paper containing a stated percentage of recycled paper and so labelled". On page 9, in Appendix A, a specific example is given. The example is of a product comprised as follows:

(a) 25% virgin materials
(b) 20% fibre from magazines from households
(c) 20% fibre from magazine returns
(d) 25% fibre from converter trimmings
(e) 10% office waste paper

The standard allows a manufacturer to say of such a product that it is "Recycled" paper composed of:

(i) 75% recycled fibre content,
(ii)40% printed wast paper
25% pre-consumer waste paper
10% post-consumer waste paper
(iii) 30% post-consumer waste paper
25% pre-consumer waste paper
20% printed waste paper, or
(iv) 50% printed waste paper
25% pre-consumer waste paper".

Australian Standards have several advantages over self-regulatory schemes as a means of providing specific restrictions on the use of marketing terms. First, the Standards Australia framework involves appropriate consultation with major stakeholders, which in turn is likely to result in better regulation of environmental claims. In contrast to industry codes, the EPA and interested non-government organisations are involved in the standard-setting process, and are likely to ensure that restrictions serve their purpose of ensuring claims are meaningful and not misleading. The process also minimises industry resistance to standards by involving industry associations in standard-setting and by giving all interested parties an opportunity to comment on drafts and thus have an input into the final standards. Industry involvement also ensures that standards are technically feasible and not overly restrictive.

The second advantage of Australian Standards is that they will apply to all industries where restrictions are relevant. This avoids the inconsistency which would result if, for example, the plastics industry were to define "biodegradable" one way, while the paper industry chose an alternative interpretation.

The third benefit of Australian Standards is that they offer three options as to enforcement, each of which has been tested in relation to standards which are already in existence. The first of these enforcement options is simply to have a voluntary standard. Predictably, Standards Australia claims that compliance with voluntary standards is high. The second and third options would render compliance with standards mandatory. This has been done in respect of about one third of the standards formulated to date.[45] The first of these is to refer to an Australian Standard in a piece of legislation relevant to the area which the standard governs, with penalties for non-compliance.[46] The other, less commonly used option is to pass a law requiring that manufacturers obtain certification from Quality Assurance Services that a Standard has been complied with. The advantage of this approach is that much of the regulatory burden, including the cost, is transferred from the public sector to the private sector. The Agency administering the law in which the standard is referred to need only ensure that certification is obtained.

Voluntary standards are unlikely to be sufficient when it comes to regulation of environmental claims. Manufacturers whose environmental claims would be severely restricted by a standard are likely to succumb to the temptation to flout them. The problem here is that consumers have no way of knowing that standards are being breached. Standards which govern environmental claims differ from standards governing physically observable things. Whereas consumers can observe for themselves whether the washing

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Arguably, the standard allows too much leeway, because most manufacturers would choose the "75% recycled fibre content" claim, at the cost of specificity.

45 Information supplied to author by Meron Clark, Standards Australia 9 November 1994.

46 See for example the *Motor Traffic Act* 1977 (ACT), which makes the wearing of helmets compulsory for motorbike riders, and states that those helmets must comply with Australian Standards: see sl9A(4).

instruction tag on one garment is in the same place as another, they cannot compare the bases on which environmental claims are made. For example, it is impossible for consumers to know that the "100% recycled" sticker on one packet complies with the relevant standard while another does not.[47] Thus, the Government should keep a close eye on compliance with standards produced by Standards Australia, and render them mandatory if required.

Conclusion as to regulation of meaningless and misleading claims

Trade practices legislation is the only real control on misleading claims in Australia at present. While self-regulatory schemes can provide useful practical guidance, they do little at present to add to the restrictions placed on manufacturers by trade practices law. Clarification of environmental marketing terms is needed to prevent confusion on the part of manufacturers as to what claims they can make and on the part of consumers as to what is meant by a particular term. It appears that initiatives on the part of standards organisations will meet this need, provided that standards are sufficiently specific and that they prohibit meaningless claims.

PART TWO: OVERALL IMPACT ASSESSMENT: THE GREEN LABELLING GAP

Ensuring that manufacturers are accurate and consistent in the claims they make may not be enough to enable consumers to compare the environmental performance of competing products with precision. Where products bear environmental claims, consumers cannot be sure that the benefits of a particular product are not outweighed by drawbacks about which the manufacturer has remained silent. Even where there are no such drawbacks, most consumers lack the expertise to judge which types of environmental benefits are preferable to others so as to decide which products to buy.

In order to overcome this problem, means must be found to communicate to consumers the overall impact of a product on the environment. A whole range of countries including Canada, Germany, Sweden, Japan and the United States, as well as the European Union, have responded to this need through certification programs which examine the production, use and disposal of products to judge their impact on the environment. This has been called a "cradle to grave" or "life cycle analysis" approach.[48] Hong Kong, is an example among others, also considering such a response.[49] In contrast, Australian industry and governments alike have resisted calls by consumer organisations to implement a similar program here.

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47 While a product with a Quality Assurance Services sticker clearly complies, the absence of such a sticker does not indicate non-compliance.

48 See pp25-27 for further discussion of this concept.

49 See Abrahams, "Eco-label approval to benefit HK Items" *South China Morning Post* 19 July 1994 in *Technology Post* p8

This part will examine efforts by non-government organisations to run their own schemes within Australia. It will then briefly review international certification schemes to show how governments and private organisations in other countries have addressed the need for reasonably comprehensive certification schemes. Finally, it will examine some of the complexities involved in introducing an Australian scheme, including whether the costs of a scheme would be justified by the benefits.

The Gap in Green Labelling Controls in Australia & Non-Government Organisations' Attempts to Fill It

Private Labelling Programs in Australia

There are two, soon to be three, non-government organisations which provide product endorsements in Australia at present. These are the Australian Conservation Foundation (ACF), the Worldwide Fund for Nature (WWF) and a new organisation called Earth Trust. The first two of these already allow companies to use their logos on products after the organisation in question has satisfied itself that the product is reasonably "green". The third, Earth Trust logo scheme, has yet to commence operations in this area.

WWF permits companies to use its Panda symbol on products in return for a royalty and after the fund investigates companies "as much as possible" given its limited resources. WWF itself emphasises that the logo is not an eco-label as WWF does not have the laboratories or the research capacity to investigate all aspects of a product's lifespan.[50] In contrast, the ACF claims that its endorsement of products is only given after a comprehensive "cradle to grave" assessment of its impact on the environment. ACF is much more rigorous than WWF in checking the environmental credentials of products, but even so, monetary constraints severely limit the depth of its inquiries.

ACF's product labelling is only one part in a three tiered program. In addition to enabling companies to note its endorsement on "green" products, the ACF has a "corporate sponsor" program, where companies' entire operations are endorsed, and a "green leap" program, where the ACF congratulates poor environmental performers for improvements which they make. Only the latter endorsement is given free of charge. Corporate sponsorship and product endorsement are only given to companies for undisclosed sums of money. Companies must also pay for assessment of their products, whether or not such assessments result in endorsement being given.

Despite its somewhat grand claim that its product endorsement involves a cradle to grave assessment of products, the thoroughness of ACF's green assessments must be doubted.

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50 Lawson, "Consumers Still Go for Green Products - Environment Survey" *Australian Financial Review* 16 August 1994 p37. See also Forbes, "Power Tool Company Accredited by ACF - Environment Survey" *Australian Financial Review* 16 August 1994 p43.

ACF uses private consulting firms to assess products' "greenness".[51] Due to limited funds, consultants usually spend only a day or so on each company or product; hardly enough time to make any real assessment of the production (including component parts), distribution, use and final destruction of a good. Moreover, there are no clear-cut criteria for qualifying for endorsement. Company documents, such as environmental audits, are used, as are interviews with senior management. If there is to be a National Pollutant Inventory[52] emissions information from this will also be used to assess a companies' overall "greenness". Whether or not a product is *essential* is also taken into account.[53] Laboratory tests are not carried out, as consultants lack the laboratories and resources as well as the expertise. As was pointed out, time is at a premium, because the company has to pay for all time spent. In essence, the ACF exaggerates when it states that a cradle to grave assessment is made. Rather, it obtains a very basic overview of a companies' production processes and the product.[54]

ACF's product endorsement scheme is the only green marketing program which tries to address consumers' need for overall assessment of products' impact on the environment. Unfortunately, the assessment aspect of that program is far from adequate, and consumers are unlikely to differentiate between different endorsements, such that the scheme's success is likely to be limited. Thus, the need for overall assessments of goods remains.

Certification Programs Overseas

Overseas, the response to the challenge of providing consumers with an overall guide to the environmental impact of the products they buy has been more extensive than in Australia. Australia's major trading partners, including Europe, the United States, Canada and Japan, have in place environmental certification systems designed to provide such guidance. These schemes are strikingly similar in many respects. The difficulties that such schemes have encountered illustrates that establishment of a successful scheme can be a difficult and lengthy process. The relative success of some schemes in obtaining recognition and industry acceptance illustrates, however, that some of these difficulties can be overcome. Aspects of the schemes discussed in this section will be revisited in section

51 Forbes, "Power Tool Company Accredited by ACF - Environment Survey" *Australian Financial Review* 16 August 1994 p43. Information supplied to author by Gabrielle Gelly, ACF, 3 November 1994. Consultants used are Robert Rosen (Melbourne) and Sustainable Solutions (Sydney).

52 As currently proposed. See generally Gunningham & Cornwall, "Toxics and the Community: Legislating the Right to Know" working paper (Australian National University, Canberra 1994).

53 For example, the ACF would not endorse a bottled water company because it sees the product as being unnecessary and thus wasteful. Coober Pedy residents may not agree.

54 It should be noted that participants, such as Robert Rosen (consultant) and Scott Lyall (WWF) did not disagree with this point: Information supplied to author by Robert Rosen 3 November 1994; Information supplied to author by Scott Lyall 4 November 1994.

four of this article where issues relevant to establishment of an Australian scheme are discussed.

The longest established green labelling program is the West (as it then was) German Blue Angel scheme which started in 1978, seven years after the concept of a scheme was put forward in the 1971 Environmental Plan. The program is run by three bodies, all of which are involved in defining product categories and determining criteria by which to award the label: the Federal Environment Agency (a government body); the Environmental Label Jury (industry and community group representatives); and the Institute for Quality Assurance and Labelling (which is like Standards Australia). As will be detailed below, criteria for certification are developed by studying a sample of products within a category in depth to find points at which there are divergences in their respective environmental impacts. This approach is also taken by most other programs. Because it takes into account each stage of a good's production and use, it is called a "life-cycle" approach to certification.

The Blue Angel is also arguably the most successful eco-labelling scheme. Although it took some time to achieve popularity, with a relatively small 500 labels issued by 1984, the German scheme had labelled over 3,200 products in 60 product categories by 1991.[55] Moreover, a 1988 survey of German householders found that the Blue Angel was recognised by 78.9% of survey participants. This success may in part be attributable to the program's relatively low certification fees and to the 20% surcharge which companies must pay towards advertising the program, as well as to the length for which it has run. Despite its success in achieving recognition and use, the German program has been subject to criticism for the allegedly simplistic approach it takes to setting criteria. This criticism is dealt with below where the stages involved in certification are discussed in turn.

Most other labelling programs are as yet in their infancy. Like the German program, each sets minimum criteria for certification, and charges fees for certification. Governments in France, Canada and Japan are just some of those which have set up labelling programs in the last 10 years. The Canadian "Environmental Choice" scheme is very similar to its German counterpart but has only been running since 1988 and so has yet to achieve the popularity of the Blue Angel. By 1991, Environmental Choice had only given 58 licences to use its logo, which it has recently acknowledged is not yet widely recognised by shoppers. The Japanese "Ecomark" program has seemingly been more successful in that it had licensed 2350 products to use its logo, but this is likely to reflect the fact that its certification criteria are extremely simple, and seemingly less rigorous than those of its German and Canadian counterparts.

In addition to these national plans, the Nordic Community and European Union have each set up programs encompassing all member States. The Nordic "White Swan" program,

55 See Commission of the European Communities, "The Commission Proposes a Community Environmental Labelling System" Brussels 29 November 1990.

encompassing Finland, Iceland, Norway and Sweden, was launched in 1989, while the European "Ecolabel" was born in 1993. Each program seeks to create a uniform set of product categories and criteria for certification, leaving member countries to put forward proposals, and to issue labels in accordance with the uniform criteria. Labels, once issued, are applicable throughout each of the communities. Unfortunately, the European scheme has had immense difficulty in achieving consensus amongst member States as to categories and criteria. By October 1994, criteria had been agreed upon for only two products, and only one product had received the right to use the Ecolabel.

There are striking similarities in the processes of the labelling programs discussed. Each uses a system of committees and boards, normally composed of representatives of government, industry and community groups, to decide upon two things. First, which product categories should be included in the program, and the items which can be said to fall within those categories. Second, the criteria against which products in a category should be judged. After this, different processes are used to test products, to contract with companies so as to give them the right to use a logo for a set period, and to ensure that the logo is not used improperly. In section five, each step in this process will be examined in greater detail.

More fundamentally, each of the programs discussed above are voluntary. This is likely to be due to the considerable advantages of voluntary schemes. The principal advantage is that the use of a voluntary mechanism means that labels are used only where they will be most effective. Since manufacturers are generally required to pay for certification, they will not obtain it unless the label influences a significant number of consumers' purchasing decisions in relation to a particular product. As a result, certification is not obtained for products where consumers are not sufficiently "green" to take any notice of the label. This has led to criticism of schemes by some authors,[56] but is in fact a benefit. It would be a waste of resources to certify such products, if certification would have little or no effect. Requiring all producers to obtain certification may increase recognition of the logo and thus consumer awareness, but would have only minor effects on demand and thus production. In all likelihood, then, the benefits of certifying such products would be outweighed by the costs.

There may also be further benefits. The anti-competitive effects of voluntary schemes are likely to be less than their mandatory counterparts, and a voluntary scheme would be able to start on a small scale. Certification is likely to be an expensive process if reasonably comprehensive criteria and testing methods are used. This cost may be prohibitive for some businesses, especially small ones, so as to create a barrier to entry into product markets and thus reduce competition. This problem can and should be ameliorated using government subsidisation of small businesses' certification costs, but would nonetheless be substantial. A voluntary scheme has the advantage that manufacturers have an incentive to

56 See for example Sellers, "Government Regulation of Environmental Marketing Claims" (1992) 41 *U Kan LR* 431 at 435-438.

submit products for testing, so are likely to do so if they are able to afford certification, but are not required to do so when they first enter the market. More importantly, a certification scheme should be relatively small-scale during its start up period. Internationally, such schemes are a relatively new phenomenon, and it is likely that many adjustments will have to be made before a scheme is ready to commence large scale certification.

The alternative to voluntary certification schemes is compelling manufacturers to tell the whole story about the environmental attributes of their products. It would be extremely difficult to formulate and enforce a law which addressed the problem of undercutting claims,[57] as this is not an area open to simplification. Cohen's discussion of self-regulatory principles which attempt to prohibit such marketing in Canada illustrates this point:

> [The Principles] prohibit ... claims of environmental benefit based on the absence or removal of an environmentally harmful substance if the product contains other substances that are equally or more damaging to the environment. The drafters appear to have been optimistic about the complexity, certainty, and normativeness of environmental impact assessment. It is not clear how one would demonstrate or indeed justify a conclusion that a particular substance is "more or equally damaging to the environment".[58]

A regulation seeking to ban undercutting claims would be open to the same criticism. Furthermore, there is some benefit in allowing manufacturers to make specific claims where more damaging aspects of a product have not yet been addressed, as this enables manufacturers to at least address some environmental problems. Perhaps more importantly, to require manufacturers to give detailed information about each aspect of their products would lead to environmental claims being so long and detailed that most consumers would experience "motivational fatigue" and discount them.

Thus, it appears that voluntary certification schemes are the appropriate means by which to prevent undercutting claims, if they are to be regulated at all. This is not to say, however, that voluntary certification programs are without their faults. As pointed out by several authors, consumers cannot distinguish between products which have been tested in voluntary schemes and failed, and those which were never submitted for testing at all.[59] Furthermore, significant resources must be devoted to programs if consumers are to appreciate the certification criteria and therefore the significance of environmental logos. In the absence of sufficient advertising consumers may make mistaken choices where, for

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57 For convenience, claims about benefits which fail to mention drawbacks of a product which are equally or more important are referred to in this paper as "undercutting claims".

58 Cohen, "The Regulation of Green Advertising: The State, The Market & The Environmental Good" (1991) 25 *UBCLR* 225 at 254.

59 See for example Baron, "Informed Choice" (1992) 17(5) *Alternative Law Journal* 245 at 246.

example, a product which has not been tested is environmentally preferable to one that has. Despite these problems, however, it seems that no other viable alternative for combating undercutting claims has been put forward.

International experience shows that setting up a labelling scheme is not something which can be done either cheaply or quickly. The German scheme is, as yet, the only one to have achieved widespread consumer recognition. The factors which are likely to have had the greatest impact on the popularity of the German scheme are time and the strength of consumers' desire to buy green. The German scheme has been in operation for 16 years while most other schemes are yet to celebrate their fifth anniversaries. Consumers have had time to become familiar with the logo, which in turn gives manufacturers a greater incentive to apply for it. The impact of green consumerism on applications was illustrated by the fact that the number of applications for the logo increased enormously during the late 1980s, when consumer awareness of environmental issues increased quickly worldwide.[60] Thus, it appears that if the trend towards green consumerism continues, there is hope that other programs will achieve similar popularity.

Global Initiatives in the Certification Field

Life-cycle analysis based certification is a global trend. The International Standards Organisation (ISO) has been active in promoting consistency in the certification sphere. It is creating "guiding principles for third party certification programs".[61] Rather than seeking to develop an international scheme, it is trying to give guidance on the creation of life-cycle certification schemes internationally - guidance which should clearly be accepted if an Australian scheme is ever developed.

The Australian Competition and Consumer Commission is in the process of reviewing its own guideline on "environmental claims for marketing" in an attempt to harmonise with these developments overseas. There is particular concern to address moves by the ISO to produce a standard to cover environmental marketing claims world-wide. The Commission believes it is important that Australia, with its expanding export trade in goods and services, conforms with international standards. It is important to avoid the creation of an artificial trade barrier for imported goods which do not comply with local requirements.[62]

In addition to the schemes outlined above, a proposal was very recently put before the United Nations to develop an eco-labelling scheme for developing countries, which often

60 As above.
61 Australian Federation of Consumer Organisations, *Eco-Consuming 1994* p5.
62 *The Bulletin* Vol 116 (5982) 8 August 1995 Crisp (ed) (Richard Walsh ACP Publishing Pty Ltd, Sydney 1995).

find the costs of registering products under existing schemes prohibitive. It is planned that this scheme would eventually lead to an internationally recognised eco-labelling system.[63]

The advantages of a world certification program would be numerous. A global system would offer economies of scale, in that a product certified in one country could carry an international logo, and thus obtain recognition in all countries. For the cost of a single certification, manufacturers could obtain world-wide rather than country-specific marketing benefits. This would greatly enhance the incentive for manufacturers to improve products' environmental performance so as to obtain certification. Moreover, an international logo would be more likely than national logos to obtain consumer recognition because, in an age of international travel and communication, marketing in one country would increase recognition in another. Confusion caused by a proliferation of different national labels would be ameliorated.

The counter-view, that such certification schemes could act as barriers to trade, does not merit serious attention.[64] As noted by a 1991 OECD report, labelling programs which are fairly administered pose a barrier to trade only to the extent that requirements such as site inspections cannot be met by products made overseas.[65] Only by, for example, emphasising the impact of transportation on the environment in assessing products can programs be used as a barrier to trade. And it does not appear that this approach has been taken by any of the programs established to date.[66] Moreover, the General Agreement on Tariffs and Trade (GATT) restricts the ability of member States to use labelling programs as barriers to trade.[67] GATT prohibits discrimination on the basis of the origin of products, and requires all programs to be transparent.[68] Programs which involve regulations and

63 Anon, "UN Scheme Provides Impetus to Ecolabelling" *Chemical Business Newsbase* 25 March 1994.

64 For a contrary opinion, see Clabon, "Ecolabelling" (1994) 3 *Reciel* 21 at 22.

65 Organisation for Economic Cooperation & Development, *Environmental Labelling in OECD Countries* (OECD, Paris 1991) pp33-35.

66 Although it should be noted that there has been recent controversy surrounding the stringent, mandatory schemes recently put in place for tropical timber by Austria and similar action proposed by Holland: see Clabon, "Ecolabelling" (1994) 3 *Reciel* 21 at 22.

67 Organisation for Economic Cooperation & Development, *Environmental Labelling in OECD Countries* p34.

68 Two provisions, Article III(4) and Article IX(1), require that products from different nations must be treated fairly. Article III(4) requires that imported products must be accorded:

> treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Article IX (1) provides that:

> each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than that accorded to like products of any third country.

Thus, it would be GATT-illegal for a program to refuse to label products produced overseas, or to impose stricter requirements for imported products.

administrative rulings must thus ensure that documents relating to product categories and criteria are readily available.

Harmonisation could follow one of two models. Ideally, a "supra-national decision making process"[69] would be developed, whereby countries agreed on product categories and criteria, which could be applied at a national level. Essentially, such a scheme would entail processes similar to those of the European scheme, but with a larger number of participating countries. A less grandiose model is that of mutual recognition, where one country automatically allows products labelled in another country to obtain its label. This system would, however, also require co-ordination of criteria and product categories between participating countries. Otherwise, tensions would develop as manufacturers in the country with the stricter requirements would be disadvantaged.

A world certification scheme would be ideal, but is unlikely to materialise except perhaps in the very long term. Unfortunately, the European difficulties in obtaining consensus as to appropriate certification criteria illustrates that co-ordination of national efforts in this area is a difficult business. At this point, the most that can be hoped for is mutual recognition between a limited number of countries, and even this may be difficult to achieve.

Should Australia develop a Certification Scheme?

Australia has so far flown in the face of the global trend towards certification. Since the demise of the ill-fated Environmental Choice initiative, it has shown no interest in establishing its own green labelling scheme. Is this is the preferable course? In our view, the answer to this question ultimately depends on whether the environmental improvements yielded through use of a certification scheme are likely to equal or exceed those which can be achieved by spending the money required for such a scheme on other regulatory or policy instruments. Before it is possible to answer this question, it is necessary to examine the main steps in the certification process in order to identify the difficulties involved as well as the limits of certification as a regulatory mechanism.

The Elements and Difficulties of Certification Schemes

Life-cycle schemes are not without their difficulties. Determination of product categories and criteria by which those categories are to be judged at first appears to be a simple matter. Unfortunately it is not. Both choices involve ambiguity and require arbitrary lines

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The transparency requirement is contained in Article X(1), which states that:

> regulations ... and administrative rulings of general application affecting the sale (of products) shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.

Organisation for Economic Cooperation & Development, *Environmental Labelling in OECD Countries* p34.

69 As above.

to be drawn. Other less problematic decisions must also be made, including what type of information the logo should convey to the consumer, and how proper use of the label and ongoing satisfaction of criteria should be ensured.

This sub-section will review these problems and the solutions which have been found to them overseas, by examining each step in the certification process in turn in order to identify the elements necessary for an effective labelling scheme as well as the problems which are likely to add to a program's cost.

1) Product Categories

Product category choice raises a number of substantial problems. First, it is important to choose product categories for which consumers are likely to be influenced by the use of a label. Overseas experience has shown that some labels have been sought by many manufacturers in some established product categories, and by none in others. In the German program, for example, which has 64 product categories, over half of the 3,600 products labelled have fallen within only 4 categories.[70]

As noted by the OECD report, this phenomenon arises because "consumers and manufacturers are not homogeneous"[71], rather, they have differing consumption priorities. The report cites an example to illustrate this point. In Germany, it was found that do-it-yourself handy-people paid attention to the use of the Blue Angel on paints, lacquers and varnishes, giving preference to labelled products over cheaper and more effective alternatives. In contrast, professional bulk purchasers largely ignored the label, focussing on quality and price.[72]

The lesson to be learned from differing responses to product categories is that attention should be paid to the type of consumer buying products put forward for certification. The need for this sort of assessment explains the use of the quite complex processes to determine product categories by existing programs.

A second reason that lengthy processes are required is because it is only if products within a category have differing environmental impacts that it will be possible to reward high performers with a label, and thus provide others with an incentive to improve. A related issue is whether to label some products at all. In the German scheme, for example, a decision was reportedly made to exclude leisure boats from certification on the basis that the use of such craft should be discouraged.

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70 At 48: Low-pollutant varnishes and coatings, low-emission gas burners, pH neutral stripping agents for waste water treatment and recycled paper.

71 At 34.

72 At 29.

The greatest complications arise, however, in defining the scope of product categories. As noted by the OECD report, catalytic converters are used to provide the standard example of this problem.[73] Catalytic converters substantially reduce the gaseous fumes emitted by cars, such that a label could be issued for cars with converters fitted. However, even with converters, cars are far from environmentally friendly. In contrast bicycles also provide transport, and are much better from an environmental perspective. The question is: should bicycles be included in the same category as cars, so that cars with converters miss out on a label, or should cars be judged as a separate category? This problem becomes much greater when other products are considered.

Three basic questions must be addressed to determine the scope of a product category. The first is: which products are close substitutes from the consumer's perspective? Or to put it another way, which products are functionally equivalent? Consumers are unlikely to switch from cars to bicycles on the basis that bicycles have labels because most people do not use cars and bicycles in the same situations, therefore placing cars and bicycles in the same category would serve no purpose. The second question is: will use of the labels educate consumers if the category is defined in a particular way? The third issue which must be addressed is: what environmental impacts are of the greatest concern? Clearly, this is a fairly subjective judgement.[74]

These issues illustrate the limits of green labelling as a regulatory instrument. A certification program cannot simultaneously inform consumers about all product choices and influence industries in which consumers will ignore labels. It cannot therefore replace other forms of regulation, such as licence requirements, emissions limits and information strategies of universal application such as Community Right to Know. Instead, it can only supplement existing regulatory mechanisms by exercising influence over a limited range of consumption choices and thus manufacturers' environmental performance.[75]

2) Choosing Certification Criteria

Once product categories are determined, it is necessary to develop means by which to judge products in each category against one another. At least two issues must be addressed. First, it is necessary to find a practical alternative to subjecting each product certified to a full cradle to grave analysis. Second, it is necessary to decide which criteria

73 At 22.

74 Choice of product categories is a fairly complex matter, which requires an element of subjective judgment and extensive research. In Germany, for example, the FEA prepares technical papers which draw on research including literature searches, market surveys, discussions with manufacturers and expert opinions to put forward product categories. These processes are expensive, and must be taken into account in balancing the costs and the benefits of introducing a certification scheme.

75 For these reasons, the German Government regards certification as a 'soft' regulatory instrument: Organisation for Economic Cooperation & Development, *Environmental Labelling in OECD Countries* p48.

should be used. Criteria must be defined according to divergences in products' environmental performance.

a) Why use minimum criteria rather than assessing products fully?

All existing programs have taken the approach of using a life-cycle assessment of products to identify the areas in which there is the greatest potential to reduce the products' environmental impacts, and develop minimum standards within those areas. Products must meet or exceed those standards to obtain certification.

Ideally, a certification program would accurately assess the comparative impacts of competing products, and certify or grade high performers. The most favoured contemporary approach is the cradle to grave, or life cycle, assessment mentioned earlier. This is theoretically advantageous because it is comprehensive and, when used in a labelling scheme, encourages improvement of all aspects of a product by manufacturers. Recent studies cited by Cohen have found that,

> life-cycle analyses should comprise two distinct stages. The first would involve a quantitative inventory of material and energy needs, and waste emissions levels ... The second stage would involve assessment and characterisation of the effects related to this material-energy-emissions inventory in terms of potential risk to the ecology in general and human health, habitats, and aesthetic surroundings in particular.[76]

Cradle to grave analysis is, however, an extremely complex business which would be exceedingly expensive if done thoroughly. Grodsky identifies six shortcomings which together render a comprehensive cradle to grave analysis impractical.[77] These include the

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76 Cohen, "The Regulation of Green Advertising: The State, The Market & The Environmental Good" (1991) 25 *UBCLR* 225 at 261.

77 I. Boundary Definition: It is extremely difficult to determine the boundaries of cradle to grave analysis. For example, it is necessary to decide whether to count the costs of transportation of goods, and if such costs are counted, to what extent.
II. Data is Likely to be Difficult to Obtain: Businesses do not have to release information which is a "trade secret", and are likely to be reluctant to do so, or even if they are prepared to release information, their suppliers may not be. Companies may not collect all relevant data, which is likely to be very expensive to obtain independently.
III. Different Consumers Use the Same Products Differently.
IV. Difficulty in Allocating Waste and Resources Between Different Products Produced by the Same Plant: Information revealed by environmental audits and by the proposed National Pollutant Inventory, as well as that which is kept by manufacturers, is generally site-specific rather than product-specific.
V. It is Difficult to Account for Recycled and Recyclable Products: Tracing the supply routes and production processes of recycled products is difficult because sometimes

fact that data is likely to be difficult to obtain, that different consumers use the same product differently, that it is difficult to allocate waste and resources between different products produced by the same plant, that it is difficult to account for recycled and recyclable products, and that it is difficult to assess the impact of different processes on the environment.

While these problems are substantial, it may at least be possible to ameliorate them by *approximating* products' impact on the environment. This involves accepting that there is some degree of subjectivity involved, such that life-cycle assessments are not definitive. Even with the error which such processes must involve, assessments made using substantial information about a product by people with technical expertise will certainly be much more accurate than the assessments most consumers are able to make. This means that manufacturers will have *better* (not perfect) incentives to improve all aspects of environmental performance, and consumers will *better* be able to minimise their impact on the environment.

A practical means of approximating products' impact on the environment is to examine the environmental impact of a sample of products in depth, so as to identify the features of the product which have the greatest environmental impact, either in production, use or disposal. These features can then be used to develop criteria to assess relative environmental impacts. Products can then be required to surpass the standards set by the criteria to obtain certification. Grodsky, points out that this is analogous to "a doctor establishing physical health thresholds for a patient's heart rate, cholesterol level, blood pressure.." etc.[78] This analogy can also be used to show the utility of approximating life-cycle analysis: medical examinations are useful even though they will sometimes be inaccurate and they do not normally test for rare diseases.

Nevertheless, even truncated, simplified approximations of life-cycle analysis are commonly expensive and have largely failed to overcome the problems noted above, hence the snail like progress of the European Union's eco-labelling scheme, and the very disappointing rates of progress of the New Zealand and Canadian programs.

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products are used to produce the same product when they are recycled (bottle to bottle), and at other times they are used to produce others (bottle to carpet).

VI. Assessing the Impact of Different Processes on the Environment: The most important problem with full cradle to grave impact assessment is that the task of comparing the overall environmental impact of goods requires analysts to compare chalk with cheese: They must decide which is worse, an extra kilo of landfill waste, or an extra litre of ozone depleting emissions? Grodsky, "Certified Green: The Law and Future of Environmental Labelling" (1993) 10 *Yale J on Reg* 147 at 218-226.

78 At 224.

b) How many criteria should be used? The need for divergences and the danger of over-simplification

The number of criteria that should be used by a program should be governed by the number of such divergences which exist in each product category, as well as by balancing the likely effect of additional criteria against the cost and complexity they add. Where these considerations yield two or more criteria, then their use is likely to enhance consumers' ability to judge environmental performance. Where they yield only one, however, there is little point in including the product category in a certification program. It would be better to simply develop an Australian Standard to govern advertising in relation to that criterion.

Although different schemes make differing claims as to the comprehensiveness of their assessment criteria, an examination of criteria used in the Canadian and German schemes, for example, reveals that the criteria used are very similar indeed. This similarity is likely to arise due to the need to identify areas in which products' impacts differ from set environmental standards. The OECD uses a fictitious product, a widget, to demonstrate this:

> The production of widgets is highly polluting, yet all widget manufacturers employ the same production technology. Widgets are all used identically, as well. It is only in the disposal of widgets that the widgets differ significantly in their environmental impact, because some widgets are recyclable. Thus, although widgets have a significant impact on the environment at the stages of production and use, there is no difference among products on which to establish a criteria. If all widgets are produced the same way, a criterion cannot move widgets toward cleaner production technologies because it is impossible to set criteria which would distinguish among products. It is only at disposal that the environmental impact of the different widgets can be distinguished (ie between recyclable and non-recyclable widgets). Therefore, an environmental label may be granted on the basis of a single criterion (recyclability) even though the entire life cycle of the product was considered. The number of criteria is thus related to the variation among products within each product category.[79]

Thus, rather than pinpointing areas in which products have the *greatest* environmental impact, criteria must pinpoint areas in which there are *differences* in the environmental impacts of products within a category to be effective. For some products, these differences are likely to be limited.

Although it would be ideal to use *all* possible criteria so as to provide a relatively comprehensive impact assessment and thus provide manufacturers with an incentive to

79 Organisation for Economic Cooperation & Development, *Environmental Labelling in OECD Countries* p21.

improve a whole range of factors, the cost of using some criteria may outweigh the benefit. Thus, a judgement must be made as to the impact each possible criterion is likely to have on consumption choice and the environment.

After deciding upon the areas which criteria should govern, it is necessary to set minimum requirements which products must meet or exceed if they are to be certified. The European program, for example, intends to certify the top 10-20% of environmental performers in each product category. As pointed out by the OECD report, "having a high threshold implies that labelled products have a small market share".[80] Thus, market share is an issue which is often explored when deciding upon criteria. The German and Canadian schemes both have a policy against labelling products which dominate their market category (even if they are relatively environmentally sound).

If labels are effective, then product standards will rise so that a greater proportion of products will be eligible for certification. For this reason, most programs review criteria every three years, to ensure that they are sufficiently strict.

3) Enforcement mechanisms and administrative structure

One of the advantages of certification schemes is that to a degree they are self-enforcing, ie the process of obtaining certification itself ensures a relatively high level of compliance. In addition, most schemes licence companies to use their logos on products only for a limited period, which ensures that compliance is continuing as products can be reviewed prior to licence renewal. In addition, some countries have chosen to supplement certification with other means of ensuring compliance. In Canada, for example, licensing agreements permit spot auditing of manufacturing plants with immediate access to all relevant production and purchase records.

It cannot be denied that the certification process itself raises many problems, which can only be solved through the use of informed, subjective judgements. But while definition of product categories and criteria is a difficult process, useful categories and standards have been produced by some programs, which shows that the problems raised in this section are not insurmountable for some, or even most product categories. *These difficulties are, however, likely to add to the cost and controversy involved in any program.* These factors must be taken into account in considering the organisational structure and cost-effectiveness of certification programs.

Unfortunately, decisions as to an administrative structure through which to create criteria and categories pose problems almost as great as those related to categories and criteria. Many of these problems are of a technical nature. As such, they are beyond the scope of

80 As above.

this paper and are addressed elsewhere.[81] Suffice it to say here that none of these structures is likely to work effectively without substantial subsidisation from government, a point that brings us back once more to the considerable costs of green labelling schemes, and to whether the benefits justify incurring those costs.

CONCLUSION: IS GREEN LABELLING WORTH IT?

This article has examined both the benefits and the considerable problems which establishment of a certification system would entail. It is now necessary to address the fundamental policy question of whether Australian governments should embrace certification or continue to tolerate the problem of undercutting claims. The test we believe should be applied to answer this question is: would the government money which a certification scheme requires be better spent on other instruments for environmental protection? Notwithstanding the difficulties of assessing the detailed provisions of individual schemes,[82] we can nevertheless arrive at some general conclusions about the value of green labelling initiatives, based on the experience so far.

Certification schemes are not generally self-financing. With the possible exception of American schemes, all existing programs are partially government funded. Although both the Canadian and Norwegian governments started out with the hope that their programs would become self-financing after a couple of years, by 1991 neither program had achieved this goal: both received substantial government assistance. There is no doubt that seed funding is required for certification programs, and that ongoing subsidisation of fees will also be needed. Whether that expenditure is worthwhile depends on both the level of subsidisation and the environmental benefits the program delivers.

In principle, if consumers show a strong preference for labelled products then manufacturers will strive to obtain the label, and will be willing to pay substantial fees to get it, thus both increasing their environmental performance and decreasing the need for government subsidisation of the program. Unfortunately this seems to have occurred in

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81 Dawson & Gunningham, *Greening the Supermarket Shelves: Regulation of Ecolabelling in Australia* Australian Centre for Environmental Law Working Paper, Australian National University 1995.

82 For example, a trade-off must be made between comprehensiveness and cost. Programs which produce comprehensive sets of criteria in well-defined product categories are likely to be a lot more effective in achieving environmental change than those which take a simpler approach, in that they will provide incentives for manufacturers to reduce a range of environmental impacts of their products to achieve certification. On the other hand, a simpler approach is likely to require a much lower level of government expenditure. Either approach could be efficient, depending on the extent to which increased comprehensiveness impacts on cost. And the only assessment which can be made with certainty is that a single-criterion system would be ineffective, in that it could be replaced with a direct restriction on advertising. A similar situation exists with respect to organisational structure.

only a small minority of cases, the German Blue Angel scheme, and possibly the Japanese EcoMark, being the only notable successes.

There are two reasons why such cases are the exception. First, labelling schemes can only work if consumers readily identify with the label. This is only likely to happen if the label is promoted by substantial (and therefore expensive) advertising, at a level of subsidisation which most governments are unwilling to support. Second, most manufacturers of consumer goods are hostile to such schemes and will only enter into them if they cannot afford not to (eg when the absence of a label puts their product at a competitive disadvantage).[83] There is thus a considerable hurdle to overcome before a green labelling program becomes viable: persuading enough companies that it is worthwhile to join. In the absence of substantial advertising and other incentives, this hurdle may never be overcome. The result will be that a scheme never becomes viable. This was the experience of Environmental Choice in Australia, and seems also to be the fate of its New Zealand equivalent. The Canadian scheme, despite the expenditure of many millions of dollars, is also said to be having an impact in only two product areas. The European Union scheme is similarly experiencing an extremely sluggish start. Accordingly, there are reasons to doubt that green labelling schemes provide "a big bang for our bucks".

This is not to suggest that no reforms are worth considering. On the contrary, consumers should be given some assurance that specific claims made by manufacturers are not misleading, so that consumers can use them when they wish to judge the environmental performance of one product against another. The existing trade practices legislation, aimed at eliminating misleading advertising, needs to be complemented by the formulation of bright line standards, as discussed in part one of this article. The latter would compensate for the current absence of commonly accepted definitions for use in making environmental claims. There is also a case for introducing legislated environmental labelling schemes for specific confined issues such as the energy efficiency of appliances, where most of the problems identified in this article are far less severe (for example energy consumption can be easily measured).[84]

Beyond this, the case for developing a life-cycle based certification scheme in order to summarise information about a range of environmental impacts for consumers has not been made. In light of the difficulties involved in developing such a scheme it seems unlikely that the benefits would outweigh the costs.

In summary, green consumerism is a positive trend which should be encouraged. If the government is able to ensure that manufacturers give consumers sufficient accurate information about the products they buy, then consumers' decision to buy green will

83 The failure of the Australian Environmental Choice scheme was largely attributable to industry hostility and resistance.

84 See further, Bradbrook, "Eco-labelling: Lessons from the Energy Sector" (1996) 18 *Adel LR* 35.

benefit the environment directly, and indirectly by encouraging manufacturers to make environmental improvements to their products. In an ideal world of unlimited resources, government would ensure that this trend is not sabotaged by unscrupulous advertising on the part of manufacturers. For the present, however, the costs of a broad-based eco-labelling certification scheme are likely to outweigh the benefits, and it is rational for government to limit itself to much more modest reforms in terms of bright line standards, and to focus its initiatives on those more specific areas, such as energy labelling, where environmental change can be brought about at an acceptable financial cost.