



# Radical compliance in advertising

Handbook - September 2023



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# About this guide

With greenwashing continuing to muddy the marketing waters, one thing is clear: the days of slogans without substance are numbered. Claims by businesses that they're sustainable, impactful, and responsible have become wallpaper.

Consumers are losing trust, but there's an antidote to this: radical compliance. Certified B Corporations are uniquely positioned to share with their audiences the positive impact they're having, and the path they're on to improve.

This guide is designed for B Corps, developed with the support of Marque Lawyers, to provide practical advice on how to understand and comply with the current law around greenwashing in Australia. The law in Australia is principle-based, so much of the guidance is relevant to other countries, however, regulations and laws do vary so if you are communicating in other markets, please ensure you comply with local laws and regulations.

The content in this guide was outlined in a webinar hosted by B Lab on 31 August 2023, which you can watch online via [this recording](#).

Compliance with advertising law can make a real difference. It means crafting marketing campaigns and communications with real information and solid substantiation. From this solid base, you can communicate with authenticity and honesty, build trust, educate, and influence your audiences to drive positive impact.

We hope you find this guidebook useful.



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# About Marque

Marque Lawyers is a for-profit commercial B Corp law firm led by the purpose of using the law for good. As part of its wider commercial offering, Marque has extensive experience advising on the Competition and Consumer Act and Australian Consumer Law, advertising and climate advocacy. They love working with B Corps to build powerful and legally robust content, telling great stories with great transparency. That's just one way Marque delivers on its purpose.



## **Hannah Marshall - Partner**

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Having literally consumed the Competition and Consumer Act, Hannah can tell you without blinking whether your advertising claims for the health benefits of cage-free, organically grown charcoal tea leaves will pass muster or leave you with a major regulatory headache. She advises clients on complex competition and regulatory challenges right across their business; managing risk, adding value and handling dealings with regulators.



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Danie digs deep when it comes to heavy-duty regulatory regimes or the insane intricacies of competition law, producing perfectly formed answers that a normal person could only unearth with an excavator and a few drinks. She was awarded the Jerome Lipper Award for distinction in International Legal Studies at New York University, and has published multiple articles in international legal publications.



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## 1. Introduction

- 1.1 Hello, welcome. This is a practical guide for B Corps about misleading advertising and greenwashing.
- 1.2 For B Corps, transparency and trustworthiness are imperative. We hold ourselves to a higher standard. Legal compliance is a fundamental building block in delivery on our purpose. And, done right, our impact and environmental claims not only elevate our own business successes, but provide a broader platform for change.
- 1.3 This guide will help you understand the relevant laws to navigate and give you practical tips on how to build robust claims. Misleading conduct laws are principles-based. That means there's sometimes not a clear answer on your level of legal risk. Given the serious legal and reputational consequences, if in doubt you should always get legal advice.

## PART A: LEGAL OBLIGATIONS AND RISK

### 2. Legal Obligations

- 2.1 The Australian Consumer Law (ACL) prohibits misleading conduct and false representations. These laws have wide application, including to advertising, and environmental and impact claims. There are similar provisions in the ASIC Act and Corporations Act for financial products and services.
- 2.2 Misleading conduct: The key provisions of the ACL relating to misleading advertising are as follows:
- a. there is a broad, catch-all provision that businesses must not engage in misleading or deceptive conduct (section 18, ACL);
  - b. there are further prohibitions on businesses making specific false or misleading representations in connect with the supply of goods or services (section 29, ACL). This includes false representations:
    - i. that a product is of a particular standard, quality, value or grade;
    - ii. that purport to be a testimonial by any person relating to goods;
    - iii. that goods have sponsorship, approval, performance characteristics, uses or benefits;
    - iv. about the price of goods; and
    - v. about the origin of goods.
- 2.3 ACCC guidance: The Australian Competition and Consumer Commission (ACCC) issues regulatory guides to explain when and how it will exercise specific statutory powers, explain how it interprets law, describe the principles underlying its approach and give practical guidance. The most relevant guidance documents for advertising are below. These aren't laws in themselves, they just describe how the ACCC thinks the law should apply.
- a. [Advertising and selling guide](#): Good practice guidance.
  - b. [Environmental and sustainability claims](#): Draft guidance for business (draft Greenwashing Guidance). This guidance is linked to a current ACCC enforcement priority, which are misleading environmental or sustainability claims. Further information about environmental claims is outlined below in Part C of this manual.

### 3. Risks

- 3.1 Non-compliance with these obligations has both legal and reputational consequences. Greenwashing in particular is a major regulatory focus for the ACCC and ASIC at present and consumers are becoming more concerned with the legitimacy of a business' claimed environmental credentials.
  
- 3.2 Legal risk: The ACCC has the power to investigate and enforce breaches of the ACL. The consequences for contravening the ACL can extend to prosecution and multi-million dollar penalties.
  - a. Before beginning any regulatory action, the ACCC has the power to compulsorily obtain information or issue a substantiation notice requiring a business to provide substantiation for a claim or representation.
  - b. There are multiple steps that the ACCC can take prior to seeking penalties, including:
    - i. seeking an injunction to stop the advertisement or a stop order in relation to a misleading document;
    - ii. accepting enforceable undertakings that the business won't engage in the behaviour again;
    - iii. requiring corrections notices, public warning notices or compliance programs;
    - or
    - iv. issuing infringement notices, which are similar to an on-the-spot fine and are currently \$16,500.
  - c. The ACCC can also commence a prosecution, which is a court proceeding in which it seeks orders that a business pay pecuniary penalties and is restrained from engaging in the relevant conduct. The maximum penalty for businesses is the greater of: (1) \$50M; (2) three times the benefit obtained / detriment avoided; or (3) if the value derived from the breach cannot be determined, 30% of annual turnover. Individuals face a penalty of up to \$2.5M.

- 3.3 In addition to action taken by the ACCC, misleading conduct can also give rise to private actions or class actions by affected parties resulting in substantial damages awards. There has been a wave of litigation commenced by advocacy groups.
- a. The Australian Centre for Corporate Responsibility has sued Santos for misleading conduct over its ‘net zero’ claims, ‘zero emissions’ claims in relation to blue hydrogen, and ‘clean energy’ claims in relation to natural gas.
  - b. In August 2023 ‘Australian Parents for Climate Action’ commenced proceedings in the Federal Court against EnergyAustralia over carbon neutral claims.
  - c. There have also been numerous cases abroad; in the US a class action has been launched against Delta airlines over carbon neutral claims and in the Netherlands climate activists have sued KLM airlines for misleading claims about flying sustainably.
- 3.4 Reputational risk: Legal non-compliance and particularly misleading advertising can have severe, negative impacts on a business’s reputation.
- a. Reputational risk is a significant factor for B-corps, which hold themselves to a higher standard. Transparency, trustworthiness and compliance are all fundamental to maintaining the reputation your business has built. Purpose is meaningless without compliance.
  - b. Consumer-power via social media and the evolution of cancel culture only serve to amplify this risk and they have the potential to result in consequences that are more damaging than legal or regulator action.
  - c. On the flipside, there is an opportunity for B-Corps to build robust advertising that will have a positive influence on environmental outcomes. This is because advertising has the power to impact behaviour by communicating changes in social norms and providing information to consumers to assist them to choose the more environmentally sound option. Your business can harness this opportunity to build brand value and play a part in creating positive change.



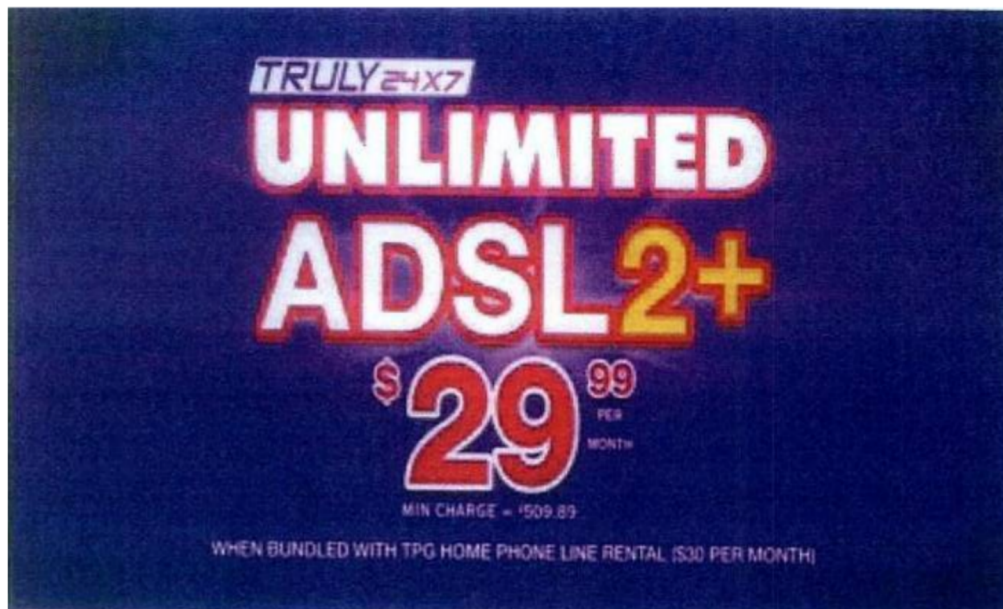
## PART B: GENERAL PRINCIPLES

### 4. What is misleading?

4.1 The prohibition on misleading conduct is a principles-based rule, meaning that whether a claim is misleading will be circumstance specific and depend on the overall context of the claim. When assessing whether a claim or representation is misleading, the following considerations apply.

a. Dominant message: The dominant message or overall thrust of an ad must be accurate and complete. This is most relevant in the context of headline claims and footnotes. Where the strength of a headline claim would be significantly greater than a fine print disclaimer, this may convey an inaccurate dominant message to consumers based on the main claim.

i. This is what the High Court found in a case against TPG for its advertisement of ADSL2+ below. The dominant message was that there was unlimited ADSL offered for \$29.99 per month. Additional costs were disclosed in footnotes and further conditions were disclosed prior to the customer committing to the offer. Yet the ad was deemed misleading based on its dominant message.



b. Overall impression is important: Conduct may be misleading or deceptive if the overall impression of an advertisement or promotion is false, not completely accurate or incomplete. A statement cannot be looked at in isolation; the surrounding factors and surrounding content / images are relevant. There are many examples of ads combining individual elements of content in a way that overall is misleading. Nurofen paid a \$6M penalty for marketing its Specific Pain products. The products all had the same active ingredient, which was also the same as normal Nurofen. Technically, it was correct that the products could treat the pain claimed. But they were not special or different, which was what the claims implied.



- c. Intention is irrelevant: The relevant test is whether the conduct was objectively misleading or deceptive (or likely to be). This test considers the effect or likely effect of the conduct on the ordinary and reasonable members of your audience. This takes into account their character, but does not include the very ignorant or very knowledgeable, or the very cautious or the very careless.
- d. Likelihood to mislead is sufficient: A court can make a finding without somebody actually being deceived. There only needs to be a real chance or possibility that the conduct would lead consumers into error.
- e. Silence can be misleading: It is misleading to omit information that should reasonably be disclosed. An example would be advertising that your packaging is biodegradable, but remaining silent that this benefit only applies to specific parts of the product packaging.

## 5. How to avoid making misleading claims?

- 5.1 When developing a claim or a claim concept, follow this two-step process.
- 5.2 Step 1 - Substantiation: consider the quality of your substantiation for the claim at the outset. Starting with this, rather than conceiving a claim you would like to make and retrofitting your evidence, helps to reduce risk. Consider the following.
- a. What is the evidence / proof that you will rely on if a complaint is made about your advertising? Practically, you should consider this at the concept stage for each claim. Keep records and a paper trail of all sources supporting your claim. They should be up to date and reflect the data available. If your substantiation is weak or uncertain, you should seek better information at this stage.
  - b. If you are relying on third party information, can you verify it? You will be held liable if it is inaccurate.
  - c. If you are relying on scientific studies, are they widely accepted? Have they been peer-reviewed or subject to independent scrutiny?
  - d. If you're claiming a reduction in waste, emissions etc. has the reduction been calculated on a reasonable basis and using accepted methodologies?
  - e. What part of your product / service life cycle does the substantiation relate to? If it is just one part, consider the overall position. E.g., if you claim "not tested on animals", you should carefully consider the rest of your supply chain to confirm whether all individual ingredients in your product have not been tested on animals.
  - f. Is the evidence you rely on of a kind that you can include details / link to it. This isn't strictly required, but can help consumers understand and evaluate your claim.
  - g. If you're using a third-party certification, consider the nature of the scheme and its quality, what you're certified for, how would you characterise the certification scheme, and if you remain compliant with any applicable rules for the certification.

- 5.3 Step 2 - Match your claim to your substantiation: Tie your claim to the supporting evidence and don't be tempted to overstate it. Approaching it this way avoids the risk of inconsistency between your substantiation and your claim. When you're tailoring your claim, consider the following.
- a. Don't leave out important information.
  - b. Don't use small print to vary your headline claim.
  - c. Also consider how imagery may change the overall impression of an advertisement. Images of plants, animals, the earth, green and blue colours, are examples of design elements which can add to an impression of environmental benefit.
- 5.4 Ultimately, your advertising should reflect the current work that is already occurring in the business, such as the decisions made around materials, partnerships, and supply chain. The operational work comes first (the substantiation), and then promotion follows.

## **6. Advertising medium (e.g. social media/video/traditional media)**

- 6.1 The use of advertising medium will affect how you present information, and what is required to reduce the risk of it being misleading. Claims should be structured around the medium used, including inherent limitations such as space or time available to view content.
- a. The same legal principles will continue to apply regardless of advertising medium. There are not different rules for advertising based on medium (or taking into account the inherent limitations of that medium).
  - b. The ACCC has been clear that physical limitations of a particular medium are not an excuse for producing a misleading advertisement. Where there is limited space available (e.g. social media or internet advertising) or limited time available (e.g. video content), you should consider whether the specific proposed claim is appropriate for that medium.

## **PART C: SPECIFIC CLAIMS**

### **7. Environmental claims generally**

- 7.1 Environmental claims have been under particular scrutiny in recent years with the rise of the conscious consumer and the uptick in businesses making such claims. The ACCC has conducted recent sweeps of potentially misleading environmental claims and released draft Greenwashing Guidance in July 2023. ASIC has also increased its enforcement action, having commenced proceedings against three financial service providers this year. Given the current scrutiny, extra care should be taken with any claims of this nature.
- 7.2 There are no specific laws relating to ‘greenwashing’, which is the practice of misrepresenting the extent to which a product is environmentally friendly or sustainable. Instead, this conduct is encompassed within the existing broad prohibition on misleading or deceptive conduct. The ACCC’s draft Greenwashing Guidance is not a law in itself; it just explains how the ACCC thinks misleading or deceptive conduct laws will apply to environmental claims. It also sends a strong signal as to the kinds of claims they are most likely to investigate.
- 7.3 Below you will find guidelines on some of the key risk areas when making environmental claims.

### **8. Meaningful claims**

- 8.1 Only make environmental claims when there is a genuine environmental benefit associated with your product or business. You should not make claims that your product or business has a specific environmental benefit if:
- a. all similar products or businesses have the same feature e.g., sustainably made bamboo toothbrushes where the ‘sustainable’ claim only relates to the material itself and not how it has been sourced; or
  - b. where you are simply advertising the observance of existing laws e.g., a business claiming that it is ‘reducing emissions’ but it is legally required to reduce emissions by a certain amount each year, as are others in the industry.

## 9. Vague statements

- 9.1 Where a claim is too vague, for example, 'green', 'sustainable' or 'environmentally friendly', it risks being misleading. This is because the words in isolation are inherently open to multiple reasonable interpretations. This means that it may be possible to substantiate one interpretation of the statement, but not other interpretations.
- 9.2 The key to reducing this risk is to make the claim more specific and clearly referable to the supporting evidence available. Rather than making the claim: 'our products are safer for the environment', try adding a few words to clarify what you mean: 'our products are safer for the environment because they do not contain palm oil'. By tailoring the claim to the specific practices you are implementing (or avoiding), you can reduce the range of interpretations to those which you can substantiate.

## 10. Absolute claims

- 10.1 Absolute claims like 'zero waste' and data based claims like '50% recycled plastic' are higher risk as they do not allow room for tolerances. You will need to start by considering your substantiation and analyse whether it is sufficient to support the claim. The key to reducing risk for absolute claims is to amend the language of the claim to be more specific, or to remove the absolute nature of the claim if it is not entirely accurate.
- 10.2 If you claim your product or service is 'free from' something, consumers will naturally assume this means 100% free. If that's not accurate, and your product or the manufacturing process does in fact contain even a small proportion of the material, component or characteristic, then you need to change the claim. For example, claiming an EV delivery truck is 'emission free' is likely to be misleading, where it doesn't contemplate emissions from manufacturing the vehicle or recharging it.
- 10.3 If an absolute or data-based claim applies only to a portion of a product, that must be clear. If your 'plastic-free' claim only applies to one part of your packaging, then be explicit e.g., plastic-free bottle, plastic-free packaging.

## 11. Claims around investments and screens

- 11.1 In the financial services industry, there are additional considerations for impact claims related to sustainability-related products that ASIC has considered in its ASIC Greenwashing Guide. A common area of scrutiny has been claims made about investment screens. When you make claims about investments, the following applies.
- a. The product should be true to label. A 'no tobacco fund' should not have any ties to tobacco investment, direct or indirect. Even a small threshold allowance for indirect tobacco investments puts you at risk where you use an absolute claim. You also need to consider the entire tobacco supply chain from growers through to retailers.
  - b. Accurately describe your screens. This is a similar concern. If you claim 'zero fossil fuels' then you need to make sure there is no exposure at all, direct or indirect. This headline claim cannot be cured by a footnote or clarification elsewhere that your fund allows a 5% tolerance. ASIC has commenced a prosecution against Mercer Super on this basis. Mercer claimed to exclude investments in companies involved in intensive fossil fuels, however it was invested in AGL, BHP, Glencore, Whitehaven and others.

## 12. Aspirational claims

- 12.1 When making aspirational claims about future environmental objectives, make sure you have a clear, actionable plan for how this will be achieved and how you propose to communicate it to your audience. Net zero claims are a common example, see further guidance on carbon claims below at section 16.
- 12.2 In its draft Greenwashing Guidance, the ACCC acknowledges that transitioning to a more sustainable business model takes time and is often not linear. The key legal issue is not the nature of your goals, as your business can look to implement any practices or measures that it considers will minimise environmental impact. Rather it is the way that you describe it in any public facing material i.e., your claims must align with the internal processes taken and be sufficiently clear to consumers. Transparency is paramount.

## 13. Qualifications and footnotes

- 13.1 The rule of thumb with qualifiers and footnotes, is that the headline claim should still be accurate and make sense without them. That means you're not using them to change the meaning of the headline. Rather, it's just to add additional information or reference points.
- 13.2 E.g. calling a product 'recyclable', but adding a footnote that it can only be recycled at certain industrial recycling facilities. This is likely to be misleading. An ordinary interpretation for a consumer product would be that the product can be recycled via their usual domestic services.

## 14. Comparative claims

- 14.1 Comparative claims can arise in a few ways; most commonly by comparing a product attribute with an earlier product attribute. E.g. now 20% more durable. Less commonly, by comparing your product with a competitor's. There are some basic rules for all comparative claims to avoid them being misleading.
- a. Compared products should be substitutable, and it should be clear exactly what is being compared i.e., are you making a comparison with one of your own products (which one), or a competitor product (which one), or something else? And which aspect of those products are you comparing; waste, durability, material use, packaging?
  - b. Use up to date information, make sure it's accurate for the life of the campaign.
  - c. Measure compared features using the same method. E.g. if you're comparing waste produced in a manufacturing process to make a claim of waste reduction, use the same method of calculating waste for each product.



## 15. Materials claims

- 15.1 Any claims about the materials used in your product should apply the same principles that we have outlined in this manual under vague statements in section 9.
- 15.2 When describing a product as having a particular quality, like being recyclable, compostable or biodegradable, consider the following guidelines.
- a. Be clear on the amount of the product that is composed of those materials, e.g., made from 25% recycled materials.
  - b. If claiming that a product is compostable, you should specify the circumstances where this will happen i.e., at a certain temperature, after a specified period of time.
  - c. It is lower risk to explain what you mean by common terms, particularly where they do not have a fixed definition e.g., 'circular', 'natural' or 'present in nature'.

## 16. Carbon claims

- 16.1 Many companies are now making 'net zero' or 'carbon neutral' claims. Without any qualifications for these claims, they risk being misleading where consumers don't understand the scope / nature of the claim and the extent of the advertised benefit. If you intend to make any emissions claims, consider the following.
- a. Claims should be founded on a thorough baseline assessment using recognised methodologies.
  - b. Be transparent about the inclusion and calculation of scope 2 and 3 emissions and the use of emissions reductions activities versus reliance on purchased offsets.
  - c. If your claim relies on offsets, give an indication of the kind of offsets used. Without this, there's risk of being misleading by omission. 'Neutral' assumes equivalency between the emission and the offset. Given the range and nature of offsets, that may create a misleading impression.
  - d. For net zero claims, you must have a clear plan with measurable and realistic milestones, and track those milestones, to avoid the claim being misleading.
  - e. Specify whether the claim relates to the whole business, one product, one area of the business E.g. it would be misleading to claim 'our coffee is carbon neutral' when this only relates only to your cafes / shops or head offices, and not the cultivation process or the roastery.

## PART D: BUSINESS RISK ANALYSIS

### 17. Broader strategy considerations

- 17.1 Stepping back, B Corps should undertake a broader risk analysis at a leadership level to effectively manage impact and marketing claims.
- a. Look at your communications overall, including your website, press releases, marketing, partnerships and other reporting.
    - i. Are you aware of the nature of your claims and relevant substantiation, have you undertaken a broader content review?
    - ii. Do you have a credible pathway for any net zero commitments made and have you articulated key assumptions and uncertainties?
    - iii. For any emissions-reductions plans, have you clearly communicated the offsets or emerging technologies you are relying on?
    - iv. Do you rely on external assurances or independent parties to support your ESG / impact reporting? Are they credible?
  - b. Consider what processes are in place to support compliance across the business.
    - i. Ensure that the relevant team members have been trained about the law and the risks.
    - ii. Apply review processes for external marketing and contracts throughout your supply chain.
  - c. Develop an ESG strategy for your business and make sure it's reflected in your contracts and company policies. Consider how these internal systems are reflected in your impact reporting.

#### **You've reached the end of the handbook!**

Do you have feedback or questions? Please feel free to contact us. Angie, Hannah and Danielle's email addresses are listed in the first section, or you can contact the B Lab team via [community@bcorporation.com.au](mailto:community@bcorporation.com.au)



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Law, done differently

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