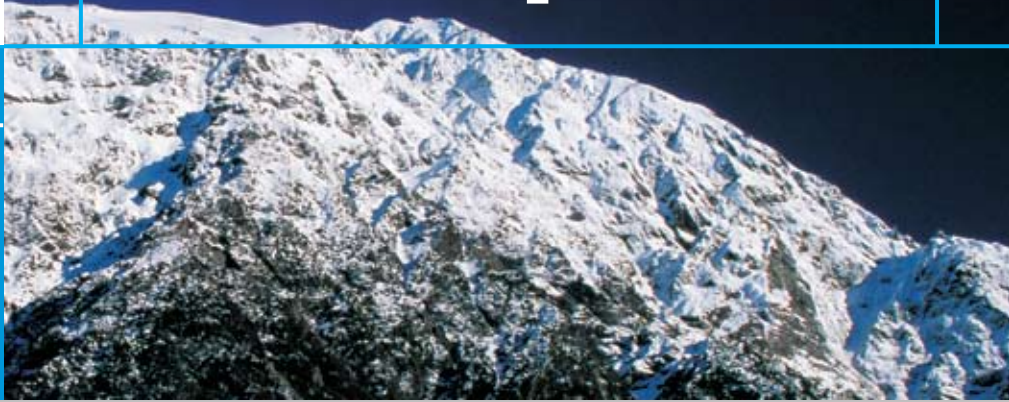


Fineprint

INSIDE:

- 1 Being Green, Being Good
- 3 Have the Second Hand Smarts
- 4 Resource Management Act
- 5 Keeping Your Affairs in Order



Being Green, Being Good

GUIDELINES FOR GREEN MARKETING TERMS

'Green' is just a colour, isn't it? Wrong. Over the last 30 years this word has become loaded with the hopes and ideologies of the ecological movement, and now green-type words are frequently used on products and services. This article gives some guidelines for your business in the use of 'green' language.

Words can carry strong connotations, and the law imposes some legislative controls on what can, and cannot, be said. For example, using *bank*, *banking* or *banker* cannot be used in a company name unless authorised under the Reserve Bank of New Zealand Act 1989. Similarly, the Co-operative Companies Act 1996 controls use of the word *co-operative* in a company name. The Flags, Emblems and Name Protection Act 1981 protects a range of names such as *Royal*, *Government*, *United Nations* and *Anzac*.

Marketers enlist green

The Green politics of the last 30 years has led to widespread unease about the adverse consequences of human actions on nature, and the acceptance of the broad aims of environmentalism. As a result environmental claims can now be a powerful marketing tool. Businesses are increasingly using environmental

claims to differentiate themselves, and their products or services, from those of competitors. The claims come in a wide range of forms such as environmental sustainability, recycling, carbon neutrality, energy efficiency, use of natural products or impact on animals and the natural environment: they are green-friendly.

Commerce Commission response

Rather than enacting specific legislative controls the Commerce Commission, that administers the Fair Trading Act 1986 (the Act), is using the broad effects based controls in the Act to ensure that those in trade must not mislead or deceive consumers in any way. In response to uncertainty and some downright shonky claims, in late 2008 the Commission issued Guidelines for Green Marketing. Further, the Commission issued draft Guidelines as to carbon off-set and neutrality claims on





which consultation feedback was due by April 2009. Both Guidelines can be seen on the Commerce Commission's website www.comcom.govt.nz under Fair Trading.

Contravention

Environmental claims can contravene the Act as either:

- Misleading or deceptive conduct, or
- False or misleading representation.

The Commission's Guidelines note that there does not have to be an intention to mislead. The focus of the Act is on the overall impression a trader's conduct (particularly advertising) creates and the new Guidelines warn that 'it is important to carefully consider your audience when making environmental claims' and you should consider the more susceptible members of your audience when formulating a marketing campaign. The Guidelines note that the law allows a degree of latitude when statements are clearly puffery on the basis that most reasonable consumers are aware that some vague or generalised exaggeration occurs in advertising. However, it seems that consumers are easily confused by green advertising: they lack the information to assess what can be very fashionable and compelling claims.

Making environmental claims

The Commission's Guidelines recommend that generally environmental claims should:

- Be honest and truthful,
- Detail the specific part of the product or process to which it is referring,
- Use language which the average member of the public can understand,
- Explain the significance of the benefit, and
- Be able to be substantiated.

Some suggestions and examples:

- **Providing specific and accurate information is the key:** sweeping claims such as 'safe for the environment' could have many meanings depending on the audience. Some may believe this means your product is biodegradable; to others it may infer that it contains no toxic components. You risk misleading at least some part of the audience,



- **You must be able to substantiate claims:** if a dishwasher manufacturer claims a new model is '60% more water efficient' but there is no scientific or test data to back this up, there may not be a good faith basis for making the claim and a strong risk that the Act is breached,
- **Avoid jargon and take care with images:** consumers who are unfamiliar with technical terms will often make assumptions and are likely to be misled. Green images can be representations: a picture of a dolphin on a tuna product may be taken by consumers as meaning the tuna captured did not harm dolphins which, if not the case, is misleading,
- **There should be a real environmental benefit:** 'CFC-free' is likely to risk misleading consumers because CFCs are now prohibited in almost all aerosols, and
- **'Recyclable':** make clear whether it is the product or the packaging you are talking about. Only use this term if the product can actually be collected and recycled across most of New Zealand, ie: it actually happens rather than being theoretically possible.

Making carbon claims

Some businesses, keen to display their 'green' credentials, are analysing their carbon footprint and taking steps to reduce that footprint or purchasing off-sets to compensate for the environmental impact of their activities. There are no universally accepted definitions of 'carbon neutral' or 'low carbon' terms. Consumers are even more at risk of unscrupulous traders 'green-washing' their advertising and extracting a premium on goods or services that claim to reduce environmental impact.

The Commission's Guidelines are still in draft phase, but potential problem areas are:

- **Carbon off-set claims:** these are often purchased from an independent off-set provider. Inappropriate or poor quality off-sets may expose the purchaser to unsubstantiated carbon off-set claims and breach of the Act,
- **'Additionality':** this is the idea that carbon reduction benefits under a commercial project are 'in addition' to those that would have happened anyway. A routine upgrade of equipment or changes in response to tightening regulatory requirements cannot be regarded as 'additional',
- **Timing and forward credited off-sets:** the buyer pays and has the off-sets credited to them up front. There is the risk that the credits from the off-set provider may not eventuate. It is a good idea to obtain a contractual commitment from the off-set provider to secure replacement credits if the off-set product does not perform adequately,
- **Double counted off-sets:** an off-set provider may contract to plant 10,000 trees for a customer purchasing carbon off-sets. The trees are planted but are not then 'retired' as off-sets; and the provider later sells the same carbon sequestered by the 10,000 trees as an off-set to a second customer. The first customer has misled its customers, and
- **Permanence and risk management:** a reforestation project has risks from fire or pest infestation. It is a good idea to contract the off-set provider to guarantee purchased credits will be maintained and replaced if the forest is destroyed.

Environmental and carbon claims are fertile areas for sloppy marketers. The Commission is signalling that, with the publication of its Guidelines, cavalier 'green-washers' will be prosecuted. ■



Have the Second Hand Smarts

BUYING AND SELLING USED GOODS

Are you trying to save money and buy second hand? Have you been clearing out your cupboards to sell those unused presents and bad purchases? Buying and selling at garage sales and online auctions is a great way to save money and recycle, but you need to know your rights and obligations to ensure you don't get caught out by consumer law.

Different rules apply, depending on whether the sale is made from a private sale or a professional trader. Businesses and people who trade regularly are considered professional traders. If you start selling goods more regularly (even if this is still a hobby) you are likely to be deemed to be a professional trader.

We supply some tips below to help you with buying and selling second-hand goods.

Private sale

When you purchase items by on-line auction from a one-off seller or at a garage sale, you need to carefully check the item before you buy. There are very limited options for you to obtain a refund or get the item repaired if it is faulty. You may be able to claim damages or seek a refund if the seller provided incorrect information about the goods and you bought the item based on that incorrect information. It can be difficult to prove this so it is easier to check the goods thoroughly and ask questions before paying. If a seller tells you that an item was well used and damaged you couldn't then require the seller to fix the item after the sale.

Similarly, if you are selling goods you need to make sure that you are careful in how you describe them to a buyer. If you provide incorrect information and the purchaser relies on this incorrect information they may be able to claim damages or a refund from you.

Trader

The obligations of the Fair Trading Act 1986 apply to professional traders. Under that legislation a seller must accurately describe the goods, price and the terms of sale. The seller is not able to amend terms of the sale later. It is illegal to advertise or provide advice about goods that is inaccurate or in a misleading way. If a buyer has been misled, they may be able to obtain compensation from the seller or cancel the purchase. In addition, a seller could be liable for a fine of up to \$60,000 if they breach this Act.

The Consumer Guarantees Act 1993 does not apply to regular auctions or on-line auctions. This legislation only relates to second hand goods if they are sold by a professional trader and not at auction. Under the Act the goods must be fit for their intended purpose, safe, free from defects, look acceptable and last for a reasonable amount of time. If the product breaks you are able to require the seller to repair or replace the problem if it is minor. For major faults you can obtain a full refund.



Payment and delivery

When selling goods by on-line auction you should set out your required terms of payment and delivery when you first set up the auction. It is preferable to accept payment from a buyer in cash or by electronic transfer. If you accept payment by cheque you should wait until the cheque has cleared (usually three working days) before sending the item to the buyer. If you are posting the goods, the buyer should pay for this and the goods should be at the buyer's risk from the time of posting. You should post the goods promptly to the purchaser.

You need to comply with general contract law and a seller needs to supply the specific item that has been advertised and paid for. The buyer needs to pay the agreed purchase price.

When buying items that are being delivered or posted to you, you should consider getting them insured to cover more expensive items for loss or damage in transit.

For buyers, if at all possible, it is advisable to sight or pick up the goods before you pay the seller. For more expensive items you may wish to consider a payment or 'escrow' service where an independent third party holds the funds for the seller until the goods have been delivered and you then agree to allow payment to the seller.

For more detailed advice, the Ministry of Consumer Affairs website is very helpful, see www.consumeraffairs.govt.nz or feel free to give us a call. ■



Resource Management Act

MORE AMENDMENTS IN THE PIPELINE

The Resource Management Act 1991 does not just affect large businesses; it also impacts on infrastructure, homeowners, small businesses and farmers. It seeks to enable development and use of resources while at the same time avoiding, remedying or mitigating adverse effects on the environment. The National government signaled early on that changes were afoot with this legislation; we outline these below.

High level of criticisms

Very few people would find fault with the Resource Management Act's (RMA) motive of protecting the environment. There has been, however, growing criticism over the 18 years since the RMA became law, of its ability to effectively manage complex environmental issues, and complaints have been growing about slow and costly plan preparation and consenting processes.

Some environmental groups claim the RMA (or its implementation) does not do enough to protect the environment. However, businesses claim that processes and regulations (predominantly plans) impose a heavy burden of compliance costs, stifle innovation, and contribute to the high cost of land and housing. Those administering the RMA often have to manage conflicting desires and expectations of those undertaking activities on the one hand, while also addressing the rights of parties who may be adversely affected by such activities on the other.

Multiple amendments

The level of dissatisfaction with the RMA is such that this single piece of legislation has been amended more than 15 times since it came into force. Some of those amendments have been minor but others have been quite significant.

The RMA is now undergoing a further reform with the introduction of the Resource Management (Simplifying and Streamlining) Amendment Bill. The Bill focuses on improving the quality and certainty of decisions, and reducing delays and costs by simplifying procedures. When announcing the planned reforms, Prime Minister John Key stated, "We need to unlock that lost growth potential and untangle the red tape suffocating everyone from homeowners to businesses".

Reform package

Key elements of the reform package are:

- Introducing measures to remove frivolous, vexatious and anti-competitive objections. These measures include enabling the courts to seek security for costs and award indemnity costs, and sanctions against third parties who act on behalf of trade competitors without disclosing this information,
- Streamlining processes for projects of national significance by creating an Environmental Protection Agency (EPA) to administer the consenting process for proposals of national significance.

This would enable direct applications to the EPA and improve the current call-in powers to the relevant Ministers,

- Improving plan development and plan change processes by removing further submissions, streamlining decision reporting and decision making, removing the non-complying category and removing the ability for appeals to be lodged that challenge entire plans,
- Improving resource consent processes by removing the presumption that consents are notified, reducing delays due to multiple requests for information, and streamlining decision reporting,
- Improving workability and compliance by enabling applicants and submitters to choose whether a notified application be considered by the local authority or an independent commissioner,
- Enabling applications to be determined in the Environment Court without the need to first go through local authority consenting processes and increase the maximum fines for offences, and
- Improving national instruments to ensure that they can be more efficiently and effectively integrated into plans and implemented.

Will the reforms solve the problems?

Many changes, such as tackling the issue of trade competition, and direct referral to the Environment Court, appear to be positive steps toward reducing overly bureaucratic delays and the vexatious stifling of industry. However, other changes, including limiting appeal rights on a planning document to matters of law, appear to be contrary to the objectives of the Bill, being to reduce delays and costs by simplifying procedures.

It is difficult to determine at this stage whether the Bill will reduce the current level of frustration with the administration of the RMA. It is clear however that New Zealand depends on the sustainable use of its natural resources for its economic well-being. The RMA is therefore here to stay.

Where to from here?

The Bill is currently being considered by the Local Government and Environment Select Committee with the government hoping to enact this legislation by September. This will be followed by further reforms to the RMA which will look at policy issues in more detail (such as infrastructure, water and urban design). ■



Keeping Your Affairs in Order

WHAT YOU SHOULD DO NOW

No one can escape the fact that we are experiencing an economic recession. Whilst it may not be at the top of your To Do list, in these financially uncertain times we have noticed an increasing number of clients coming in to see us to ensure their personal affairs are in order.

While you can go without many things in tough economic times, you should never be without a plan to ensure your affairs are in order. Making sure you have the proper arrangements in place for your family in case the unexpected happens can seem a daunting and somewhat morbid task, but the sense of security and peace of mind it provides for everyone is well worth it.

Your Will

First, you should make sure your Will is up to date. Every adult should have a current and valid Will; they are not just for the elderly or terminally ill. You need to ensure your Will reflects your current situation, and also fulfills your wishes for the future.

If there has been a change in your family circumstances such as a new baby, the death of someone close to you, you've got married, or recently separated or divorced, then it is essential that you update your Will. Many people know that marriage automatically revokes a previously valid Will, however many are unaware that a Will does not become invalid when you separate or divorce. It is important that your assets are going where you want them to go when you pass away.

EPAs

We recommend that every adult should have Enduring Powers of Attorney (EPAs). There are two types of EPA. An EPA in relation to personal care and welfare allows the person acting for you (your attorney) to make decisions regarding your care. It can only be used when you become mentally incapable of making those decisions for yourself. An EPA in

relation to property enables your attorney to deal with any of your property or assets, and can take effect at any time. This is helpful to have if you are travelling or living overseas, or of course if you become incapable of looking after your own property yourself.

There were some changes in EPAs that came into effect in September 2008. To refer to these please look at the Winter 2008 issue of *Fineprint*.

Safeguarding assets

Many families want to protect their assets against risk, for a variety of reasons such as business risk, relationship breakdown or other possible events. Do talk with us if you want to know more about how we can help you safeguard what you have worked hard to accumulate in your working life.

If you already have a trust, now is a good time to ensure all is in order. Check that your trust deed is up-to-date so it still meets the beneficiaries' needs. It may also be worthwhile checking that the trustees are still happy to continue in their roles. And on a more virtuous note, you could also ensure that all the trustees' meetings minutes are filed, gifting certificates are in sequential order, and so on.

Experiencing a recession is not something that we would willingly enjoy, but making sure your personal affairs are in order will give you some fundamental security and peace of mind that if the unexpected happens, your family is well looked after. Do not wait until it is too late. ■

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NZ LAW member firms have agreed to co-operate together to develop a national working relationship. Membership enables firms to access one another's skills, information and ideas whilst maintaining client confidentiality.

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Postscript

Copyright Act, s92A no more

The government announced in February that it would delay the introduction of the controversial s92A of the Copyright Act 1994 until the end of March. The Prime Minister said that he hoped that a voluntary code of practice could be worked on by internet service providers and copyright holders, adding that if there was no agreement, s92A would be suspended. If agreement was reached, there would be a review in six months.

Since then the government has pulled the controversial section after service providers and rights holders could not agree on a code of practice. The section will be amended to address areas of concern, said Commerce Minister Simon Power.

Surgical Tax Cuts

Two orthopaedic surgeons have made an incision into the fiscal anatomy of corporate bodies.

They formed companies which purchased their orthopaedic practices. The Inland Revenue Department (IRD) maintained that the arrangements they had made in forming the companies and paying themselves artificially low salaries was tax avoidance. The surgeons maintained there was no tax avoidance arrangement simply because they were employed by family companies, and did not receive what the IRD considered were commercially realistic salaries under the Income Tax Act 1994.

The High Court¹ rejected the IRD's market salary approach and held that if the same arrangement was in place for a number of years then the tax avoidance purpose is unlikely to be incidental in one year and not incidental in another based on the quantum of the tax advantage.

The surgeons may not have the case sewn up because the IRD is appealing the decision. Also, the government's medium term goal is to align top personal tax rates with company and trust rates so that legislation may be passed which would alter the effect of these decisions.

¹ Penny & Anor vs CIR. CIV-2007-409-1153, 19 March 2009

Holidays Act to be reviewed

The Minister of Labour, Kate Wilkinson, has established a working group of five members (including two nominations each from the Council of Trade Unions and Business New Zealand) to review the Holidays Act 2003. The group has been formed to provide recommendations to the Minister that will make the Act easier for businesses and employees to understand and apply, and that will reduce compliance costs. In particular, the group will review:

- The calculations for holidays and leave under the Act,
- Trading in some part of an employee's annual leave for cash, and
- Allowing employers and employees to agree to transfer the observance of a public holiday to another day.

The group's final report is due to come out in December this year.