

It's Not Easy Being Green

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Act I, Scene I: *It was just like any other day (launch mood)*

* Enter Marketing/Brand Team (the green warriors)

- New personal care product range concept
- Therapeutic and cosmetic ‘*natural*’, ‘*eco-friendly*’ and ‘*sustainable*’ avocado oil skincare collection
- Headline ‘***Green inside and out***’ across product labels, associated social media, marketing collateral & more ... it’s all systems GREEN!

* Enter Regulatory Affairs Team (the gatekeepers)

- ARTG permissible claims for therapeutic products checked
- Regulatory review of ‘natural’ and green claims escalated to Legal

* Enter Legal (the overlord)

- TGA/TGAC and Australian Consumer Law review with bonus sanity check
- Friend or foe? Time will tell.

Act I, Scene II: *Green inside and out*



Act I, Scene III: *Who raided the green infographic jar?*

pure

organic

natural





















 FARM FRESH
 FAIR TRADE
 RAW
 SUSTAINABLY MADE
 ETHICALLY SOURCED
 FAMILY-OWNED BUSINESS
 LOW GLYCEMIC
 HANDMADE
 SMALL BATCH



ORGANIC COSMETICS

 HERBS
 FOR SENSITIVE SKIN
 SLS FREE
 BIODEGRADABLE PACKAGING
 CRUELTY FREE
 MSG FREE
 12M
 PH 5.5
 RECYCLE
 DYE FREE
 SILICONE FREE
 PESTICIDE FREE
 ALCOHOL FREE
 NON TOXIC
 UV
 ANTIBACTERIAL
 FOR ALL SKIN TYPE
 ECO FRIENDLY
 SULFATE FREE
 ORGANIC
 SUSTAINABLE
 NON GMO
 HAND MADE
 DADAREN EDEF
 GLUTEN FREE



 NOT TESTED ON ANIMALS
 CRUELTY FREE
 ORGANIC PRODUCT
 NITRATES FREE
 GLUTEN FREE
 SULFATE FREE
 NATURAL INGREDIENTS
 VEGAN
 SUSTAINABLE DEVELOPMENT
 SODIUM FREE
 HANDMADE
 FRESH COSMETICS
 BIODEGRADABLE
 PARABEN FREE
 PLANT DYED
 NATURAL FRAGRANCES
 SLS FREE
 RECYCLE
 PERIOD AFTER OPENING
 NON GMO

Back to our Avocado skincare range & the overlord



- * **Overlord:** “There are a heap of premium claims here on the sustainable qualities of this range”
- * **Green warrior:** “Yep, all marketing claims following the theme - green inside and out, not therapeutic claims ...”
- * **Overlord:** “Great concept but a few issues we need to explore further; at this stage other than verifying that an avocado is the colour green inside and out, I can’t approve much more!”
 - Can we substantiate these claims, do we have a reasonable basis to believe that the claims can be substantiated?
 - What’s the overall impression or likely effect on the target audience?
 - We will need Supply Chain, Procurement, Manufacturing, Operations input on: Organic, Natural, Environmentally Friendly, Sustainable, No Harm to the Environment, and let’s bring Reg Affairs back in on TGAC compliance too
 - BTW, I get that our intentions are all good here ... more work on the evidence chain please
- * **Green warrior:** “I’ll block more than 30mins and maybe the conference room next time!”

Getting it right for people, planet and profit



Claims cannot be vague and should be relevant

'Environmentally friendly' – how? based on what metrics?

Claims must be accurate

'No harm to nature' – end to end? doubtful unless the product is made in utopia

Comparative claims ambiguously suggesting greener credentials require even more robust data backed evidence

Natural, pure or organic claims may be acceptable if true, substantiated and clear language is used

'100% organic' may be qualified to the avocado fruit grown organically with the oil extract certified by an independent third party reputable agency/TGA; typically these claims are too vague and regulators don't like them

Logos and imagery are claims (colours are relevant too); false certifications disguising as trademarks will not pass the sniff test



- What ingredients are organic? Cannot make a bold broad unqualified claim
- Sustainable? Is this packaging, is this contents? How? End to end?
- Certified by who & for what?

Act I, Scene IV, *Near enough is not good enough*



BE ACCURATE, CLEAR AND SPECIFIC & UP TO DATE

Including general eco friendly or sustainable statements or images with no associated claims can be **vague, ambiguous and untrue**

Credible evidence must be up to date



NARROWER CLAIMS BETTER MANAGED

Supply chains even in the most sophisticated places are not 100% risk free from modern slavery down the chain – have you reported 100% risk free metrics in your MS statement?



PRODUCT LIFE CYCLE

All production and operational components need to be addressed – production process, transport to customers, disposal at end of life (does the customer need to do anything for the claim to be right?)

Intermission, *Key take-aways from Act 1*

- * Green claims will be misleading if there are no reasonable grounds for making them
- * Promoting that an entire product is organic when it is only the avocado oil that is certified organic will be misleading
 - Fine print disclaimers cannot correct a false claim or impression of a headline claim e.g. Natural (with a disclaimer that says its manufactured using chemicals and other toxic ingredients)
 - Over-exaggerating the attributes as puffery; therapeutic goods are a definite no and cosmetic goods playing up the green puff are high risk (green inside and out will be tricky!)
- * Claims **must be able to be substantiated with evidence** not anecdote or wishful thinking
 - Cannot claim 100% recyclable if only 65% of the product is e.g. a cap cannot be recycled
- * Claims **must be specific**
 - Should refer to the specific part of the product to which it relates e.g. 'natural' – which ingredient and occurring in nature or derived from nature? Does the processing of the avocado into avocado oil mean it is not natural when the processing is done via other non natural substances? Needs verification.
- * Claims **must not overstate** a benefit e.g. Locally sourced Avocados from 50% more local producers' – formerly only 10%? Is that a material benefit?

Act II, Scene I: Setting the scene

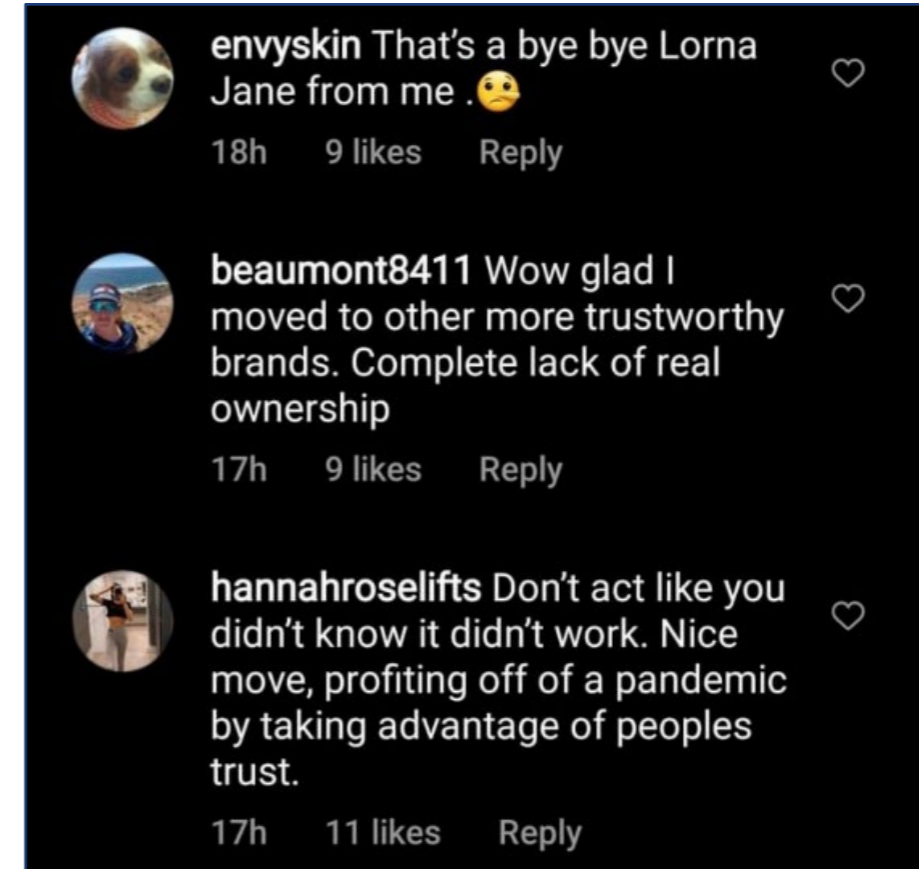
Sukin sued over carbon neutral marketing

Makers of Nurofen ran 'misleading and deceptive' campaign against Panadol: court

Bondi Sands faces US class action over alleged 'greenwashed' sunscreen

ACCC seeks \$10m fine for Heinz over 'reckless' marketing of kids snack

Tlou Energy cops first ASIC fine for 'greenwashing'



Greenwashing: Hiding in plain sight



Act II, Scene II: Enter the Regulators

Regulator	ACCC	ASIC	AD Standards	TGA
Prohibited conduct	<ul style="list-style-type: none"> Misleading or deceptive conduct False misrepresentations Misleading conduct as to the nature, manufacturing process or the characteristics of any goods. 	False or misleading representations or statements about a financial product	Environmental Claims that are: <ul style="list-style-type: none"> Misleading or deceptive Overstate the benefits Unable to be substantiated and verified 	Advertising claims must not be misleading and must be truthful, valid, accurate and substantiated . Prohibition includes use of the term 'natural'.
Generally applies to:	All representations 'in trade and commerce'	Investor materials and corporate statements such as annual reports	<ul style="list-style-type: none"> All advertising or marketing communications But not product labels/packaging; corporate reports etc 	All advertising in relation to therapeutic goods
Enforcement	Toolkit includes: <ul style="list-style-type: none"> Investigative processes Infringement notice Enforceable undertaking Litigation (incl. potential civil penalties) 	Toolkit includes: <ul style="list-style-type: none"> Investigative processes Infringement notice Enforceable undertaking Litigation (incl. potential civil penalties) 	<ul style="list-style-type: none"> Removal or amendment of advertisement Publication of adverse case report Referral to a government or industry body 	<ul style="list-style-type: none"> Warning or direction to take down the advertisement Cancelling or suspending ARTG registration Court proceedings (including criminal or civil penalties)

Increased regulatory focus on ‘greenwashing’

ACCC

“We will **closely scrutinise** businesses that make environmental or sustainability claims about their products, services or operations. This priority is aimed at addressing **concerns that businesses are falsely promoting environmental or green credentials** to unfairly capitalise on increasing consumer demand for products or services with these benefits...

Gina Cass-Gottlieb, ACCC Chair, 16 June 2022

The ACCC **won’t hesitate to take enforcement action** where we see that consumers are being misled or deceived by green claims...In looking at claims, we are **concerned about what the ordinary consumer will understand a claim to mean**. While a claim may be technically true, this does not necessarily mean that it will not mislead consumers.”

Delia Rickard, ACCC Deputy Chair, 20 September 2022

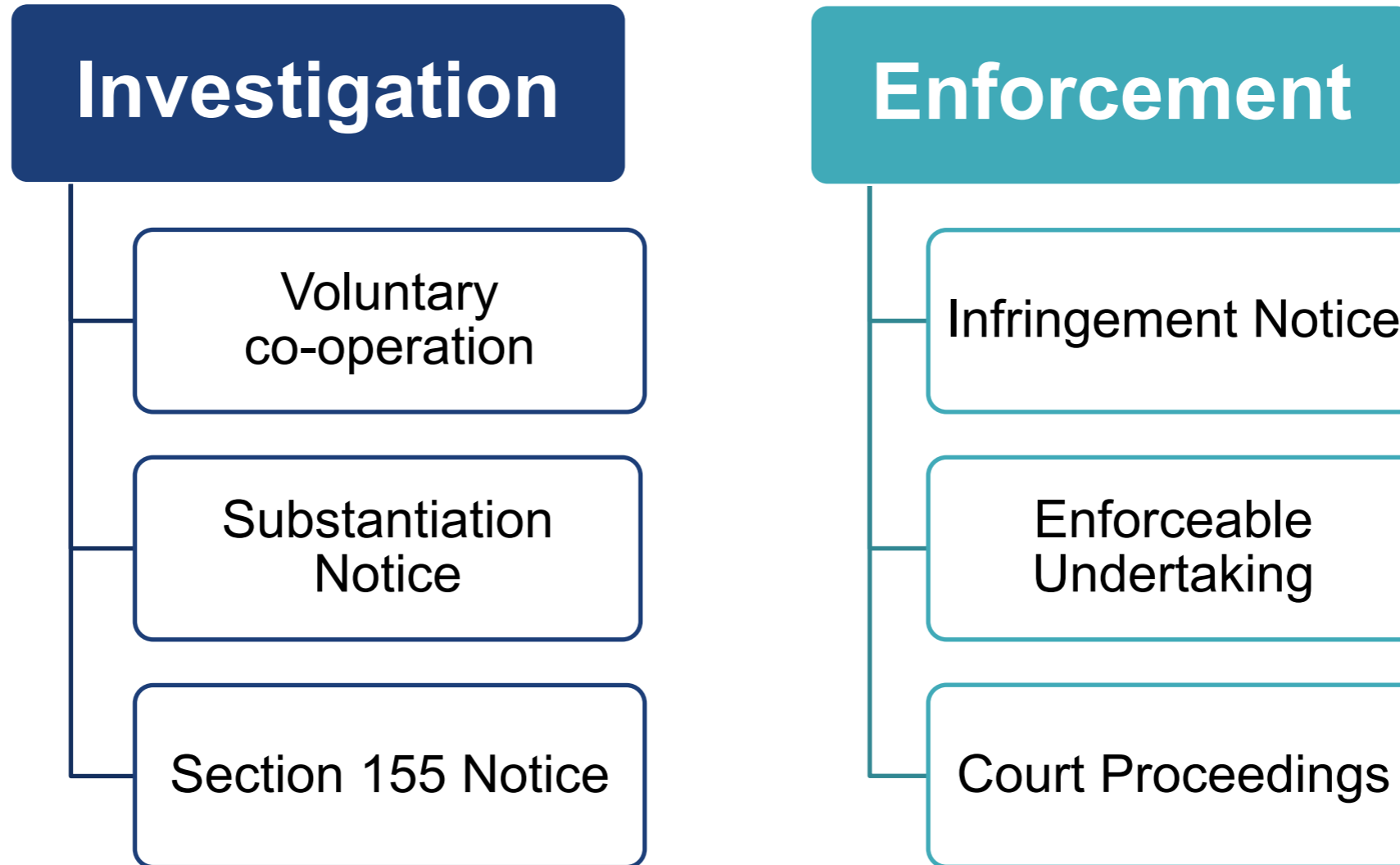
ASIC

“As entities promote sustainability and green practices as part of their value proposition, they **must ensure they can support those statements** and have a reasonable basis for doing so”

“ASIC is currently investigating a number of **listed entities** ... in relation to their green credentials claims. Companies are on notice that **ASIC is actively monitoring the market for potential greenwashing** and will take enforcement action, including Court action, for serious breaches.”

Sarah Court, ASIC Deputy Chair, 27 October 2022

ACCC Investigation and Enforcement Toolkit



Regulator proceedings: Potential outcomes

-  Declaration of contravention of Act
-  Injunction restraining future conduct
-  Pecuniary penalties
-  Corrective advertising
-  Mandatory compliance programs
-  Behavioural order
-  Compensation for those affected



New maximum civil penalties

For **companies**, the maximum penalty has been raised to the greater of:

- \$50 million;
- three times the value of the benefit obtained; or
- 30% of the company's adjusted turnover during the breach turnover period for the offence.

For **individuals**, the maximum penalty has been raised to \$2.5 million.

Act II, Scene III: Case studies



Bondi Sands: “Reef friendly”

- Bondi Sands sunscreen products labelled as “Reef Friendly”
- Products do not contain oxybenzone and octinoxate but do contain other ingredients alleged to be harmful to coral reefs and marine life



Sukin: Carbon neutral certified?

- Sukin skincare products achieved carbon neutral certification under the Carbon Reduction Institute’s program in 2015.
- Sukin withdrew from the program in 2018, but (allegedly) did not recall or remove products that were still labelled with CRI’s logo.



Carbon neutral energy?

- ASIC issued infringement notices to Tlou Energy totalling \$53,280.
- ASX announcements by Tlou made sustainability-related statements, including that electricity produced would be ‘carbon neutral’
- No substantive modelling of the likely carbon dioxide emissions that would be generated at the Tlou power station

UK Advertising Standards Authority

Innocent Drinks (23 February 2022)



**“Little drinks
with big dreams
for a healthier
planet”**

- Innocent said the ad was a ‘call to action’ and its ability to do this was supported by:
 - its “B Corp” status
 - a commitment to be carbon neutral by 2030
 - the opening of a carbon-neutral factory that ran on renewable energy and a cleaning system that reduced water usage by 75%.
- Did not provide evidence that the products themselves environmentally friendly.

Final Scene: Key takeaways from Act II



Substantiation is critical at all stages



Assume claims will be challenged and be prepared



Rapidly developing area → Re-assess claims



Mind your competitors



Engage with your legal team at an early stage

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