

EXECUTIVE OFFICE



**Australian
Competition &
Consumer
Commission**

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28 September 2009

Dr John Kaye MLC
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Dr Kaye

Your complaint about South East Fibre Exports Pty Ltd

I refer to your complaint to the Australian Competition and Consumer Commission (ACCC) dated 5 August 2009 in respect of certain representations by South East Fibre Exports Pty Ltd (SEFE) regarding the environmental benefits of its proposed bio-electricity generation plant.

You alleged that in a leaflet entitled *Forests: Nature's Solar Energy Collectors (the Leaflet)*, SEFE made misleading representations to the effect that the energy produced by its proposed bio-electricity generation plant could count as GreenPower under the government's GreenPower accreditation scheme (**the Representations**).

You further alleged that even if the Representations were not assertions of GreenPower accreditation, they carried a non-specific and unsubstantiated implication of environmental benefit.

I have considered your allegations in the context of sections 52, 53 and 55 of the *Trade Practices Act 1974 (the Act)*. The relevant provisions are set out at **Attachment 1** to this letter.

Having regard to the facts and circumstances and to legal precedent on the meaning of "in trade or commerce", it is my view that the Representations were not made "in trade or commerce" as required by the Act but rather, *in relation to* trade or commerce.

The purpose of the Leaflet appears to be to influence public opinion, presumably, so the community can form a favourable view of the proposed bio-electricity

plant. The Leaflet does not seek to encourage consumers to acquire SEFE's products.

In the High Court case of *Concrete Constructions (NSW) Pty Ltd v Nelson*¹ Mason CJ, Deane, Dawson and Gaudron JJ stated:

“...the reference to conduct “in trade or commerce” in s.52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed ... the words “in trade or commerce” refer to “the central conception” of trade or commerce and not to the “immense field of activities” in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.”²

In these circumstances, the Act has no application and the ACCC does not have jurisdiction to consider whether the Representations were misleading and/or deceptive in contravention of the Act. Accordingly, the ACCC does not intend to pursue your complaint any further.

Should SEFE make the Representations in the future, for example, in the course of marketing its bio-electricity, the Representations would probably be “in trade or commerce”. The ACCC could then consider whether the Representations are misleading and/or deceptive in contravention of the Act.

I understand that the Office of the Renewable Energy Regulator has determined that the electricity generated by SEFE's proposed bio-electricity plant may qualify for Renewable Energy Certificates, as the fuel to be used is a renewable energy source under the *Renewable Energy (Electricity) Act 2000*.³ In these circumstances, I consider that the Representations are unlikely to be considered misleading and/or deceptive for the purposes of the Act.

I also understand that SEFE is changing the reference in the Leaflet from “Green Power” to “Green Energy” and all Leaflets distributed henceforth will incorporate this change.

The decision not to pursue this matter should not be taken as an indication that the ACCC will not give consideration to unqualified ‘green power’ statements which are made in the course of trade and commerce to consumers.

Furthermore, I note that this decision does not impinge upon your right to take private legal action under the Act.

¹ (1990) 169 CLR 594; 92 ALR 193

² Ibid, CLR at 603; ALR at 197.

³ This is subject to the Office of the Renewable Energy Regulator granting SEFE's proposed bio-electricity plant accreditation as an “accredited power station” pursuant to the *Renewable Energy (Electricity) Act 2000*.

Thank you for bringing this matter to the ACCC's attention. If you wish to discuss any of the issues raised in this letter please do not hesitate to contact Elizabeth Rowling on (02) 9230 3851.

Yours sincerely



Brian Cassidy
Chief Executive Officer

Attachment 1: Relevant provisions of the *Trade Practices Act 1974*

Section 52 of the Act relevantly provides:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 53 of the Act relevantly provides:

A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:

...

(c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits that they do not have;

(d) represent that the corporation has a sponsorship, approval or affiliation it does not have;

...

Section 55 of the Act relevantly provides:

A person shall not, in trade or commerce, engage in 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.