FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Woolworths Limited [2019] FCA 1039

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| File number: |  |
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| Judge: | **MORTIMER J** |
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| Date of judgment: | 5 July 2019 |
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| Catchwords: | **CONSUMER LAW** – representations of “biodegradable and compostable” made on labelling of disposable dish and cutlery products sold by respondent – identification of nature of representations – whether representations were as to “future matters” within meaning of s 4 of the Australian Consumer Law – consideration of meanings of “future matter” and “reasonable grounds” in s 4 – whether respondent had reasonable grounds for representations – application dismissed  **CONSUMER LAW** – misleading or deceptive conduct – whether representations of “biodegradable and compostable” contravened ss 18, 29 or 33 of the Australian Consumer Law – consideration of factors relevant to identifying “ordinary and reasonable” consumer – application dismissed |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) Sch 2, *Australian Consumer Law* (Cth) ss 4, 18, 29, 33  *Evidence Act 1995* (Cth) ss 56, 135, 136, 191  *Trade Practices Act 1974* (Cth) s 51A  *Federal Court Rules 2011* (Cth) r 34.50 |
|  |  |
| Cases cited: | *Ackers v Austcorp International* *Ltd* [2009] FCA 432  *Aldi* *Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; 358 ALR 683  *Australian Competition and Consumer Commission v ACM Group Ltd (No 2)* [2018] FCA 1115  *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595  *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881; 60 IPR 296  *Australian Competition and Consumer Commission v Dateline Imports Pty Ltd* [2015] FCAFC 114  *Australian Competition and Consumer Commission v Emerald Ocean Distributors Pty Ltd* [2005] FCA 1703; ATPR 42-096  *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* [1999] FCA 1161; 95 FCR 302  *Australian Competition and Consumer Commission* *v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363  *Australian Competition and Consumer Commission v Jones (No 5)* [2011] FCA 49  *Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd* [2019] FCA 992  *Australian Competition and Consumer Commission v Purple Harmony Plates Pty Ltd* [2001] FCA 1062  *Australian Competition and Consumer Commission v Safety Compliance Pty Ltd (in liq)* [2015] FCA 211; ATPR 42-493  *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2007] FCA 1904; 244 ALR 470  *Australian Competition and Consumer Commission v We Buy Houses Pty Ltd* [2017] FCA 915  *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200  *Campomar Sociedad, Limitada v Nike International Limited* [2000] HCA 12; 202 CLR 45  *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 7)* [2008] FCA 1364  *City of Botany Bay Council v Jazabas Pty Limited (ACN 060 105 053)* [2001] NSWCA 94; ATPR 46-210  *Cummings v Lewis* [1993] FCA 190; 41 FCR 559  *Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240  *Friends of Leadbeater’s Possum Inc v VicForests* [2018] FCA 178; 228 LGERA 255  *Gardam v George Wills & Co Ltd (No 1)* [1988] FCA 289; 82 ALR 415  *Gate Gourmet Australia Pty Limited (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 149  *General Electric Co (of USA) v General Electric Co Ltd* [1972] 1 WLR 729  *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser (Australia) Pty Ltd (No 2)* [2018] FCA 1; 133 IPR 190  *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* [1984] FCA 180; 2 FCR 82  *Guy v Crown Melbourne Ltd (No 2)* [2018] FCA 36; 355 ALR 420  *Gwam Investments Pty Ltd v Outback Health Screenings Pty Ltd* [2010] SASC 37; 106 SASR 167  *Interlego AG v Croner Trader Pty Ltd* [1992] FCA 992; 39 FCR 348  *Krakowski v Eurolynx Properties Ltd* [1995] HCA 68; 183 CLR 563  *McGrath* a*nd Another v Australian Naturalcare Products Pty Ltd* [2008] FCAFC 2; 165 FCR 230  *Pramoko v Grande Enterprises Ltd* [2015] WASCA 157; 108 ACSR 469  *Rakic v Johns Lyng Insurance Building Solutions (Victoria) Pty Ltd (Trustee)* [2016] FCA 430; 259 IR 47  *Rosebanner Pty Ltd v EnergyAustralia* [2009] NSWSC 43; 223 FLR 406  *Samsung Electronics Australia Pty Ltd v LG Electronics Australia Pty Ltd* [2015] FCA 227; 113 IPR 11  *Seven Network Limited v News Limited (No 7)* [2005] FCA 1092  *Shape Shopfitters Pty Ltd v Shape Australia Pty Ltd (No 3)* [2017] FCA 865; 124 IPR 435  *Sportsbet Pty Ltd v Crownbet Pty Ltd* [2018] FCA 1045  *Sykes v Reserve Bank of Australia* [1998] FCA 1405; 88 FCR 511  *Whelan v Cigarette & Gift Warehouse Pty Ltd* [2017] FCA 1534; 275 IR 285 |
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| **Table of Corrections** |  |
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| 22 July 2019 | In the last sentence of paragraph 147, the word “had” has been replaced with “did not have”. |

ORDERS

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|  | | VID 231 of 2018 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant | |
| AND: | WOOLWORTHS LIMITED  Respondent | |

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| JUDGE: | MORTIMER J |
| DATE OF ORDER: | 5 july 2019 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent’s costs of and incidental to the proceeding, including any reserved costs, to be fixed by way of a lump sum.
3. On or before 4 pm on 26 July 2019, the parties are to submit proposed agreed orders as to lump sum costs, or alternatively inform the Court the parties have not reached agreement on the question of costs.
4. In the absence of any agreement as to the appropriate lump sum to be fixed for the respondent’s costs, the matter be referred to a Registrar for determination.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| The course of the proceeding | [7] |
| the products, their supply and sale | [12] |
| Description of the Products | [13] |
| How Woolworths came to purchase and offer the Products for sale | [18] |
| Where and how the Products were displayed | [41] |
| Legal principles and issues in dispute | [51] |
| Issues in dispute | [51] |
| The s 4 issues | [53] |
| Were these representations as to “future matters”? | [53] |
| If future matters, did Woolworths have reasonable grounds for making the representations? | [59] |
| Do the representations have a temporal aspect? | [67] |
| Were the representations false or misleading? | [70] |
| The identification of the class of consumers and the attributes of members of that class | [71] |
| The time taken, and the circumstances needed, for the Products to biodegrade and to turn into useful compost | [73] |
| Legal principles | [78] |
| Relevant provisions | [79] |
| Authorities on “future matters” | [85] |
| The meaning of “representation with respect to any future matter” | [86] |
| The reason for s 4 | [92] |
| The evidentiary onus | [113] |
| What does “reasonable grounds” mean in s 4? | [114] |
| The debate about Sykes and the need for actual reliance by the representor | [117] |
| The ACCC’s alternative s 18 case: particular points arising from the relevant authorities | [137] |
| The identification of the “class” | [140] |
| The representations made on the labelling of the Products | [145] |
| The section of the public to whom the representations were made | [156] |
| Determining what representations were made | [167] |
| Biodegradable | [177] |
| Compostable | [180] |
| What representations were conveyed by the whole phrase, in its context? | [188] |
| Did the representations have a temporal aspect? | [192] |
| Whether the representations were as to future matters | [196] |
| Whether Woolworths had reasonable grounds | [207] |
| Operation of s 4 of the ACL | [209] |
| The February 2014 material provided by Huhtamaki to Woolworths Hong Kong | [216] |
| The “certificates” and reports | [221] |
| The July 2014 material provided by Huhtamaki | [233] |
| The 2016 material provided by Huhtamaki | [235] |
| The “Sample Submission Specification” forms and “Product Specification” forms | [239] |
| The relevance of Woolworths’ bioplastics report and its 2009 Corporate Responsibility Report | [246] |
| The relevance of what was on the GreenGood USA website | [252] |
| The relevance of Woolworths’ Environmental Claims Policy and internal emails | [257] |
| Woolworths’ “reputable supplier” argument | [269] |
| Documents and information which cannot on any view provide reasonable grounds | [275] |
| Findings on the material, taken as a whole | [281] |
| Summary of my conclusions on the alleged representations and on s 4 of the ACL | [294] |
| Whether Woolworths has contravened sections 18, 29 and 33 of the ACL | [300] |
| Section 18: Were the representations false or misleading? | [308] |
| On the representations as the Court has found them: evidence of the Products’ capacity | [311] |
| Biodegradability | [312] |
| Compostability | [319] |
| Conclusion | [329] |
| On the representations as alleged by the ACCC, has the ACCC proved its case? | [331] |
| The Brosig test | [336] |
| The way Mr Brosig came to conduct his test | [341] |
| The conduct of the test and its results | [345] |
| The experts’ opinions about Mr Brosig’s test | [353] |
| Mr Leake | [353] |
| Professor Clarke | [356] |
| Mr Nolan | [359] |
| Mr Brosig’s evidence at trial | [374] |
| Conclusions on the Brosig test | [386] |
| Application of the test results to compostability of the impugned Products | [389] |
| The ACCC’s evidence and the arguments it made | [391] |
| The absence of a test by the ACCC | [392] |
| Mr Nolan’s evidence | [395] |
| A further issue with Mr Nolan’s estimates and the ACCC’s case | [406] |
| The evidence of other tests | [409] |
| The ACCC’s point about how many plates and cutlery could be composted at once, and whether this makes the representations misleading | [410] |
| The use of Australian standards | [412] |
| Other factors | [414] |
| Sections 29 and 33 | [416] |
| Overall conclusion | [420] |

REASONS FOR JUDGMENT

MORTIMER J:

1. This proceeding concerns labelling on certain disposable dishes and cutlery supplied and sold by the respondent (Woolworths) in its stores between November 2014 and November 2017. The products were sold in packaging branded with the word “Eco”, and featured a green colour scheme, with graphics of grass and butterflies around the label. The packaging also contained the statement “Made from a renewable resource”. I have reproduced some photos of the products at [17] below. I refer to them as the “Products” in these reasons.
2. Critically for the Australian Competition and Consumer Commission’s allegations in the proceeding, the packaging carried the label “Biodegradable and Compostable”. The ACCC alleges that by offering for sale and selling the Products in this packaging, Woolworths represented to consumers that the Products would:

… biodegrade and compost within a reasonable period of time when disposed of

(i) using domestic composting; or

(ii) in circumstances ordinarily used for the disposal of such products,

including conventional Australian landfill.

1. The ACCC contends these were representations as to future matters, and Woolworths did not have reasonable grounds for making the representations. Alternatively, the ACCC contends if they were not representations as to future matters, then the representations were in any event false or misleading or deceptive, or likely or liable to mislead or deceive, because the Products did not biodegrade and compost within a reasonable period of time when disposed of either using domestic composting or by ordinary disposal methods such as conventional Australian landfill.
2. Woolworths denies the Products carried the representations alleged, and denies the representations (however formulated) are properly characterised as representations as to future matters. Alternatively, Woolworths contends that if the representations are considered to be as to future matters, it had reasonable grounds for making those representations. Woolworths further contends the Products simply conveyed the representations that the Products are biodegradable and compostable, and this is accurate.
3. For the reasons set out below, I consider the ACCC has not proven the allegations it has made, and the application should be dismissed.
4. In these reasons, I have taken the approach of, in the alternative, determining the case as alleged by the ACCC, both in terms of its allegation that the representations related to future matters, and also on the basis of the representations it alleged were made. I consider that as a trial judge it is appropriate for me to take that approach, and to make all necessary findings of fact, including on an alternative basis in case I am wrong in my primary conclusions. This has, however, made the reasons somewhat complex.

# The course of the proceeding

1. The proceeding was commenced by way of an Originating Application and Concise Statement in March 2018. Initially the ACCC put its case only on the basis that the representations were as to future matters. After the first case management hearing, the ACCC amended its case to include, in the alternative, an allegation that even if the representations were as to present fact, they contravened the *Australian Consumer Law* (Cth) (which is Sch 2 to the *Competition and Consumer Act 2010* (Cth)) because they were false and misleading.
2. The parties cooperated in having the matter come to trial promptly, and a statement of agreed facts, together with agreed documents, was tendered pursuant to s 191 of the *Evidence Act 1995* (Cth). During the course of the trial a number of rulings were made on objections to evidence, in particular regarding the ACCC’s objection to the evidence of Mr Lothar Brosig, who conducted a composting trial of the Products. For reasons I gave at the time, Mr Brosig’s evidence was admissible.
3. Despite the parties’ best endeavours, a number of objections to evidence remained outstanding. Some objections were resolved by agreement between the parties and the evidence to which the objections related was not admitted, either in whole or in part, according to the agreement reached. Other evidence was admitted by agreement subject to use restrictions such as those in s 136 of the Evidence Act. After trial the parties agreed on further rulings thus resolving some outstanding evidentiary objections. Proposed consent orders were filed and those orders were made prior to the delivery of judgment. The parties’ submissions, both oral and in writing, were of great assistance to the Court.
4. The ACCC relied on evidence from the following witnesses:

* an affidavit affirmed by Laughlin Joseph Nicholls, Senior Investigator at the ACCC, which described the ACCC’s purchase of some of the Products and annexed photographs of those Products, in addition to relevant information and screenshots obtained by the ACCC from the Greengood Eco-Tech Co. Ltd website, the Woolworths website, and the Municipal Association of Victoria’s website;
* an affidavit sworn by Deirdre Ellen Griepsma, Manager of Sustainable Environment at the Bass Coast Shire Council, which described the program introduced by the Council for management of “food organics and garden organics” (FOGO) waste, and the materials the Council permits residents to place in FOGO bins;
* an expert report of John Gerard Nolan in which Mr Nolan provided his opinion on the meaning of the words “biodegradable and compostable” as applied to a disposal consumer product, circumstances in which food and green waste composts, and the biodegradability and compostability of the Products; and
* a reply expert report of John Gerard Nolan, in response to expert reports filed by Woolworths.

1. Woolworths relied on evidence from the following witnesses:

* an affidavit affirmed by Susan Maree Gregory, Secretariat Manager of Woolworths Group Limited, which described the relationship between Woolworths and its subsidiary Woolworths (H.K.) Procurement Limited and briefly outlined the employment history of Ms Usagi Ho, a former employee of that subsidiary;
* an expert report of Lothar Brosig in which Mr Brosig reported on a composting trial he had conducted on samples of the Products;
* an expert report of Simon Leake in which Mr Leake provided his opinion on the meaning of the terms “biodegradable” and “compostable”, what materials are biodegradable and compostable and how this is determined, composting processes available in Australia and whether the Products are compostable; and
* an expert report of Professor William Clarke in which Professor Clarke provided his opinion on the meaning of the terms “biodegradable” and “compostable”, factors which affect the rate at which material degrades or decomposes, the biodegradability and compostability of the Products, the waste management industry in Australia, and standards relating to compostability and degradability of plastics.

# the products, their supply and sale

1. In this part of my reasons, I make findings of fact based on matters in the agreed facts, or matters which were not the subject of any contested evidence.

## Description of the Products

1. The Products can be divided into two categories: disposable cutlery and disposable dishes, the latter consisting of both plates and bowls of various sizes. The cutlery came in packages of 20 pieces and the dishes came in packages of 10, 20 or 100 pieces.
2. The cutlery is made of Crystallised Polylactic Acid, or CPLA. CPLA comprises approximately 90% polylactic resin (made from fermented corn starch) and approximately 10% talc.
3. The dishes are made of bagasse, which is a fibrous product left over after sugarcane or sorghum stalks are crushed to extract their juice. Bagasse comprises approximately 98.8% of bagasse pulp, in addition to about 1% of a water resistant chemical and less than or equal to 0.2% of an oil resistant chemical. In other words, as Woolworths submitted, bagasse is a reconstituted natural fibre, not dissimilar in that sense to paper.
4. Both CPLA and bagasse are non-toxic and it is an agreed fact that upon decomposition in an “appropriately managed environment”, both may be used as a soil additive.
5. The following photos provide examples of some of the Products.





## How Woolworths came to purchase and offer the Products for sale

1. There are agreed facts that:
   1. the cutlery was supplied to Woolworths by Huhtamaki Josco Limited (Huhtamaki), and was manufactured by its majority-owned subsidiary Shandong Greengood Eco-Tech Co. Ltd (GreenGood); and
   2. the dishes were supplied to Woolworths by Huhtamaki, and manufactured during the period of the alleged contraventions by two different entities. Between 2014 and 2016, the dishes were manufactured by Huhtamaki’s subsidiary GreenGood, and between 2016 and November 2017, by Huhtamaki’s partner factory, Shandong Teanhe Green Pak Science and Technology Co Ltd (STG).
2. The narrative about how Woolworths came to decide to supply and sell the Products is somewhat opaque. Woolworths took the course in this proceeding of adducing limited documentary evidence which could be said to relate to its decision-making process, and did not call the then employee of its subsidiary (Ms Usagi Ho) who had engaged in some correspondence with Huhtamaki about the Products. Nor did it call any other employee. A narrative of sorts can be cobbled together from these documents and the agreed facts. Each of the parties sought to put these documents to forensic use to advance their own arguments and where necessary later in these reasons I refer to how the parties deployed these documents. The ACCC seeks to make something of the absence of evidence from Woolworths on these matters and I return to this later in these reasons.
3. In January 2014, Woolworths received a report about bioplastics it appears to have commissioned, entitled “The future role of bioplastics in Australian consumer goods packaging”. I refer to this as the “bioplastics report” in these reasons. In an apparent coincidence, the reviewer of the report was Mr Nolan, an expert witness for the ACCC in this proceeding. The term “bioplastics”, and the specific term “biobased bioplastics”, were described in the executive summary in the following way:

The term ‘bioplastic’ is used in this report to describe a large and diverse grouping of polymer types, which are generally defined as being biobased (renewably based), biodegradable (at end-of-life), or both.

The primary focus of this study is biobased bioplastics. The definition of a ‘biobased’ plastic, as applied in this report, is a polymer in which 100% of the carbon in the plastic is derived from renewable agricultural and forestry resources such as plant starch from sugarcane or corn, cellulose or plant/animal proteins.

1. The executive summary described the purpose of the review in the following terms:

To help Woolworths, its suppliers and other stakeholders make more informed decisions when considering the use of bioplastics for consumer packaging, Woolworths and Landcare commissioned this study to look at three key questions:

* Do bioplastics compete with food supply and affordability?
* Are bioplastics a better environmental choice than conventional alternatives?
* Are bioplastics compatible with the recovery and reprocessing systems currently prevalent in Australia?

1. In its terms therefore, the focus of the report was packaging, rather than products. However, the report did contain a section on “Consumer views” about biodegradable and compostable plastics. Neither party took the Court to this specific section, but I consider it is worthwhile extracting (with some typographical errors, as they appear in the original report):

4 CONSUMER VIEWS

A comprehensive market research study and report ‘*Consumer attitude to biopolymers*’ was commissioned by WRAP UK. The report discussed the extent of consumer confusion around biopolymers, and made the following summary points (WRAP, 2007, p. 29):

1. Consumers are not generally aware that they may already be buying biodegradable and compostable plastics.

2. Consumers do not generally look for information on how to dispose of packaging on the packaging itself.

3. Even when told that they are using biodegradable or compostable plastics, most consumers will dispose of it as they would a similar product made from conventional plastic.

The WRAP report went on to state that:

If consumers continue to behave as they have in the past, this will mean the quantities of biopolymers entering the recycling stream become large enough to cause serious problems for the plastics recycling industry.

The report’s conclusion was that clear policy was urgently required on how consumers should deal with the new plastics and this should be succinctly communicated, as it was important that conventional plastics recycling and recycling generally should not be jeopardised.

In the Australian context, the approach has not been to form such centralised policy or Directives as in Europe, but to encourage designers and specifiers to consider and make decisions on packaging on the basis of priority.

One of the clearest explanations is provided in the Australian Packaging Covenant *Design Smart Material Guide* on compostable plastic packaging (APC, 2013b). This guide systematically sets out the options and implications of design decisions ranging from: fitness for purpose, maximising product weight to packaging ratios and end of life management.

The APC Guide points out that bioplastics can fulfil the same function and performance as conventional polymers, and require the same considerations, compliance with standards, and product/packaging information for consumers. It also discusses end‐of‐life pathways, and the probability that most bioplastics will be disposed to landfill where they may decompose anaerobically over time.

The Australian Competition and Consumer Commission (ACCC) has produced two documents to clarify requirements: one on green marketing (ACCC, 2011) and another on end of life disposal claims on plastics bags, including claims on biodegradability, degradability and recyclability (ACCC, 2010). In the earlier document with respect to end of life, the ACCC states that:

being able to substantiate claims is particularly important if those claims predict future outcomes, such as whether plastics will biodegrade or degrade within a certain time frame and under certain conditions.

To date in Australia there has beens comparatively low level of general communications to households or commercial businesses encouraging separation of organics from recyclables and general waste. There has been even less communication on the matter of end‐of‐life impacts and composting of biodegradable plastics.

1. This report was admitted pursuant to a ruling under s 136 of the Evidence Act that its use was limited to the issue of whether Woolworths had reasonable grounds for the representations, if s 4 of the ACL applied and the representations were characterised as future representations. It was not therefore admitted as to the truth of its contents. Nevertheless, it may be relevant to note the following matters from this extract:
   1. the terms “biodegradable” and “compostable” are used in the report as descriptions of kinds of biopolymers;
   2. there had been some market research done about consumer attitudes to these kinds of products and it had been drawn to Woolworths’ attention; and
   3. the ACCC had produced two documents (in 2010 and 2011) about claims made in relation to such packaging. Neither of these documents were in evidence.
2. The bioplastics report contained definitions of the terms “compostable” and “biodegradable”. These assumed some relevance in the ACCC’s arguments about s 4 of the ACL and whether Woolworths had reasonable grounds for the alleged representations. Aside from those arguments, in this proceeding, it is a matter for the Court to determine how the reasonable consumer would understand those terms as they appeared on the packaging of the Products, and what if any representations were conveyed by the use of those terms.
3. Turning now to the chronology of how the Products came to be on Woolworths’ shelves, it is an agreed fact that Huhtamaki had been supplying products to Woolworths since approximately 2003. There is limited evidence about how these particular Products came to be developed for or supplied to Woolworths. The next relevant piece of evidence in the chronology concerns inquiries made in February 2014 about what “claims” were available to put on packaging for bagasse products. I find that inquiry was made by Ms Usagi Ho on behalf of Woolworths. Ms Ho was, at the time, an employee of Woolworths (H.K.) Procurement Limited, which the parties agree is and was a wholly-owned subsidiary of Woolworths. Woolworths (H.K.) Procurement Limited appears to have operated as a procurement business for Woolworths’ group operating companies in Australia and New Zealand, particularly for the purpose of procuring products from suppliers based in China and elsewhere in Asia. I shall call that corporation “Woolworths Hong Kong” in these reasons.
4. There is no context provided in the evidence for her inquiry, but the terms of Ms Ho’s email were as follows:

Hi Sheila,

We are working on the bagasse products packaging now.

Can you pls forward your current bagasse range claims on the packaging? We want to tell our customer how eco friendly of this material and put it on the packaging.

Can you pls forward your example for our reference today?

Thanks and regards,

Usagi Ho

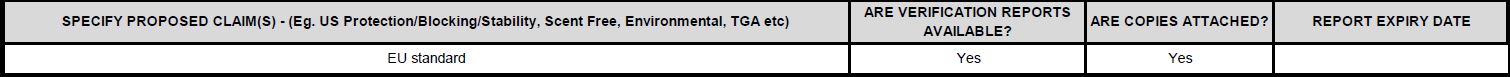
Sourcing Manager

Everyday Needs

Woolworths (H.K.) Procurement Limited

1. An employee of Huhtamaki responded, as requested, on the same day, attaching a number of documents including “certificates” and reports for their bagasse products. I will return to the content of those documents in my findings about the parties’ respective “reasonable grounds” arguments for the purposes of s 4 of the ACL. I note at this point, however, as Woolworths contends, that in the material supplied by Huhtamaki in response to Ms Ho’s request there were also some limited references to CPLA products.
2. The ACCC contends that Woolworths adduced no evidence about:

… what, if anything, was done with the email or its annexures, whether it was read by or relied on by the recipient at Woolworths HK, let alone by any relevant decision maker at Woolworths. Indeed, Woolworths has adduced no evidence about who the relevant decision maker/s were, or what regard was had to the communication by the recipient or other staff at Woolworths. Woolworths led no evidence from anyone involved in the communication at all, and took the view that it was not required to provide any explanation itself as to its conduct or the decision process it pursued.

1. Woolworths challenged this submission, and referred to a series of forms which had been tendered, called “Sample Submission Specification” forms or “SSS” forms (later re-named “Product Specification” forms or “PS” forms). There was no witness evidence about the role played by these forms: Woolworths invited the Court to draw inferences from the documents themselves. For present purposes one example will suffice. One SSS form related to a 20 pack “Select Eco Side Plate”, one of the dishes in the range covered by the ACCC’s allegations in this proceeding. The form contained details of who, on behalf of Woolworths, was identified as the “buyer” of the sample, and then all the details of the supplier/vendor, which in this case was Huhtamaki. There were descriptions of the packaging and dimensions of the product, and then under the heading “Labelling & Packaging Details”, the following information appeared:
   1. The country of manufacture and packaging is specified as China;
   2. Under the heading “Retail Pack Product Claims” there are the following entries:
2. Under the heading “Document Completed By”, the name of an employee of Huhtamaki was entered. The date the SSS form was prepared is stated to be 14 May 2014. The purpose of these forms, and whether, as their headings indicated, they related to the provision of “samples”, and for what purposes, is not the subject of any additional evidence.
3. If, as I find based on the date entered on most of the SSS forms in evidence, that these forms were completed in May 2014, by that stage, on the agreed chronology, Woolworths had already awarded Huhtamaki the supply of the Products. This appears to have occurred around 24 March 2014. It is an agreed fact that on that date an employee of Woolworths Hong Kong sent an email to Huhtamaki confirming it had been awarded the supply for those Products 在日前收到产品.
4. Between this date, and around mid-July 2014, on the agreed chronology, Woolworths undertook a process of commissioning, reviewing and approving the artwork for the packaging of the Products. At the end of July 2014, it is an agreed fact that there were further communications between Woolworths Hong Kong and Huhtamaki about the provision of “certificates” for some of the bagasse products. Whether or not these certificates have any relevance or probative force in the question of Woolworths’ “reasonable grounds” is a live issue between the parties, and I return to it below.
5. It is an agreed fact that from around 11 August 2014, Woolworths began receiving the Products, and in November 2014 it is an agreed fact that it commenced retail sales of the Products. There was further correspondence during 2016 between Woolworths Hong Kong and Huhtamaki about reports and certificates for the bagasse products and again, where necessary, I refer to this correspondence in the section of these reasons dealing with my findings on whether Woolworths had reasonable grounds for the representations it made, for the purpose of s 4 of the ACL.
6. Woolworths was notified of the ACCC’s investigation into the Products in early February 2017. It is agreed there were further communications between Woolworths Hong Kong and Huhtamaki during 2017 about certifications, some of which were expressly directed at the Products, but the underlying correspondence was not ultimately admitted into evidence, by agreement.
7. The final aspect of the narrative to which reference should be made is an email exchange that occurred in March 2014 between two Woolworths employees: Mr Kane Hardingham and Mr Adam Carrig.
8. Again, Woolworths adduced no contextual evidence about this email exchange, and no evidence about or from these two employees. Accordingly, I make findings on the basis of what is on the face of the emails themselves. Mr Carrig identified himself as holding a B.Sc. Biological Sciences, and as occupying the position of “Lead Quality Specialist - HardGoods / GM” at Woolworths. Mr Hardingham identified himself as occupying the position of “Environmental Manager” for Woolworths.
9. On 13 March 2014, Mr Carrig emailed Mr Hardingham in the following terms (with any typographical errors in the original):

Hi Kane,

As per our conversation earlier today regarding the select eco range of plates, bowls, cups etc...

After talking to the business team about only having the biodegradable claim on BOP, the feeling is that this claim is the major selling point and if we are not going to shout about it (ie; not on the front of pack), then why have it at all?

I can see the logic behind that thinking but are we restricted in anyway to not do this?

Any feedback or guidance would be greatly appreciated mate.

Cheers

1. Mr Hardingham replied later that day in the following terms:

Hi Adam,

Advice on the biodegradable claim has been given with the ACCC’s focus on green claims and the limited availability of council services which will take this material, all in mind.

Technically the products are biodegradable but as there is only 6-8% of councils offering this service the consumer has a limited opportunity to dispose of this material correctly.

With this all in mind, there are two options for these products.

1) A claim of biodegradable on back of pack.

2) No claim of biodegradable on pack at all, as is the case at the moment.

This advice is made based on the original product that was developed, if the specification and/or supplier changes then we would need to reassess the certifications for the product.

We have also arranged independent research on bioplastics, looking at three key questions:

Do bioplastics compete with food supply and affordability? In the short-term, no.

Are bioplastics a better environmental choice than conventional materials? There are still a lot of unknowns in life cycle assessments and the science in this area.

Are bioplastics compatible with the recovery and reprocessing systems currently available in Australia? Significant barriers exist.

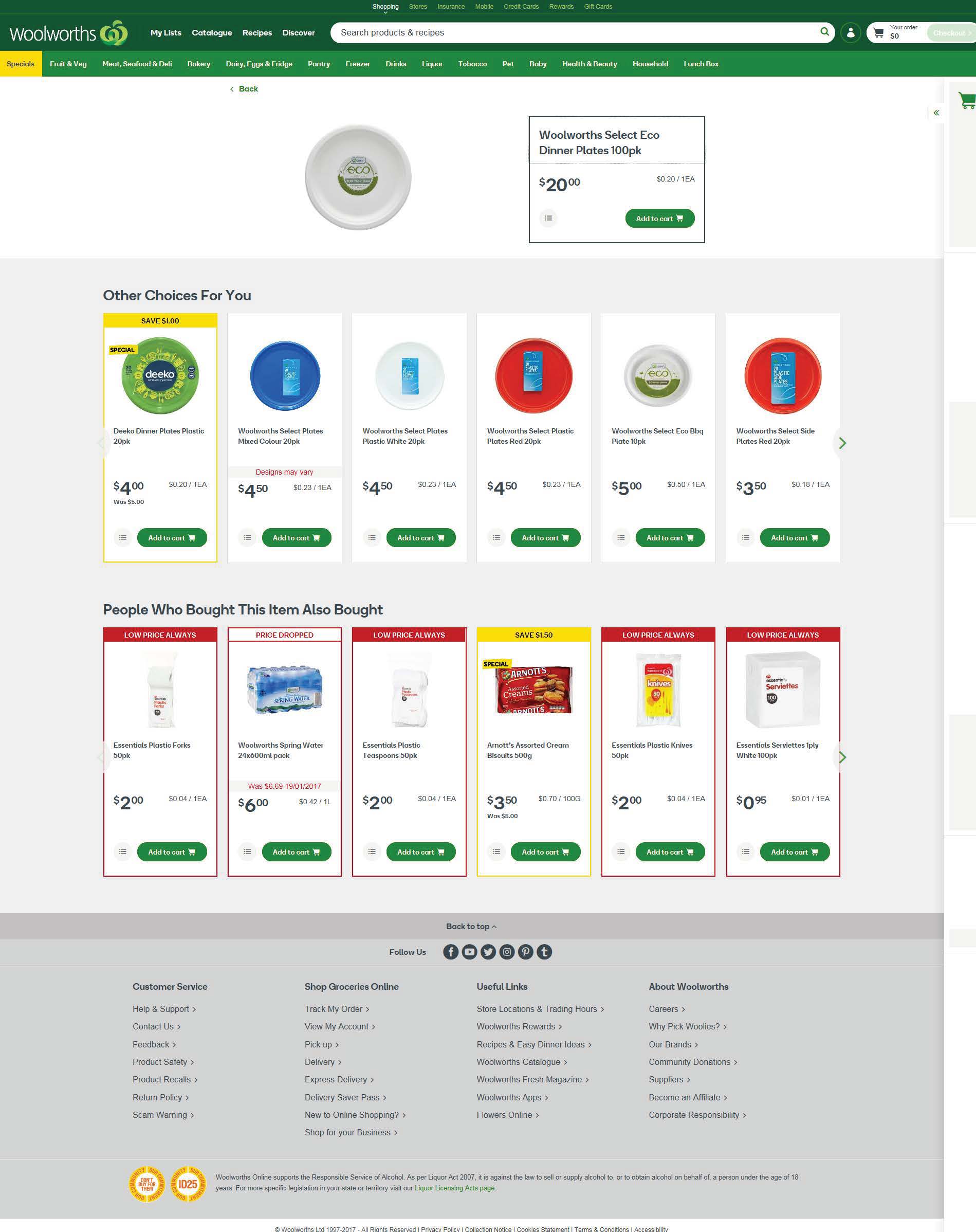
This research supports a cautious approach when it comes to this material.

Hope this helps. I am happy to meet with the team if further discussion is required.

1. Each of the parties sought to put these communications to different forensic uses in advancing their case, and where necessary I refer to them later in these reasons.
2. For present purposes, it is sufficient to find, as I do, that these communications were occurring within Woolworths itself, and at a reasonably senior level of management, given Mr Hardingham’s position title. In his email to Mr Carrig, Mr Hardingham was, I infer, referring to the bioplastics report, which I have referred to and set out excerpts of above. These communications occurred before Woolworths, on the timeline contained in the parties’ agreed chronology, settled on a version of the packaging artwork for the Products, and well before the Products went on sale in its stores.

## Where and how the Products were displayed

1. It is an agreed fact that the Products were available for sale both online and in Woolworths’ stores.
2. Mr Nicholls gave evidence about having accessed the Woolworths online store, and having found the Products available to purchase online. He exhibited to his affidavit a number of webpage captures from the Woolworths website, all of which provide similar displays of the Products. One example will suffice:



1. Mr Nicholls also exhibited to his affidavit a number of photographs taken by him and his colleague, Ms Kate James, of the Products displayed on shelves in Woolworths’ stores. Woolworths did not dispute the representativeness of these photos, in terms of how the Products were displayed for sale in its stores. I accept these photos are representative of how the Products were displayed in Woolworths’ stores. They were located in an aisle and on shelves amongst other disposable crockery and cutlery products, serviettes and other products intended for use in eating and drinking. They were displayed close to Woolworths’ “Essentials” range of similar products, including paper crockery and plastic cutlery, and also appear, from the photographs, to be located amongst a number of other brands of mostly plastic products.
2. It was an agreed fact that the Products were offered for sale in packs of 10, 20 and 100 items. From the photographs, it appears various sizes of packs were on display. The following photographs depict an example of the way the Products were displayed in Woolworths’ stores (located on the bottom shelf in these examples):



1. The webpage captures from Woolworths’ online store which were annexed to Mr Nicholls’ affidavit establish, and Woolworths did not dispute, that the pricing of the Products was higher than comparable plastic or paper products. As the ACCC submits, the webpage captures demonstrate, and I find, that:
   1. Woolworths offered for sale a 20 pack of plastic plates at $4.50, whereas a 10 pack of the Products was advertised for sale at $5.00; and
   2. Woolworths offered for sale an 80 pack of paper plates at $5.00, whereas a 100 pack of the Products was advertised for sale at $20.00.
2. It is also the case, and Woolworths did not dispute, that the packaging did not provide any instructions on how to dispose of the Products, or indicate whether consumers needed to do anything to the Products before disposing of them (such as cut the dishes up).
3. The ACCC places some emphasis in its submissions on the overall appearance of the packaging of the Products, in particular (and aside from the words at the centre of the proceeding):

* the prominence of the word “Eco”;
* the use of the colour green; and
* the use of images such as grass and butterflies.

1. The ACCC submits that:

The purpose of the message conveyed by the packaging was to provide assurance to consumers about an environmental benefit that would occur following the use and disposal of the product. This assurance was a matter of substance and importance given the marketing appeal of positive environmental messaging to the public generally, and the importance of ensuring that such messaging is properly considered, and used with accuracy and care — attributes missing with respect to the impugned conduct of Woolworths.

(Footnote omitted.)

1. Woolworths addresses these contextual submissions only briefly, as I understood it, really to contend that the context does not make the representations conveyed by the phrase “biodegradable and compostable” any less accurate or true, and that the additional components on the packaging were merely consistent with that primary phrase.
2. I deal with the substance of this submission later in these reasons, in resolving the question whether the alleged representations were made by Woolworths, and if so, whether they contravened the ACL. For present purposes, in terms of findings about how the Products were displayed and sold, I accept the ACCC’s submission that the context in which the Products were displayed and sold included the whole appearance of the packaging, with the components identified in [47] above being prominent.

# Legal principles and issues in dispute

## Issues in dispute

1. I propose to outline the issues in dispute, as they arise from the parties’ respective statements and submissions. It is these issues which determine the applicable legal principles. For ease of reference I shall refer to the words on the packaging of the Products as “the labelling”, and where I do so, I take into account all of the features and characteristics of the Products which I have set out at [1], and [13]-[17] above.
2. As I have noted, the ACCC’s case was initially put only as a case about future representations, pursuant to s 4 of the ACL. It was then amended to allege an alternative case of false, misleading or deceptive conduct if, contrary to the ACCC’s primary position, the representations made by Woolworths were not as to future matters.

### The s 4 issues

#### Were these representations as to “future matters”?

1. The ACCC submits that the labelling, seen in the context of the packaging as a whole, contained an “element of prediction”: namely, it contained a representation about the “likely performance” of the Products; or the ability of the Products “to do something in the future”. It submits:

Biodegrading and composting could only occur at some time in the future: following purchase, and after use, which was conceivably some time thereafter. The message conveyed by the product packaging was likely to cause consumers to anticipate things that would happen when disposing of these goods, in a predictive sense.

1. Woolworths, on the other hand, submits the labelling did not convey any prediction, forecast, promise or opinion about future events. To be a future matter, Woolworths contends, the factual matter represented must not be capable of being true or false at the time the representation is made. Woolworths further contends the labelling of these Products described the inherent properties of the Products, in the same way as a statement that a product is “flammable”, or “poisonous”, or “non-toxic”. Woolworths relies on the example of the word (or label) “recyclable”, submitting (by reference to s 51A of the *Trade Practices Act 1974* (Cth), the predecessor to s 4 of the ACL):

The word “recyclable” provides a close analogy to “compostable”. It would be difficult to contend that a statement that a conventional cardboard box, or an ordinary glass bottle, was “recyclable” was a representation “with respect to a future matter”. The statement is true at the time it is made. One does not need to wait and see what transpires. It does not fall within the mischief of that which s 51A was seeking to address.

1. The ACCC contests Woolworths’ contention that the labelling concerned an “immediately demonstrable fact”, such as the words “flammable” or “watchable” might convey. It contends the labelling involved predictions about how the Products would behave in “potential future circumstances”, depending on how they were treated and disposed of. As to the comparison with the word “recyclable”, the ACCC is not prepared to accept that word contains a representation as to a present matter, and appears to suggest it might also contain a representation as to a future matter for the purposes of s 4 of the ACL.
2. Woolworths submits, as I understood it, that the ACCC’s approach is too broad. It would encompass words or labelling on a product whenever there were future events attaching to the use or disposal of the product. For example, Woolworths submits:

If this was the proper way in which to approach consumer goods then nearly every representation on a product – that describes what the product will do when the product is being used – would be a representation with respect to a future matter. The possibilities are endless: “stain remover”, “air freshener”, “floor cleaner”, “disinfectant wipes”. Rather than being statements as to “future matters”, they all tell us what happens when the existing properties of the product in each case are utilised or engaged: common stains will be removed, the air will be freshened, the floor will be cleaned, a surface will be disinfected. Properly understood, they are statements of about the present nature or qualities of the product in question.

1. The second aspect of prediction said by the ACCC to attach to the labelling is that there was an implied representation that the Products would biodegrade and compost within a reasonable period of time. This might be seen as something of a self-fulfilling prophecy for the ACCC’s case: if the ACCC is correct that the labelling contained such an implied representation, then it is likely the labelling as a whole is properly characterised as being about a “future matter”, in the sense of a prediction (which is how Woolworths sought to describe the effect of s 4 of the ACL).
2. However, Woolworths contends that even if the ACCC is correct about the implied representation concerning “reasonable time”, then the representation was still one as to the inherent qualities of the Products. That is, if the representation was the Products “would biodegrade and compost within a reasonable period of time when disposed of using domestic composting or in circumstances ordinarily used for the disposal of such products, including conventional Australian landfill” (being the contention taken from the ACCC’s amended Concise Statement) then such a statement was either correct or incorrect at the time it was made, because those characteristics are “knowable and testable”.

#### If future matters, did Woolworths have reasonable grounds for making the representations?

1. The ACCC contends the effect of s 4(2) is to impose on Woolworths an evidentiary onus to prove it had “reasonable grounds” for making the representations, failing which the “deeming operation of the section is engaged”. The ACCC describes this onus in its written submissions as one requiring Woolworths to “adduce evidence”. I note this emphasis, because it runs through the ACCC’s submissions and its criticisms of the nature and extent of the evidence adduced in this proceeding by Woolworths.
2. Relying on the judgment of Heerey J in *Sykes v Reserve Bank of Australia* [1998] FCA 1405; 88 FCR 511 at 513, the ACCC contends Woolworths must prove, by evidence, the facts and circumstances existing at the time of the representations and on which it in fact relied. Those facts and circumstances must be objectively reasonable and support the representations made. The ACCC emphasises the need for proof of actual reliance and, where a corporation is the representor (as here), for the corporation to identify and adduce evidence of its state of mind. The ACCC submits this cannot be done in this proceeding through reliance on information held by an employee of a subsidiary (being Ms Ho of Woolworths Hong Kong).
3. The ACCC points to some of the documentary evidence to contend that Woolworths had a specific policy for the making of environmental claims (the Environmental Claims Policy), but also refers to the absence of evidence about whether that policy was followed in Woolworths’ decision-making concerning the acquisition and sale of the Products. There was, the ACCC contended, no evidence from Woolworths about communication of the procurement documents to any person or persons within Woolworths who made the decisions about the supply and sale of the Products, or evidence of reliance on those documents as grounds for making the alleged representations.
4. If the Court accepts (contrary to the ACCC’s contentions) that Woolworths has adduced evidence of actual reliance, the ACCC contends the available material did not provide Woolworths with objectively reasonable grounds on which to make the representations. On this limb of its case, the ACCC again emphasises Woolworths’ non-compliance with its own Environmental Claims Policy, the timing and content of some of the correspondence from Huhtamaki (including that some of the correspondence took place after the operative decision to sell the Products), concerns raised in the correspondence between Mr Hardingham and Mr Carrig (which I refer to above) which “demonstrates that Woolworths was aware that the claims [on the Products’ labelling] were problematic”, the absence of any testing or trials of the Products before they were made available for purchase, as well as the information provided from the manufacturer of the products (GreenGood) on its own website. The ACCC also contends:

The certificates provided to the Woolworths HK procurement employee, in light of the guidance available to Woolworths at the relevant time, provided no assurance to Woolworths that these specific Products would, following disposal using available waste disposal methods in Australia at the time, undergo biodegradation and composting into a useful, non-toxic soil additive within a reasonable period of time.

1. Nor, the ACCC submits, can Woolworths prove it had reasonable grounds because it relied on Huhtamaki’s status as a “reputable supplier”.
2. Even if the Court finds actual reliance does not need to be proved by Woolworths, in the alternative, the ACCC contends Woolworths did not have reasonable grounds, based on the information presented at trial, and relies in this regard on the evidence relevant to its alternative s 18 case.
3. Woolworths accepts the question whether the maker of a representation has reasonable grounds is an “objective question”, by which I take it to accept the question is to be answered objectively. Woolworths disputes the need for the existence of reasonable grounds to be established by evidence from the representor, and also disputes that there is a need to prove – in all cases – that the representor in fact relied on materials which were sufficient to provide reasonable grounds. Woolworths contends that criterion, drawn from *Sykes*, should not be seen as required in every case under s 4.
4. In any event, Woolworths contends that the test in *Sykes* is satisfied on the evidence. It contends it requested and received information – including certifications and test results – from Huhtamaki, and that Huhtamaki was a “reputable supplier” of the kind discussed in the relevant authorities. Woolworths further contends that Huhtamaki provided information to Woolworths at the time the representations were made and that Woolworths in fact relied upon the information received from Huhtamaki by its employees (or employees of its subsidiary), as demonstrated by the information contained in the SSS and PS forms. Woolworths also contends it was objectively reasonable for it to rely on the materials received from Huhtamaki, and that those materials supported the truth of the representations made in the labelling on the Products. Woolworths contends that the matters on which the ACCC relies to prove lack of reasonable grounds are insufficient. In its closing submissions, Woolworths contends:

The respondent has discharged its burden pursuant to s.4 of the ACL of adducing “evidence to the contrary”. In those circumstances, the deeming effect of s 4(2) no longer applies and the ACCC has to establish a lack of reasonable grounds for the making of the representation. The ACCC has failed to do so.

### Do the representations have a temporal aspect?

1. This issue is one of characterising the representations made by the labelling “biodegradable and compostable” on the product packaging. The ACCC contends the Court must determine what was the “dominant message” given by the labelling on the Products, considered in their packaging and context as a whole, and then contends that there is a “necessary temporal aspect” to the labelling. The focus in this aspect of the ACCC’s case appeared to be on the “compostable” aspect of the label. It submits that, as to the use of the word “compostable”:

Consumers understood that there would be a finished product, and that the finished product would look and feel a certain way, and be able to be used in certain ways — in other words a completed process within a reasonable time.

1. Woolworths submits there was no such temporal aspect: it contends the ACCC has not adduced any evidence to suggest that consumers believed there were time limits, or time periods, around composting processes. It contends that the evidence before the Court, in large part consisting of expert evidence, suggests composting periods vary substantially, depending on factors including the composting regime and the attentiveness to ideal composting requirements. Woolworths further contends that the process would have to be “very slow indeed” to be able to say a product that is slow to compost was not “compostable”. The time taken would need to be out of line with that taken for “other conventional compostable material” (such as grass clippings and leaves) to compost. On the evidence, Woolworths contends such material might take from a number of weeks to up to two years to break down into usable compost. The ACCC has not, Woolworths submits, proven the Products were so slow to compost as to be out of step with other, comparable, compostable materials. It also submits that the evidence available suggests the Products would break down into usable and useful compost within a reasonable period of time, and probably at the outer limits in less well-managed composting systems at around ten weeks.
2. While these submissions overlapped with submissions about whether the representations were false or misleading, as I understood the argument, another point made by Woolworths’ submissions was that it would be incorrect for the Court to imply into the label “biodegradable and compostable” any representation about a period of time over which those processes would occur, because in fact those time periods are so variable.

### Were the representations false or misleading?

1. The resolution of this issue, obviously one of the principal contested issues at trial, has a number of components. That is because there were competing contentions, and reliance on competing evidence, which were said variously to tend to prove each party’s case in relation to Woolworths’ alleged contraventions of the ACL. I shall refer to this as the “ACCC’s alternative s 18 case” in these reasons.

#### The identification of the class of consumers and the attributes of members of that class

1. The ACCC emphasises that the class of consumers should not be identified as having a sophisticated knowledge of biodegradation and composting, or of the differences between disposal in landfill and disposal in a compost. The ACCC contends that consumers with home composts or “some degree of knowledge about home composting but who do not practise it” would expect, absent qualification or disclosure, that the Products would compost at the same or a similar rate as other organic waste products. The ACCC refers to the “environmental messaging” on the packaging and submits that:

In the absence of any direction or qualification on the product packaging, such a consumer would reasonably think that the product would biodegrade and compost if disposed of in the ordinary course after typical use, such as in a council bin after use at a picnic or at home in ordinary waste.

(Footnote omitted.)

1. Woolworths submits that the class of consumers can be assumed to have a degree of common sense, and in this case it was relevant the Products were sold next to “conventional disposable cutlery and plate products”, because that would be the comparison consumers were making. In other words, a comparison with products which are not biodegradable and cannot be composted. Woolworths submits consumers would have a variety of states of knowledge about composting – from none at all, to a sophisticated knowledge and practice of home composting – but ordinary consumers would understand that products are composted to avoid them going into landfill, that people compost to reduce waste and produce a material that may be useful for their garden, and that the composting process involves material breaking down organically. It submits the label “biodegradable” would speak to a larger range of consumers than “compostable”, depending on a consumer’s own waste disposal practice.

#### The time taken, and the circumstances needed, for the Products to biodegrade and to turn into useful compost

1. This was the issue which occupied most of the expert evidence and a substantial portion of the parties’ submissions. Again, the focus was predominantly on the composting process, rather than biodegradation. The ACCC also seemed to focus on the fact the label stated “biodegradable **and** compostable” and not “biodegradable **or** compostable”. This also appeared to explain why the focus was on whether the Products were “compostable”, because the ACCC contended that the labelling “g[ave] work to both words” and was thereby false or misleading to the extent it suggested that the Products could be disposed of in both landfill and compost, in circumstances where the Products would not compost in landfill. I do not consider this point has any merit, but in any event I make findings about how consumers would understand each part of the phrase, and the whole of the phrase.
2. The ACCC submits – relying more on “misleading” than on “false” or “deceptive” – that no matter what kind of common disposal method was used (disposal in a council bin that goes to landfill or in a home compost), the Products would not biodegrade and compost within a reasonable period of time. It also submits that, no matter what composting system was used, the Products would compost more slowly into a usable form than other organic products suitable for composting, such as food scraps. It contends the volume of the Products disposed of in one site would significantly affect the rate of composting, and slow it down even further. Further, the ACCC contends the Products would take longer to transform into an “acceptable” looking product to be used in compost because they would not be suitable as a finished compost product any time prior to complete disintegration.
3. In answering these submissions, Woolworths places great emphasis on the absence of any tests or trials conducted by the ACCC to make out its case regarding the compostability of the Products. The only trial conducted was done on behalf of Woolworths, by Mr Brosig on the instructions of Mr Leake. Woolworths submits Mr Brosig’s test demonstrated the Products were “readily compostable” in an industrial composting system, and were indicative of the time the Products would take to compost in a well-managed home compost system. Woolworths further submits the trial also indicated that even in a home compost that was not well-managed, the Products would turn into usable compost in a longer period of time, but contends that other compostable products would also take longer to compost in those conditions.
4. In dealing with these competing submissions, the Court will need to determine the weight to be given to Mr Brosig’s trial, and to the opinions of Professor Clarke, Mr Leake and Mr Nolan respectively. Included in this determination will be the weight to be given to the evidence about the voluntary Australian Standard AS 5810-2010 entitled “Biodegradable plastics – Biodegradable plastics suitable for home composting” from Mr Nolan, Mr Leake and Professor Clarke. Consideration will also need to be given to the evidence about the range of conditions likely to exist in home composting systems, and to the differences between thermophilic and non-thermophilic conditions for composting. The ACCC’s submissions about the numbers of the Products which might be disposed of by a consumer at any one time (given their character as disposable cutlery and dishes) will also need to be considered. Woolworths contends this point is without merit.
5. The evidence before the Court suggested that some councils in the States of Victoria and New South Wales offered consumers the option of having their organic waste disposed of in an industrial composting system. There was evidence from Ms Griepsma, of the Bass Coast Shire Council, that the absence of an appropriate marker or symbol on the Products would mean the Products would be rejected for such processing and directed to landfill. Therefore, the parties’ arguments focussed on the options generally available to most consumers for disposal of the Products, being placing the Products in ordinary waste bins to be disposed of in landfill, or disposal in home composting systems. Although neither party addressed this, it seems to be assumed by both parties that it is irrelevant if consumers (wrongly) think they can dispose of these Products in recycling bins.

## Legal principles

1. Since the ACCC maintained the “future matters” allegations as the principal way in which it put its case against Woolworths, I deal first with the applicable principles concerning the scope and operation of s 4 of the ACL.

### Relevant provisions

1. Although some are well-known, it is still useful to set out the text of the relevant provisions. Especially in relation to s 4, the text is important in resolving some of the contentions between the parties about its operation.
2. Section 4 provides:

**4 Misleading representations with respect to future matters**

(1) If:

(a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and

(b) the person does not have reasonable grounds for making the representation;

the representation is taken, for the purposes of this Schedule, to be misleading.

(2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:

(a) a party to the proceeding; or

(b) any other person;

the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

(3) To avoid doubt, subsection (2) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or

(b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.

(4) Subsection (1) does not limit by implication the meaning of a reference in this Schedule to:

(a) a misleading representation; or

(b) a representation that is misleading in a material particular; or

(c) conduct that is misleading or is likely or liable to mislead;

and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

1. Section 18 provides:

**18 Misleading or deceptive conduct**

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).

Note: For rules relating to representations as to the country of origin of goods, see Part 5-3.

1. Relevantly to the provisions on which the ACCC relies, s 29 provides:

**29 False or misleading representations about goods or services**

(1) A person must not, in trade or commerce, 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:

(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or

…

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or

…

Note 1: A pecuniary penalty may be imposed for a contravention of this subsection.

Note 2: For rules relating to representations as to the country of origin of goods, see Part 5-3.

1. Section 33 provides:

**33 Misleading conduct as to the nature etc. of goods**

A person must 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.

Note: A pecuniary penalty may be imposed for a contravention of this section.

1. At a general level, it should be recalled that consideration of alleged contraventions of provisions such as s 18 or s 29 involves a two-stage process: first, determination of whether the alleged representation is made (or what, if any, representation is made) by the statement or conduct impugned; and second, whether the representation is misleading, or deceptive or false, or likely to have those effects: see *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2007] FCA 1904; 244 ALR 470 at [14]-[15] (Gordon J).

### Authorities on “future matters”

1. There are three aspects of the applicable principles to be considered:
   1. what is meant by a “representation with respect to any future matter” in s 4;
   2. what is the onus borne by the representor for the purposes of s 4; and
   3. if that onus is discharged, what the applicant must prove, in relation to reasonable grounds.

#### The meaning of “representation with respect to any future matter”

1. The parties’ submissions diverge about the width of this phrase in s 4. The approach I have taken, which accepts the contentions put by Woolworths, is also consistent with the approach recently taken by Gleeson J in *Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd* [2019] FCA 992, particularly at [276]-[286], especially at [285].
2. Woolworths submits the phrase is concerned with:

… representations, such as predictions, promises, forecasts and opinions as to future events where the factual matter represented is not capable of being true or false at the time the representation is made (because it lies in the future).

(Original emphasis.)

1. The ACCC submits that language is too narrow, and does not accommodate authorities which have applied s 4 to situations where there is “a representation of likely performance”. It also relies on descriptions such as whether the representation has “an aspect of futurity about it”, referring to the observations of Foster J in *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser (Australia) Pty Ltd (No 2)* [2018] FCA 1; 133 IPR 190.
2. Woolworths’ submissions should be accepted. They reflect the text of s 4, when seen in its context, and having regard to its purpose. Those are the governing principles for construing the phrase: see my summary of the relevant authorities in *Friends of Leadbeater’s Possum Inc v VicForests* [2018] FCA 178; 228 LGERA 255 at [44]-[46].
3. However, some preliminary observations should be made. The purpose of s 4 is facultative: it does not itself impose any separate or different liability. The prohibitions remain in the operative provisions in Ch 2 of the ACL. In circumstances to which it applies, s 4 imposes an evidentiary onus on a representor, but maintains the legal onus on the party alleging a contravention of Ch 2 of the ACL: see in particular confirmation of this in s 4(3)(b). Conversely, s 4(3)(a) makes it clear that compliance with the evidentiary onus does not necessarily result in rejection of the alleged contravention: rather, it simply places the party making the allegation of contravention in the usual position of being required to prove the allegation on the balance of probabilities. As Foster J said in *GlaxoSmithKline* at [137]:

It is an evidentiary provision only and does not reverse the legal or persuasive burden which the applicant bears of establishing that reasonable grounds for making the representations did not exist (see also *Crowley v WorleyParsons Ltd* [2017] FCA 3 at [71]).

1. Where the deeming effect of s 4(2) is displaced by the adducing of “evidence to the contrary”, then the ultimate onus of proving the absence of reasonable grounds will remain with the party alleging contravention: here, the ACCC.

#### The reason for s 4

1. It is accepted that s 4 bears a relationship to s 51A of the TPA, although it does not operate in quite the same way. It is worth setting out the terms of s 51A:

(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.

(2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

(3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

1. The history of the introduction of s 51A into the TPA in 1986 was traced by Allsop J (as his Honour then was) in *McGrath* a*nd Another v Australian Naturalcare Products Pty Ltd* [2008] FCAFC 2; 165 FCR 230 at [166]-[176]. As his Honour recognised at [165], by reference to the authorities there cited, legislative history can assist a court in determining the context of a statutory provision. In tracing the history of the provision, his Honour noted the reference in the Explanatory Memorandum to the Trade Practices Amendment Bill 1985 (Cth) to the observations of Franki J in *Thompson v Mastertouch TV Services Pty Limited* (1977) 15 ALR 487 at 495, where Franki J had identified the gap that the introduction of s 51A was designed to fill. Justice Franki had stated:

… a prediction or statement as to the future is not false within the words of [s 59] if it proves to be incorrect unless it is a false statement as to an existing or past fact which may include the state of mind of the person making the statement or of a person whose state of mind may be imputed to the person making the statement.

1. Reference should also be made to the observations of the Full Court in *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* [1984] FCA 180; 2 FCR 82, a defamation action which also alleged contraventions of s 52 of the TPA in relation to published statements about the second applicant, a professional cricketer. The Full Court said at 88:

If a corporation is alleged to have contravened s. 52(1) by making a statement of past or present fact, the corporation’s state of mind is immaterial unless the statement involved the state of the corporation’s mind. Whether or not s. 52(1) is contravened does not depend upon the corporation’s intention or its belief concerning the accuracy of such statement, but upon whether the statement in fact contains or conveys a meaning which is false; that is to say whether the statement contains or conveys a misrepresentation. Most commonly, such a statement will contain or convey a false meaning if what is stated concerning the past or present fact is not accurate; but a statement which is literally true may contain or convey a meaning which is false.

Many statements, for example, promises, predictions and opinions, do involve the state of mind of the maker of the statement at the time when the statement is made. Precisely the same principles control the operation of s. 52(1) with respect to the making of such statements. A statement which involves the state of mind of the maker ordinarily conveys the meaning (expressly or by implication) that the maker of the statement had a particular state of mind when the statement was made and, commonly at least, that there was basis for that state of mind. If the meaning contained in or conveyed by the statement is false in that or in any other respect, the making of the statement will have contravened s. 52(1) of the Act. Compare *Lyons v. Kern Konstructions (Townsville) Pty Ltd* (1983) 47 A.L.R. 114.

The non-fulfilment of a promise when the time for performance arrives does not of itself establish that the promisor did not intend to perform it when it was made or that the promisor’s intention lacked any, or any adequate, foundation. Similarly, that a prediction proves inaccurate does not of itself establish that the maker of the prediction did not believe that it would eventuate or that the belief lacked any, or any adequate, foundation. Likewise, the incorrectness of an opinion (assuming that can be established) does not of itself establish that the opinion was not held by the person who expressed it or that it lacked any, or any adequate, foundation.

1. In *McGrath* at [177]-[191], Allsop J also traced the judicial interpretation of s 51A, and the debate about whether it imposed a legal onus of proof or an evidentiary burden to remove the effect of the deeming provision. Having determined it was the latter, Allsop J (at [192]) described the effect of s 51A(2):

If evidence is adduced by the representor that is said to be evidence to the contrary, it will be for the Court to determine whether it is to the contrary in the sense just discussed. If it is, the deeming provision will cease to operate. That was the view of Emmett J, as understood by Keane JA. That is my view. That was not, however, an expression of the view that the legal or persuasive onus has been changed by s 51A(2), as some of the judgments in the “trend of established authority” referred to by Keane JA have stated. For instance, if evidence “to the contrary” is adduced by the representor, and if the representee itself adduces evidence tending to the lack of reasonable grounds, the matter might be equally poised. In such a case, there has been evidence “to the contrary” adduced by the representee, thereby eliminating the operation of the deeming provision, and, on the totality of the evidence, the proof of the reasonableness (or lack thereof) of the grounds is evenly balanced. Section 51A(2) does not, in my view, mean that in those circumstances the representor has not met an onus. The section does not cast the legal or persuasive onus, in such a case, on the representor. Its terms do not say so. The enactment history makes clear that the terms were deliberately chosen not to say so.

1. The difference between s 51A and s 4 is that s 4(3) implements the approach set out by Allsop J in *McGrath*. See also: Lockhart C, *The Law of Misleading or Deceptive Conduct* (5th ed, LexisNexis Butterworths, 2019) at [4.38].
2. I consider this was the kind of construction of the term “future matter” that was adopted by Nicholas J in *Samsung Electronics Australia Pty Ltd v LG Electronics Australia Pty Ltd* [2015] FCA 227; 113 IPR 11. The facts in *Samsung* concerned television commercials and related internet, cinema and point of sale advertising undertaken by LG to advertise and promote a range of 3D televisions that employed a particular form of 3D technology. Samsung alleged the advertising contravened s 18 and s 29(1)(a) of the ACL. Some of the representations conveyed by the advertising were said to be about “future matters”. For example, as Nicholas J explained at [82], one advertisement was alleged to convey a representation that “conventional 3D TVs can only be viewed in the dark” and also to convey a representation that “a person watching conventional 3D TV will have to do so in the dark”, which Samsung alleged to be false or misleading.
3. The parties referred the Court to [85] of his Honour’s reasons, but what his Honour said at [83] is also important:

Most of the representations which Samsung alleges were conveyed by the TVCs consist of representations about the performance characteristics of conventional 3D TVs and LG Cinema 3D TVs. Each of these representations is pleaded as, and in substance is, a statement of fact. Whether or not the TVCs also convey representations with respect to future matters depends upon the proper characterisation of the representations actually conveyed.

1. At [84], Nicholas J then set out his understanding of the operation of s 4:

The expression “future matter” is not defined by the ACL. The same expression as used in s 51A of the TPA, was also not defined. However, when read in context, the expression is not hard to understand. A “representation with respect to any future matter” for the purposes of s 4 of the ACL and, before it, s 51A of the TPA, is a representation which expressly or by implication makes a prediction, forecast or projection, or otherwise conveys something about what may (or may not) happen in the future.

1. At [85], Nicholas J distinguished between a statement about the “character” of a representation and conclusions that might be drawn from that character:

It is important to distinguish between the representation actually conveyed by a product advertisement and what conclusions might be drawn from it. A person may reasonably infer from the statement “this is a 3D TV” that he or she will be able to view the TV in 3D at some time in the future. However, this does not change the fundamental character of the representation which is one made with respect to an existing state of affairs. In this case I am satisfied that none of the representations conveyed by the TVCs can be characterised as having been made with respect to a future matter.

1. Then at [86], Nicholas J distinguished the authorities about health and therapeutic products (referring specifically to *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* [1999] FCA 1161; 95 FCR 302 which concerned an electrified mat, represented to have particular health effects once a person slept on it). His Honour relevantly said:

The representations made, as found by his Honour, were broadly to the effect that as a result of its emission of negative ions, the mat benefits the health of persons who sleep on it. That decision, and others concerned with the efficacy of therapeutic products that are said to offer health benefits when administered or used as directed, are distinguishable from the present case. In such cases the representation is made with respect to a future matter in that the consumer is told that if he or she uses the product a particular health benefit will be obtained at some time in the future. I do not think it is possible to tease any such representation out of any of the TVCs in issue in this proceeding.

1. That conclusion is consistent with his Honour’s interpretation of the term “future matter” as involving a prediction, forecast or projection.
2. I accept Woolworths’ submissions that this construction of “future matter” as involving a prediction, forecast or projection is also consistent with the concept of “reasonable grounds”, present in both s 4 and in s 51A. Representations about the future inherently involve an opinion or prediction of some sorts, and thus involve the disclosure of a (present) state of mind by the representor. The purpose of the “reasonable grounds” criterion is to require an appropriate basis for the state of mind (being the opinion or prediction) disclosed by the representation. Whether or not there were reasonable grounds for the representation about what might happen in the future would be relevant to establishing the character of the representation as misleading, or false, or deceptive. This point is, with respect, well made by Rares J in *Ackers v Austcorp International* *Ltd* [2009] FCA 432 at [359] and [363]:

When, as here, the representation is an assurance of an income stream over a period, it has the character of a prediction or forecast. It is about a future state of affairs which can only be verified by future experiences over the term of 10 years. Such a representation has a character distinct from that of a statement about rent which is currently due and payable. The latter is a statement with respect to an existing or present state of fact. The maker of a representation with respect to a future matter cannot know, however sure he or she is, that it will come true…

…

Section 51A recognises that representations with respect to a future matter can be objectively misleading or deceptive if the prediction turns out in due course to be wrong. If s 52 operated in that unqualified way, because of the consequence of future error it would create liability for every representation about future matters, however responsibly the representation may have been made at the time. So, s 51A ordinarily affords a representor an important protection in making such a wrong prediction if, when making it, the representor had reasonable grounds for doing so.

1. Despite the submissions made by the ACCC, I do not consider this construction is in substance any different to a construction which uses the language of “likely performance” of a product. A “prediction” may be a form of representation about “likely performance”. So might a “forecast”. Altering the language used in this way does little to elucidate the meaning of the phrase in s 4.
2. The ACCC gives a large number of examples in its written closing submissions (at [71]-[80]) to support the proposition that the term “future matters” extends to the “likely performance” of a product. As I understand it, that proposition is said to be applicable to the present case because the labelling “biodegradable and compostable” is said by the ACCC to involve a representation as to the “likely performance” of the cutlery and the dishes following their disposal. Aside from the authorities to which I refer below, I do not consider any of the authorities on which the ACCC relies suggest a meaning of the phrase “future matter” which is different from the meaning of a prediction, forecast or projection, and that they do not suggest anything other than that where a “future matter” is involved, there is an opinion being expressed by the representor about what will happen at some future time.
3. *Australian Competition and Consumer Commission v Purple Harmony Plates Pty Ltd* [2001] FCA 1062 concerned advertising in a brochure and on the internet for a range of products which, as Goldberg J noted at [3], “were stated to have various benefits”. For example, as Goldberg J explained at [9], wearing the “Purple Harmony Disk” was said to:
   1. help strengthen the immune system (if worn over the thymus gland);
   2. enable the human body to cope better with the electrified and toxic environment;
   3. increase a person’s general health; and
   4. cause aches, pains, niggly coughs and colds to be less severe.
4. These are all aptly described as predictions. They concern the effects that a consumer might experience, in the future, from wearing the disk. That is why, in the passage relied on by the ACCC in this proceeding, Goldberg J said (at [18]) that these representations were:

… not merely representing matters of present or past fact; rather they were couched in terms that represented that the products presently possessed characteristics and benefits, the characteristics and benefits had been demonstrated to exist in the past and would be maintained and enjoyed in the future.

1. In *Gwam Investments Pty Ltd v Outback Health Screenings Pty Ltd* [2010] SASC 37; 106 SASR 167, the appellant had contracted to supply a mobile drug testing unit to the respondent, which would be attached to an Isuzu truck. The truck had to weigh less than six tonnes to be lawfully driven on public roads. Once the drug testing unit was attached, this weight was exceeded. The ACCC refers in its submissions to the reasons of White J, who was in dissent on the question of whether there were contraventions of the TPA. But in any event, on the facts the representations were said to be by silence as to the final combined weight of the truck with the unit attached. Justice White’s finding (on which the ACCC relies) at [150] was that:

… the defendants’ conduct in combination had conveyed a representation that an Isuzu NPS 300 truck with the unit designed by Christian Albertini mounted on it would be able to be driven lawfully on the roads. This was a representation as to a future matter.

1. Again, it is not difficult to describe this representation as a forecast or a prediction, and it is clearly the expression of an opinion about a state of affairs in the future (that is, the weight of the truck once the drug testing unit was attached and it was ready to drive on public roads).
2. Finally, in *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881; 60 IPR 296, the subject-matter of the proceeding concerned television, website and catalogue advertising about a product called “AbTronic”, which was a pad with electrodes attached, and which consumers were instructed to place on their bodies to provide electronic stimulation to muscles, causing the muscles to contract. There were a large number of alleged misrepresentations (some of which were admitted) but Dowsett J described them generally at [5] of his reasons:

Broadly speaking, it is alleged that the first respondent represented that use of the AbTronic would cause weight loss, reduce body fat and improve the “tone” of musculature.

1. As Dowsett J recorded at [125] of his reasons, the respondents admitted that certain representations made were as to future matters. It is in that context that Dowsett J said at [126], in a passage on which the ACCC relies:

Representations as to the capacity or qualities of any device almost invariably carry predictions as to the way in which it will perform in the future. Thus a statement as to such capacity may be misleading pursuant to s 52, both because the device does not have the relevant capacity, and because there were no reasonable grounds for the statement, contrary to s 51A. It will not necessarily always be appropriate to pursue both routes to a finding of contravention of s 52. In most cases, an applicant should decide whether the statement in question was misleading because of demonstrable factual incorrectness or because it was made without reasonable grounds. Pursuing both courses may lead to a waste of resources, as appears from the present case.

1. Ironically, in the present case the ACCC appears to have pursued the very course Dowsett J counselled against. It has relied on misrepresentations as to existing future matters, in the alternative to existing fact. Be that as it may, the point of this paragraph of his Honour’s reasons, and the two more specific ones on which the ACCC also relies, is to illustrate that the respondent’s statements were predictions about how the AbTronic might perform in the future, and what effects it might have, in the future, on the body of the person using it. There could be no debate that those statements would fall within the scope of s 4(1).

#### The evidentiary onus

1. The ACCC seeks to emphasise Woolworths’ obligation, pursuant to s 4(2), to adduce “evidence to the contrary” in order to negate the deeming effect of s 4(2). In this proceeding, Woolworths did adduce evidence: the Court’s role is to assess whether it is “to the contrary” of the proposition that Woolworths did not have reasonable grounds. However, as the authorities make clear, no onus is imposed on Woolworths: the onus remains with the ACCC to prove an absence of reasonable grounds, if the deeming effect of s 4(2) is negated. I accept Woolworths’ submissions that at trial the ACCC’s arguments about the nature and quality of the evidence before the Court relating to reasonable grounds, and the absence of witness evidence adduced on behalf of Woolworths, tended to convey the impression that Woolworths bore some kind of onus in this proceeding. It does not. That fact must be steadily borne in mind when this is a proceeding seeking, amongst other relief, civil penalties. As I have explained above, if the representations are properly characterised as relating to “future matters”, then s 4(2) required Woolworths to adduce evidence “to the contrary” of the presumption in s 4(1) if it sought to avoid its deeming effect. That was all.

#### What does “reasonable grounds” mean in s 4?

1. At a level of principle, this aspect is straightforward to state, even if it may not always be straightforward to apply. As adapted from what was set out by the Full Court in *Australian Competition and Consumer Commission v Dateline Imports Pty Ltd* [2015] FCAFC 114at [100] (and extracted below), to avoid the deeming effect of s 4(2), the representor must adduce evidence to establish that at the time of making the representation the representor had (that is, possessed) facts sufficient to induce, in the mind of a reasonable person, a basis for making the representation. As I explain below, I consider the authorities suggest that for a representor to “have” reasonable grounds, the representor must rely on the information, facts or circumstances said to constitute the reasonable grounds.
2. While I accept, as Woolworths submits, that *Dateline* was a case where the pleadings alleged there was a representation to the effect that the representor had reasonable grounds to state that the product in question (a hair straightening treatment) did not contain formaldehyde, and therefore this was not a case about s 4 and predictions or “future matters”, I nevertheless consider that what the Full Court said about how reasonable grounds are to be established is applicable to s 4(1) and (2).
3. Further, in *Australian Competition and Consumer Commission v ACM Group Ltd (No 2)* [2018] FCA 1115 Griffiths J relevantly stated (at [173]):

There will not be reasonable grounds for making a representation if, at the time it was made, the person who made it did not have facts sufficient to induce in the mind of a reasonable person a basis for making the representation, which is to be assessed objectively and not by reference to the maker’s subjective state of mind (see *ACCC v Jones (No 5)* [2011] FCA 49 at [32] per Logan J, applying *George v Rockett* (1990) 170 CLR 104).

#### The debate about Sykes and the need for actual reliance by the representor

1. Woolworths submits in the alternative that it has adduced evidence to the contrary for the purposes of s 4(2) of the ACL, and further, that this evidence satisfies the test in *Sykes*, including the test of “actual reliance”. In one sense, this makes the debate between the parties about Heerey J’s third proposition in *Sykes* something of a side issue, but since the parties spent considerable time on it in submissions, I propose to determine it.
2. *Sykes* was decided in 1998, five years after *Cummings v Lewis* [1993] FCA 190; 41 FCR 559. The subject-matter of the proceeding was the issuing by the Reserve Bank of Australia of a series of plastic notes, commencing with the $5 note. The appellant had developed a plastic note handling system to be marketed to commercial users of the notes. The appellant wrote an editorial for a trade journal about the plastic notes and their introduction, and consulted the Reserve Bank about the editorial. Reflecting some delays in the production of the notes, the Bank changed a sentence in the editorial about the commencement date of the notes so that it read:

The plastic bank notes are expected to be introduced starting with the new $5 note from sometime after Easter 1991.

1. The $5 note was not released until November 1992, and the appellant alleged a contravention of s 52 of the TPA, relying on s 51A. The Bank pleaded it had reasonable grounds for the time estimate it had given. The Bank’s defence was upheld at trial, but on appeal by majority (Heerey and Sundberg JJ) the Court found the Bank did not have reasonable grounds for the representation.
2. At 513, Heerey J set out what has been adopted and quoted since as the “test” for s 51A, and applied also to s 4 of the ACL (see, for example: *ACM Group Ltd (No 2)* at [173] (Griffiths J); *Australian Competition and Consumer Commission v We Buy Houses Pty Ltd* [2017] FCA 915 (Gleeson J) at [482]; and *Rakic v Johns Lyng Insurance Building Solutions (Victoria) Pty Ltd (Trustee)* [2016] FCA 430; 259 IR 47 (Bromberg J) at [73]-[75]):

If there was a representation as to a future matter, s 51A requires the representor to show:

* some facts or circumstances
* existing at the time of the representation
* on which the representor in fact relied
* which are objectively reasonable and
* which support the representation made.

1. Justice Heerey encapsulated his approach to s 51A at 514:

But the question posed by s 5lA is whether the representor had reasonable grounds for making the representation. If it did not, the representation “shall be taken to be misleading”. The ordinary s 52 misrepresentation is treated as misleading or deceptive even if the representor be innocent of fraud or negligence.

1. The focus of the provision on what was before the representor at the time of the representation as either establishing reasonable grounds or not, is made clear in the next passage of his Honour’s reasons at 514:

In any case, the evidence discussed by Emmett J convincingly shows that there was not merely **lack of positive grounds for the Bank making the representations**, but evidence pointing the other way. Also, the appellants were correct in arguing that matters which **occurred after the representations could not be relied on** to establish reasonable grounds.

(Emphasis added.)

1. Justice Heerey described (at 515) the statement as altered by the Bank in the appellant’s editorial as being a “prediction” and therefore a representation with respect to a future matter.
2. Support for the approach taken by the ACCC in this case can be found in the reasons of Mason P in *City of Botany Bay Council v Jazabas Pty Limited (ACN 060 105 053)* [2001] NSWCA 94; ATPR 46-210, quoted by Allsop J in *McGrath* at [186]. In *Jazabas* at [85], Mason P said this about Heerey J’s observations regarding s 51A in *Sykes*, and the third proposition made by his Honour regarding s 51A in particular:

The third proposition stated by his Honour is, I think, implicit in the provisions. Were it otherwise, the sections would throw the inquiry into the full realm of the law of negligence, calling for consideration of what the respresentor ought to have taken into account, an enquiry that would track back into investigating the scope of any duty of care. Rather, the sections effectively require the representor to identify the facts or circumstances (if any) actually relied upon before turning it over to the trier of fact to decide whether they were objectively reasonable and whether they support the representation made. This approach to s 51A(2) was recently adopted and applied by Katz J in *Blacker* (at [86]ff).

1. Justice Allsop held in *McGrath* (at [187]) that these remarks by Mason P were directed at the substantive issue of “the time of the assessment of the existence of reasonable grounds and the universe of material to which one turns in making that assessment”.
2. In *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200 at [2827] Jagot J also appeared to prefer the passage in *Jazabas* at [85]. Her Honour relevantly said:

… I note that a better articulation of the principle relating to opinions as to future matters is that the relevant provisions “effectively require the representor to identify the facts or circumstances (if any) actually relied upon before turning it over to the trier of fact to decide whether they were objectively reasonable and whether they support the representation made” (*City of Botany Council v Jazabas* at [85]).

1. I accept there are also dicta in other cases which indicate acceptance of the position in *Sykes*, including the need for evidence of what the representor relied on: see *Pramoko v Grande Enterprises Ltd* [2015] WASCA 157; 108 ACSR 469 at [57] (Martin CJ, with whom Newnes JA and Beech J agreed); *Gate Gourmet Australia Pty Limited (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 149 at [300] (Einstein J); *Australian Competition and Consumer Commission v Emerald Ocean Distributors Pty Ltd* [2005] FCA 1703; ATPR 42-096 at [30] (Nicholson J); *Australian Competition and Consumer Commission* *v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363 at [140] (Kenny J); *Seven Network Limited v News Limited (No 7)* [2005] FCA 1092 at [16] (Sackville J); *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 7)* [2008] FCA 1364 at [418] (Collier J); *Australian Competition and Consumer Commission v Jones (No 5)* [2011] FCA 49 at [23] (Logan J) and *Whelan v Cigarette & Gift Warehouse Pty Ltd* [2017] FCA 1534; 275 IR 285 at [178] (Collier J).
2. Moreover, this approach was the one taken by the Full Court in *Dateline* at [100]. To put what was said at [100] in context, it is necessary to extract the two preceding paragraphs:

Dateline submits that its success on the truth of the underlying representation is enough to defeat these grounds. In other words, so long as the represented fact is right, Dateline submits that the ACCC has not shown that it was misleading or deceptive for Dateline to have made the representation on incomplete or wrong reasons that it believed were correct and complete, and did not include the reasons showing it to be correct.

We do not accept this submission. It is not a question as to Dateline’s subjective belief. Rather, the representation that Dateline had reasonable grounds for making the several representations of fact is to be considered in light of the grounds which Dateline actually then knew and whether those grounds, objectively, were reasonable.

There will not be reasonable grounds for making a representation if, at the time of making, it, the representor did not have facts sufficient to induce, in the mind of a reasonable person, a basis for making the representation: *Australian Competition and Consumer Commission v Jones (No 5)* [2011] FCA 49 at [32]-[33]; *George v Rockett* (1990) 170 CLR 104 at 112.

1. Most importantly in my opinion, the text of s 4(1), read with s 4(2), clearly supports the position for which the ACCC contends. Subsection (1) is concerned with whether the person making the representation “does not have” reasonable grounds. The only sensible way to understand that phrase is that at the time of making the representation, the representor herself or himself, or through its corporate actors, “had” – as in fact possessed – a basis which can be objectively described as reasonable, for what was represented. The text directs attention to the information which in fact provided the basis for the statements or conduct. It does not direct attention to whether there were reasonable grounds for the making of the representation. Rather, the text focuses on whether the representor “had” such grounds.
2. In that sense, the debate over whether the representor needs to adduce evidence of “reliance” might be something of a distraction from the statutory text of s 4. Reliance might be implicit, or inferred. Using the language I have used above in an attempt to explain the meaning of the provision as I understand it, the question asked by the text of s 4(1) (read with the effect of s 4(2)) is:

Did the person who made the representation about a future matter possess information which, assessed objectively, gave that person a reasonable basis for making the representation?

1. This does not gainsay the proposition put by Woolworths that reasonable grounds might be established by adducing evidence that the representor relied on information from a “trusted and reliable source” for the representation it made: see *Danoz Direct* at [174] (Dowsett J). That may well be one way to discharge the evidentiary burden, and such evidence may well be sufficient to satisfy a Court that the applicant has not proven absence of reasonable grounds. These matters will depend on the particular circumstances.
2. Without more, I do not accept Woolworths can derive any support from Foster J’s observations in *GlaxoSmithKline* at [150], where his Honour simply stated (having referred to a submission made by the applicants about *Sykes* and the position concerning actual reliance):

Whether or not that is a true statement of the relevant law, I am prepared to infer from the existence of the matters relied upon by Reckitt as at August 2015 and from the fact that Reckitt has been shown to have known about Study NL9701 and the NCT Study as well as obviously knowing about the ASMI complaints and the outcome of those complaints, that Reckitt actually did rely upon those matters now invoked as reasonable grounds when it ran the campaign.

1. The reasons do not indicate what reservations, if any, his Honour had about the aspect of *Sykes* presently under consideration. Similarly, the suggestion by Ward J in *Rosebanner Pty Ltd v EnergyAustralia* [2009] NSWSC 43; 223 FLR 406 at [433] that “matters not known to the representor, or on which the representor did not specifically rely, might nevertheless form reasonable grounds” appears, with respect, to be based on a passage from *Cummings* which needs to be read in context, as the ACCC submits. It is unclear whether any particular argument was put to Ward J about *Sykes*. However, the Full Court decision of *Cummings*, or at least the passage to which her Honour referred and to which the parties in this case referred, does not support a wider approach allowing the Court to look at material which the representor did not “have”.
2. *Cummings* was a case about the *Fair Trading Act 1987* (NSW) equivalent of s 51A, and was referred to by both parties in submissions concerning what constitutes “reasonable grounds”, and also about the third of Heerey J’s propositions in *Sykes*. *Cummings* concerned representations alleged to have been made in the course of arrangements for putting together racing syndicates, which involved the appellant’s purchase of “top quality yearling bloodstock”. As Cooper J described it at 569, the falsity alleged in each case was “the failure to procure that all the syndicate shares were subscribed and paid for”. The Full Court found the representations were as to future matters, so that the equivalent provision of s 51A was engaged. Woolworths relies on parts of the following passage from the reasons of Sheppard and Neaves JJ at 566 about how reasonable grounds might be established:

Evidence of reasonable grounds may be established by evidence other than that of the persons who are alleged to have made particular representations as to a future matter. Indeed, as in so many other areas, a court may find the overall probabilities to which the circumstances of a given case give rise, the background to it and the conduct of parties prior to conversations taking place as providing better guides to whether or not they had particular states of mind or whether particular factors existed which would establish evidence of something such as reasonable grounds. It was the overall circumstances of the case which enabled his Honour to say, in relation to both Mr Leckie and Mr Lewis, that each genuinely believed the encouraging assertions which his Honour found them to have made. If one changes the exercise to an inquiry, not into genuine or honest belief, but into whether there were reasonable grounds, it is again the overall circumstances of the case which will provide more reliable guidance than would oral evidence on the part of interested parties.

1. It is unclear whether their Honours intended to confine their approach to “reasonable grounds” to matters going to the actual state of mind of the representor. Their Honours referred at 566 “to whether or not [the parties] had particular states of mind **or** **whether particular factors existed which would establish evidence** of something such as reasonable grounds” (emphasis added). This passage makes it clear the grounds must nevertheless be those of the representor, although they might be established through evidence from sources other than the representor. That is the case here. There is no direct evidence from any employee of Woolworths who purports to be the representor. Nonetheless, there is evidence of the circumstances in which the representations on the labels came to be made, and indeed (on Woolworths’ submission) what information was in its possession at the time the representations were made, and what it can be inferred to have “relied” upon. All this passage in *Cummings* is doing, in my opinion, is cautioning against reliance on subjective evidence from the representor as being necessarily likely to give an accurate picture of what information the representor “had” as a basis for any prediction or forecast made.
2. The situation posed by Woolworths at [142] of its closing submissions – of a prediction which turns out to be “entirely true and accurate” but where the information actually relied on at the time of the representation did not objectively establish reasonable grounds – might be somewhat fanciful. However, it is also nothing more than the working out of the intended effect of a provision such as s 4, which is to require those making predictions to have a reasonable basis for them at the time they make them. A representor is not entitled to rely on luck going her or his way and the prediction turning out to be true when there was no objectively reasonable basis for it when it was made. The whole purpose of s 4 (and earlier of s 51A) was to avoid this kind of recklessness. The Full Court in *Dateline* at [101]-[102] rejected a similar submission.

### The ACCC’s alternative s 18 case: particular points arising from the relevant authorities

1. The parties were not in dispute about the general principles applicable to the ACCC’s alternative s 18 case. The core principles were summarised by Gleeson J in *We Buy Houses* at [56]-[58], with which I respectfully agree:

A representation will be false, misleading or deceptive or likely to mislead or deceive if it if it has a tendency to lead into error, or if it induces or is capable of inducing error: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 (“*TPG*”) at 651, [39]; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; (1982) 149 CLR 191 at 198; *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 1582; (2000) 104 FCR 564 at 589-590, [63].

Whether a representation is false, misleading or deceptive or likely to mislead or deceive is ‘quintessentially’ a question of fact, which should not be complicated or overintellectualised: *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2004] FCA 987; (2004) 208 ALR 459 at [49] (Gyles J).

In *ACCC v Dateline Imports* at [30]-[32], Rangiah J said, concerning a proceeding for breach of s 52 of the Trade Practices Act:

[30] … The question is whether a not insignificant number of reasonable persons within the class have been misled or deceived or are likely to be misled or deceived by the conduct, whether in fact or by inference: *Hansen Beverage Co v Bickfords (Aust) Pty Ltd* [2008] FCAFC 181; (2008) 171 FCR 579 at [46] per Tamberlin J, at [66] per Siopis J; *ConAgra Inc v McCain Foods (Aust) Pty Ltd* [1992] FCA 159; (1992) 33 FCR 302 at 380-381; *Bodum v DKSH Australia Pty Ltd* [2011] FCAFC 98; (2011) 280 ALR 639 at [205].

[31] The question of what is the natural and ordinary meaning conveyed by a publication or conduct is to be ascertained by the Court applying an objective test of what ordinary or reasonable readers or consumers in the class would have understood as the meaning: *Bodum v DKSH Australia Pty Ltd* [2011] FCAFC 98; (2011) 280 ALR 639 at [203].

[32] It follows that where the alleged contravention of s 52 of the TPA involves the making of a representation to the public or a class of the public, it is necessary for the Court to consider what ordinary persons in the class to which the representation is made would understand by the representation, and whether a not insignificant number of such persons would have that understanding.

1. See also my reasons in *Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240 at [120]-[124].
2. There was no real debate between the parties in their submissions about these principles, although there was significant debate about their application to the evidence, to which I return later in these reasons.

#### The identification of the “class”

1. The last remaining issue of legal principle to be addressed, relevant to the ACCC’s alternative s 18 case, is the question of how to describe, and approach, the identification of the class of persons to whom the representations about the Products were made.
2. I expressed some views about these issues in *Guy v Crown Melbourne Ltd (No 2)* [2018] FCA 36; 355 ALR 420 at [330]-[332], and I adhere to those views. I also referred to principles applicable to this matter in *Shape Shopfitters Pty Ltd v Shape Australia Pty Ltd (No 3)* [2017] FCA 865; 124 IPR 435at [93]-[104]. As I noted in the latter passages, the context in which the representations are made is critical to identifying to whom they are directed, and therefore to ascertaining what features should be attributed to that class of persons.
3. I accept, as Woolworths submits, that reactions that are extreme or fanciful are excluded from this analysis: *Campomar Sociedad, Limitada v Nike International Limited* [2000] HCA 12; 202 CLR 45 at [105].
4. I accept, as Woolworths submits, that the reasonable consumer can be attributed with “a degree of common sense”. As to its submissions that the reasonable consumer can also be attributed with a correct understanding of “conventional matters”, much depends on what is included in “conventional matters”. What is conventional to one person’s understanding is unusual to another, or out of the experience of another. The use of the hypothetical reasonable consumer is not an occasion for engaging in stereotyping about educational levels, or understandings of matters which might seem “conventional” to one sector of the public.
5. I accept also that the Court must use its own “common sense” in determining what is conveyed by packaging or other forms of communications: see *Interlego AG v Croner Trader Pty Ltd* [1992] FCA 992; 39 FCR 348 at 387-388 (Gummow J), citing *General Electric Co (of USA) v General Electric Co Ltd* [1972] 1 WLR 729 at 738 (Lord Diplock).

# The representations made on the labelling of the Products

1. In the following sections, I deal with the nature of the representations alleged to have been made by Woolworths. This is the first of the two stages to which I referred at [84] above.
2. After discussing the evidence relevant to the findings I make in this section, the first step is to explain my findings about the appropriate features to attribute to the class of the consumers who were the objects of the representations. Next, I explain my findings about what, objectively, was represented by the labelling and the use of the phrase “biodegradable and compostable”, in the whole of the circumstances of the way the Products were displayed and packaged.
3. Taking the principal way the ACCC puts it case in this proceeding, I then explain my findings about why the representations were not ones relating to “future matters”. If, contrary to my findings, they were correctly described as representations relating to future matters, in the alternative, I explain my findings as to why Woolworths did not have reasonable grounds to make them.
4. While I will return to the evidence of Professor Clarke, Mr Nolan and Mr Leake (as well as Mr Brosig) in more detail later in these reasons, their evidence about the meanings of the terms “biodegradable” and “compostable” are relevant to the findings I make in this part of my reasons.
5. Professor Clarke’s evidence was:

The terms “biodegradable” and “compostable” refer to inherent properties of a given material. At any time, scientists can measure how much of a material can be consumed by organisms within a set timeframe (and thus how much of the material will biodegrade) to demonstrate the property of the material.

By way of illustration of the concept of “inherent properties”, consider a piece of wood. Wood is combustible. This is an inherent property of the material. Similarly, iron is corrodible. This is an inherent property of the material. I could conduct simple experiments to demonstrate those existing inherent properties by, for example, burning the wood or leaving iron in salty water.

1. Mr Leake’s evidence was:

Compostability and biodegradability are inherent characteristics of all organic materials. A hardwood chip of, say, Red Gum is inherently biodegradable. It may take many years to completely disappear in soil, but this does not change the fact that it is biodegradable. Although it will survive composting almost unaltered, except that its colour will darken and there will be a reduction of lower molecular weight components, it plays a useful role in composting by providing structure and aeration and, in my view, is therefore also inherently compostable.

1. Mr Nolan referred to numerous definitions in various standards, which tailor their definitions for particular purposes. Mr Nolan concluded from these various sources that he was content with the following definition of biodegradability:

I have framed and accept the following definition of biodegradability that is consistent with the above descriptions and applies to both industrial and home composting systems for the product categories:

*‘The ability of organic substances to be broken down by micro-organisms in the presence of oxygen (aerobic) to carbon dioxide, water, biomass and mineral salts or any other elements that are present (mineralization). Alternatively, the breakdown of organic substances by micro-organisms without the presence of oxygen (anaerobic) to carbon dioxide, methane, water and biomass’.*

1. And (incorporating some changes Mr Nolan made during his oral evidence) the following definition of compostable:

I have framed and accept the following definition of compostable for the products that is consistent with the above descriptions and applies to both industrial and home composting systems is:

* the ability of a material to be biodegraded and disintegrated in a composting system (as can be shown by standard test methods) and typically completes its biodegradation during the end-use of the compost;
* the compost must meet the relevant quality criteria including low regulated metal content, no ecotoxicity, no obviously distinguishable residues; and
* disintegration must be completed within 84 days for industrial composting systems ~~(ISO 4736)~~ (AS4736) and 180 days for home composting systems ~~(ISO 20200:2015)~~ (AS5810).

1. It is clear Mr Nolan’s definitions are of a different character to those of Professor Clarke and Mr Leake, and depend on compliance with Australian and other standards. That is, his definitions include features that ensure a certain outcome for the product, in a certain amount of time, rather than describing the inherent characteristics of the product.
2. In that sense, Mr Nolan’s definitions incorporate premises which form part of the issues to be determined in this proceeding. Accordingly, Mr Nolan’s definitions are of less assistance in determining what the words and phrases themselves mean, or how those words and phrases would be understood by a consumer.
3. I prefer the evidence of Professor Clarke and Mr Leake on this matter.

## The section of the public to whom the representations were made

1. In this proceeding, despite the broader descriptions found in some of the authorities to which I referred in *Shape Shopfitters (No 3)* at [100]-[101], it appears to be common ground that the relevant section of the public can be appropriately described as consumers, and indeed more specifically as consumers shopping for disposable cutlery and dishes, who may have been doing so either in a Woolworths store during the relevant period, or online during the relevant period. The parties are then not agreed about what attributes these consumers should be found to have.
2. In my opinion, the evidence supports the following findings.
3. The “in store” consumers would have been presented with a different kind of display, including of the impugned Products, to the online consumers. However, the features of the packaging to which I have referred to at [1] and [13]-[17] above would have been visible to both kinds of consumers. It is possible, I find, that “in store” consumers may have been more directly confronted with the differences between the impugned Products and the plastic products displayed next to and around them on the shelves, and thus the environmentally friendly messaging may have been more prominent to “in store” consumers than to online consumers. However, the “dominant message” conveyed by the Products and their packaging was the same for both groups of consumers. As I explain below, I consider that dominant message was that the Products were different to their plastic counterparts, in that they were more environmentally friendly because they were made of organic material, and were capable of breaking down in landfill, and capable of being composted.
4. There is a premise which should be applied to the consumers who were the recipients of the representations. It is that they sufficiently understood English to grasp a meaning for “biodegradable and compostable”. The representations here were by words, accompanied by graphics, but it is the words that are alleged to have conveyed the representations. As I noted in *Guy v Crown (No 2)* at [338]-[340], care must be taken not to apply some Eurocentric approach to constructing the “reasonable” consumer. Especially so in a society such as Australia, where consumers are as diverse in culture and language as they are in other ways. Where allegations of misleading or deceptive conduct address statements in the English language, courts need to be conscious that those statements may have an effect only on a subset of all consumers likely to encounter those statements. That is why, in modern Australian society, the word “ordinary” might too readily lend itself to stereotyping. I prefer to use the word “reasonable”.
5. As I noted in *Shape Shopfitters (No 3)* at [102], the “reasonable members” of the class are not attributed with even levels of intelligence, insight, education, experience, acuity and the like. See also *Sportsbet Pty Ltd v Crownbet Pty Ltd* [2018] FCA 1045 at [85] (Moshinsky J). As in the community, people’s characteristics are wide and varied. That would have been the case for consumers entering Woolworths’ stores in person, or searching through its online store, during the relevant period. There would have been a cross-section of consumers, including (not an exhaustive but an indicative list):
   1. those in a rush to buy disposable cutlery and/or dishes for a function or event;
   2. those consciously looking for environmentally friendly products;
   3. those planning far ahead for future events or purchasing disposable cutlery and/or dishes to have at home “just in case”;
   4. those browsing and undecided about purchasing disposable cutlery and/or dishes at all;
   5. those who knew about composting, and those who did not;
   6. those who practised composting, and those who did not; and
   7. those who had an accurate understanding about what “biodegradable” means, and those who did not.
6. The ACCC submits that many consumers would not have known that a specific disposal treatment was required in order for the product to “compost”, or about what kind of treatment was required for composting to successfully occur. I accept that only a subset of consumers likely to encounter these Products would have had an understanding of composting methods, and that particular treatment was necessary for successful composting. In my opinion, while that subset was also one of the subsets more likely to have been drawn to look at these Products, their more detailed understanding of what composting involves should not be factored in to the assessment of what the statements on the labels were objectively seen to convey.
7. Woolworths spent proportionally more time in its closing submissions on the characteristics to be attributed to the reasonable consumer than did the ACCC. I accept the following matters submitted by Woolworths:
   1. these were not expensive products and so were not products consumers would have spent a long time pondering over;
   2. the placement of the Products with other disposable dishes and cutlery, including plastic products, meant consumers would have interpreted the labels “biodegradable and compostable” in part by comparison with plastic products and would have understood the Products were different to plastic products;
   3. due to the prevalence of recycling facilities and practices, consumers would have known about the separation of some kinds of waste so that it does not end up in landfill, but would also have understood most household waste ends up in landfill or a “rubbish dump”;
   4. due to the general publicity about waste management, recycling and waste disposal, consumers would have understood that rubbish can last for a very long time in the environment and that it is desirable to reduce waste remaining in the environment;
   5. most consumers would have had some understanding that composting is a specific method of disposing of organic waste, and that it can be done at home;
   6. most consumers would have understood that if waste products are composted, they are not going into landfill or a “rubbish dump”;
   7. most consumers would have known compost is a useful product for the garden; and
   8. most consumers would have understood “biodegradable” to mean something different from “compostable”.
8. To this I add the following findings:
   1. Most consumers may not have had a technical or deep understanding of the meaning of “biodegradable”, but would at least have understood, from the prefix “bio” and the verb “degrade”, that it has something to do with organic material, and the breaking down of material.
   2. Relatively to other disposable dishes and cutlery, the Products had a price premium: consumers would have expected they were paying a price premium because the products were more environmentally friendly in terms of how they could be disposed of.
9. Importantly, I do not accept Woolworths’ submissions that the word “compostable” spoke only to that section of consumers who had access to a composting facility, whether at home or elsewhere. As Woolworths concedes, there was at least some evidence about a limited number of councils permitting their residents to dispose of PLA cutlery and bagasse dishes in kerbside food waste collection service bins. There may have been other variations in council practices, but this was not the subject of direct evidence. My finding is rather broader: I do not consider it was only consumers who were actively engaged in home composting or “composting-like” disposal methods who would have been affected by the use of the label “compostable”. I consider the statement that the Products were “compostable” would have spoken to a wider range of consumers, including those who were not aware that composting processes could not occur in landfill: in other words, it would have spoken to consumers who were to some extent ill-informed or confused about the circumstances necessary for compost to be produced, and for the composting process to occur. This view does not affect my ultimate findings in Woolworths’ favour, and indeed reinforces my opinion that the phrase as a whole – and the words within it – would be understood as speaking to the inherent qualities or capacities of the products in a general way.
10. I do not accept the analogy Woolworths draws with a label such as “dishwasher safe”, which, it submits, may only speak to consumers who have access to a dishwasher. With environmental messaging, which I find is a description that can be properly applied to these labels, I consider that general consumer awareness about the need to reduce waste disposal, and reduce the use of plastics, means that a word such as “compostable”, especially when combined with a more general environmental message such as “biodegradable”, will speak to all those consumers who have some concerns for environmental matters. There is no evidence about what proportion of consumers who shopped at Woolworths during the relevant period might have had concerns about the environment and have been conscious of environmental messaging in making their purchasing choices, but Woolworths’ 2009 Corporate Responsibility Report (see, for example, at pages 24 and 56) made it clear that Woolworths considered its customers cared about packaging and labelling, and in particular how environmental claims are made on packaging. I am prepared to find a larger proportion of consumers than those who had access to a composting facility may have been affected in their consumer choices by labelling such as that on the Products.
11. I do accept, however, that the label “compostable” would have had particular resonance (and attraction) for those consumers who did actively engage in home composting, or who had composting facilities available to them. I further accept that amongst that section of consumers there would have been those who were skilled and particular about their composting methods, those who took a more lackadaisical approach, and those who were well-intentioned but not well-informed. I accept that the attention given to conditions for home composting affects the success of the composting process, and the rate that organic waste within a compost pile or bin will break down into usable compost: all the experts, and the parties, were agreed on these kinds of general propositions.

## Determining what representations were made

1. In *Aldi* *Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; 358 ALR 683 at [74], Perram J said (Allsop CJ and Markovic J agreeing):

Whether particular conduct results in a representation is a question of fact ‘to be decided by considering what [was] said and done against the background of all surrounding circumstances’. Further, where the question is whether a representation has been made to a large group of persons such as, as here, potential purchasers, the issue of whether the representation has been made ‘is to be approached at a level of abstraction not present where the case is one involving an express untrue representation allegedly made only to identified individuals’: as to both propositions see *Campomar Sociedad, Limitada v Nike International Limited* (2000) 202 CLR 45; 169 ALR 677; 46 IPR 481; [2000] HCA 12 (*Campomar*) at [100]-[101]. The primary judge expressly recognised the first of these principles at [338] and observed that those circumstances included ‘the circumstances in which the respective products are sold to the public’.

1. The question is: objectively, what was conveyed to consumers with the attributes I have described above by the use of the phrase “biodegradable and compostable” in the context in which it appeared on the Products, taking into account how and where they were displayed?
2. In *Campomar* at [105] the High Court put the question thus:

The initial question which must be determined is whether the misconceptions, or deceptions, alleged to arise or to be likely to arise are properly to be attributed to the ordinary or reasonable members of the classes of prospective purchasers.

1. It may be accepted, as the ACCC submits, that “biodegradable and compostable” is a whole phrase and care should be taken not to break it up. Further, I accept, as the ACCC submits, that in a supermarket context, there is likely to be something of an “intuitive” reaction from shoppers to the labelling, so that no overly scientific approach should be taken to how the words “biodegradable” and “compostable” would be understood by reasonable consumers.
2. However, it is also true there were two words used in the phrase, and the Court must decide how a reasonable consumer would, in the circumstances, have understood them when they were used in the context of a single phrase on the labels of the Products. That does depend to some extent on how a reasonable consumer would have understood each of the words singularly, as well as in combination.
3. In my opinion, it is of some significance that the words on the labelling were adjectival, with the suffix “-able” on them. That is not to suggest consumers would have taken some grammatical approach to ascertaining their meaning, far from it. Rather it is to say that, intuitively, consumers would have understood by the adjectival form that the words were describing the *qualities* of the Products, or the *characteristics* of the Products. I find that this phrase, expressed as it was in adjectival form with the suffix “-able” attached, would have been understood by consumers in the same kind of way as the word “recyclable”, which is used in very similar contexts.
4. It was common ground between the parties that the word “recyclable” is found on labels, and on packaging. The parties differed about the utility of the analogy to the impugned phrase in this proceeding, but I consider there is a strong analogy. The adjective “recyclable” is readily understood by the reasonable consumer as indicating the capacity of a product to be recycled, or put through a recycling process. It is readily understood as an indicator to consumers about how they are able to dispose of a product that has such a descriptor on it. It is a word that has become extremely common in product labelling, not just as part of environmental messaging, but including that context.
5. I find the reasonable consumer would have understood the phrase “biodegradable and compostable” in the same way: as a description of the capacity of the Products to be disposed of in a particular way because of their inherent qualities; that is, that the Products were “capable” of biodegrading and “capable” of being composted.
6. The recycling comparison is a good one, and one I am satisfied reasonable consumers would readily make. Consumers understand that recyclable products will only in fact be recycled if they are treated appropriately in a recycling facility. The reasonable consumer understands that fact does not alter a product’s state, or inherent qualities, as a “recyclable” product, but it does affect whether that capacity or capability, and benefit to the environment, comes to fruition. I am comfortably satisfied that during the relevant period, consumers would have understood this distinction.
7. As I have noted above, and as the structure and content of both parties’ submissions accepted, it is necessary to make findings about how a reasonable consumer would have understood each of the two words “biodegradable” and “compostable”, before moving to determine how a reasonable consumer would have understood the composite phrase “biodegradable and compostable”.

### Biodegradable

1. I find that a reasonable consumer would have understood the basic meaning of “biodegradable” as able to be broken down, because of what the Products were made of. I find the reasonable consumer would have understood that the Products were not made from ordinary plastic. The reasonable consumer would have understood this from the use of the adjectival description, from looking at the other labelling (for example, “Made from a renewable resource”) and from the environmental messaging conveyed by the use of green colours, the word “Eco” and images of grass and butterflies. The labelling itself did not indicate what the Products were made from, and I find the reasonable consumer would not have understood any more about the make-up of the Products than that they were not made from ordinary plastic, and that this meant they were made from organic materials.
2. I am not satisfied a reasonable consumer would have understood that the breaking down process is performed by micro-organisms, or that variations in conditions in landfill or other environments where the waste is placed might accelerate or slow down that process, or the length of time that process might take. In my opinion these are more scientific or technical aspects of the meaning of “biodegradable” that would not have been understood by the reasonable consumer when she or he saw the word used adjectively on a product label in a supermarket (or while shopping online).
3. As I have noted above, I find that the reasonable consumer would have understood the word “biodegradable” in the phrase “biodegradable and compostable” to mean that the Products were capable of breaking down, or biodegrading, because of what they were made of: that is, because of their inherent qualities.

### Compostable

1. I find a reasonable consumer would have understood that the term “compost” refers to organic materials, and that compost can be made by placing organic materials together in a pile, a container or a bin, and that the kinds of materials which are put into compost are often food scraps but also other materials such as paper and plant material.
2. I find that the word “compostable” was likely to be understood by the reasonable consumer as referring to something that was a useful product for the garden, and for healthy soil, so that consumers would have understood that the Products were capable of being turned into something that could be used in the garden or to improve soil quality.
3. I find that consumers would have understood that if a product is “compostable”, that is a different and separate quality from being “biodegradable”. They would have understood that from the fact the two different words were used in the phrase on the label of the Products, and from what I have found to be the likely general understanding of what it means to describe a product in each of those ways.
4. I am not satisfied that a reasonable consumer shopping for disposable dishes and cutlery would have had any detailed understanding of composting processes. I find that most consumers may have seen, or come to know about, facilities such as home composts and compost bins, but I do not consider there is any evidentiary basis to conclude that consumers looking at the Products either in a Woolworths store or online during the relevant period were likely – as a general proposition – to understand how the composting process works or have any experience with how it works. There would certainly have been some consumers who did, and as I have found above, that may have given such consumers a particular interest in the Products. There is insufficient evidence to find that the majority, or even a significant number, of consumers looking at the Products in Woolworths’ stores or online would have had any real knowledge about composting processes.
5. However, I do not consider these findings affect one way or the other the correct and appropriate conclusion on the evidence about the nature of the representations made by Woolworths on the labelling of the Products. Whether or not the ordinary consumer had knowledge of the composting process would not, in my opinion, have affected how the consumer would have understood what was being represented by the use of the phrase “biodegradable and compostable” in the overall context of these Products, including the overall packaging. Experienced composters or not, I find the consumer would have understood the phrase as meaning no more than that the products were *capable* of biodegrading, and were *capable* of being composted – in the same way the consumer would have understood the use of the description “recyclable” to refer to the capacity of a product to be recycled, no matter what the consumer’s level of knowledge (sophisticated or otherwise) about how recycling programs operate, or what the different processes are for recycling different kinds of products.
6. These conclusions are supported by the opinion of Professor Clarke, in that part of his report responding to some of the ACCC’s evidence. At [97] of his report, Professor Clarke stated:

I have read the affidavit of Ms Deirdre Ellen Griepsma dated 23 July 2018. In response to that affidavit I make two points:

1. Whether a material is biodegradable or compostable is a property of the material - not a property of how it is handled. As long as a material is biodegradable and compostable under suitable conditions, that material is biodegradable and compostable.
2. Earlier in his report, at [83], Professor Clarke also stated the following:

Where biodegradable or compostable material is placed in landfill, it will eventually degrade. However, given the heterogeneous nature of landfill conditions referred to above, that material may degrade quickly (if in the presence of moisture and other degrading organic material) or much more slowly (if it is dry). Even if that material degrades only very slowly in such conditions, it remains properly described as “biodegradable” or “compostable” - in contrast to other materials which are placed in landfill (and which are clearly not “biodegradable” or “compostable”), such as polyethylene, polypropylene, glass and other synthetic substances. The availability of ideal conditions in which a biodegradable or compostable material will degrade or compost is not necessary for that material to have the inherent property of biodegradability or compostability, or to be properly described as “biodegradable” or “compostable”.

1. These conclusions are also supported by the evidence of Mr Leake, which I have set out at [150] above.

### What representations were conveyed by the whole phrase, in its context?

1. During the relevant period, I find that the representations conveyed to the reasonable consumer either shopping in a Woolworths store or online, and looking at the labelling on these Products, in the packaging in which they were presented, was that the phrase “biodegradable and compostable” was describing a capacity or capability that each Product had. The representations were that the Products were capable of biodegrading, *and* also capable of being turned into compost. Consumers would have understood that the Products needed to be disposed of and treated appropriately for those capacities or capabilities to be realised, and for any environmental benefit to come to fruition.
2. I reject the propositions implicit in the ACCC’s case in this proceeding that there is any more to be implied into the statements on the labels than what I have found above.
3. Contrary to the ACCC’s submissions (see for example [11] of its closing submissions) I do not accept that the reasonable consumer would have understood the labels on the Products to convey the impression that if placed in landfill (or a “rubbish dump”) the products would **both** biodegrade and turn into compost. I am satisfied the reasonable consumer would have understood composting is a different process, even if she or he did not have a detailed understanding about what the process involved. In my opinion the representations that were conveyed were that the Products were capable of biodegrading, and – separately – were capable of being turned into compost. That is what would have been understood.
4. My findings about the nature of the representations made by the labels with the phrase “biodegradable and compostable” on them means that I do not accept the ACCC’s submissions that, in order to avoid misleading or deceiving consumers, the labels needed to have some kind of qualification, direction or instruction on them. As I have found, the reasonable consumer would have understood the statements as indicating the capacity of the Products: they needed no further explanation or qualification.

### Did the representations have a temporal aspect?

1. I do not accept the ACCC’s contention, central to its case, that the representations made by the words on the labelling were that the Products would break down or compost with a “reasonable period of time”.
2. However, I do accept that phrase as used on the labels (like the word “recyclable”) conveyed the representation that the Products were *capable* of biodegrading if sent to landfill or a “rubbish dump”, and *could* be composted by one or more of the composting methods that are likely to be broadly familiar to consumers, such as some form of home or community composting, or organic waste collection by local councils. I am satisfied consumers would have understood these processes may take some time, and perhaps some considerable time, but I do not consider there was any temporal aspect incorporated into the representations themselves. In this sense, what consumers might or might not understand about the time biodegradation processes or composting processes might take is beside the point in terms of the Court determining what was conveyed to consumers by the representations: see *Aldi Foods* at [86] (Perram J, Allsop CJ and Markovic J agreeing).
3. Although the ACCC contends it is Woolworths’ approach which imbues the ordinary and reasonable consumer with a “high degree of knowledge about the environmental processes of biodegradation and composting”, in fact I consider it is the ACCC’s approach which tends to have this effect. It attributes to consumers who were purchasing these disposable products, which were clearly labelled as not suitable for re-use, a level of reflection, knowledge and consideration that I do not consider is objectively realistic in the context in which these Products were likely to have been purchased. These Products were intended to be disposed of after one use. The use of the phrase “biodegradable and compostable” on the labelling does not convey anything about how long the Products might take to degrade, or to turn into compost. It is unrealistic to assume consumers who were purchasing these Products would have been turning their minds to such matters. The Products were full of environmental messaging - in words, graphics, and colours. They were displayed and offered as an alternative to disposable plastic dishes and cutlery. The message conveyed by the phrase in its context was that the Products were capable of breaking down and being turned into something useful in the soil. Although there were two words in one phrase, as I have already noted, I consider the message conveyed was that there were two ways the Products could be broken down for environmental benefit: that is, by composting, or by biodegrading in landfill.
4. There is simply no objective basis for the ACCC’s asserted “temporal aspect” to the representations. To the contrary, the absence of any qualifying words or explanations on the packaging reinforces the impression I have found the phrase created in context: that it spoke to the capacities and inherent qualities of the Products, and no more.

## Whether the representations were as to future matters

1. Having set out the applicable principles at [86]-[112] above, and having described the nature of the representations I have found were made by the use of the phrase “biodegradable and compostable” on the labels and packaging of the Products, it will be apparent that I do not consider the representations were “with respect to” a “future matter”.
2. The representations were not in the nature of a prediction, forecast or projection about a future event. As Woolworths submits, one feature of a future representation is that it is not capable of being true or false (or, I might add, misleading) at the time the representation is made, because the state of affairs to which it relates lies in the future.
3. The representations might be described as being about the “performance characteristics” of the dishes and cutlery (cf *Samsung* at [83]), but a more accurate description is that the representations concerned the inherent characteristics of the Products, derived from what they were made from. Their capacity to biodegrade, and their capacity to turn into compost, was a function of their constituent ingredients. That in turn concerned an existing state of affairs, not a future one.
4. The capacity or capability of the Products to biodegrade and to be used in compost was a feature or characteristic which was able to be proven, or ascertained, in the present. That is what occurred with Mr Brosig’s test: the fact that the Products broke down and composted was a function of what they were made from, combined with the environment into which they were placed, which allowed their capacity or capability to be fulfilled. If the ACCC had conducted its own testing, perhaps (although it seems unlikely) there would have been some conflicting evidence. We will never know.
5. I see an analogy, as I have noted, with the word “recyclable”. That is also a description of the features or characteristics of a product, derived from what it is composed of. Whether or not it is, in fact, recycled, and turned into something that is re-usable or useful will depend on the environment into which it is placed, and whether that environment allows its features and characteristics to be fulfilled.
6. I accept Woolworths’ submissions that there are a number of other adjectival descriptions of products which fall into the same category, such as “poisonous”, “flammable”, “non-toxic” or “washable”. All of these are adjectival descriptions because they are describing the characteristics of a product, derived from its ingredients. All deal with a present state of affairs, that is either true or false, and which can be tested or ascertained as a matter of fact. The fact that the testing or proof of the capacity of the product is something that will happen in the future – when the product is used or disposed of – does not alter the nature of the representation. Rather, that is how the present representation about the features of a product is fulfilled (or not fulfilled, as the case may be).
7. The ACCC seeks to distinguish some of these adjectival descriptions from the phrase in issue by submitting that descriptions such as “flammable” or “washable” concern an “immediately demonstrable fact”. However, that is simply to distinguish between the length of time taken by a process before a product’s features become apparent or are fulfilled. The description “flammable” may refer to an “immediate” outcome, or one that occurs rather more slowly. The same is true of a phrase such as “poisonous”: the effects of the poison may take some time to manifest themselves, or they may not. A description such as “carcinogenic” is another example of an adjectival description of a product where the features or characteristics of the product to which the description relates may take quite some time to manifest themselves. It is nevertheless still a description of present fact, capable of being tested and proven to be true or false.
8. As to the comparison with the word “recyclable”, the ACCC submits:

Whilst the ACCC does not accept that on its face the word “recyclable” should be taken as not addressing a future matter, the use of the word is very different in its meaning and effect to the words “biodegradable and compostable” in the present context, as described in paragraphs 2 and 3 of these submissions. Recyclable refers to a method of disposal with which consumers are very familiar. The consumer does not need to be told anything further. It is akin to a direction about disposal — the very information missing here. Compostable in this case depends on disposal with a range of conditions being met and required to be applied by the consumer at some time in the future following usage, none of which are described or which can be assumed.

1. I reject the proposition that the level of familiarity that a consumer might have with recycling processes, as opposed to composting processes (a matter on which there was little or no evidence) is a basis for distinguishing the way in which the words “recyclable” and “compostable” should be treated for the purposes of the ACL. Both remain adjectival descriptions of the inherent characteristics of a product, both speak to how a product may be disposed of, and both require the application of the correct kinds of processes for the characteristics of a product to be fulfilled.
2. A plastic container labelled as “recyclable” will not in fact be recycled if it is placed in landfill. Nor will one of Woolworths’ plates in fact be composted if it is placed in landfill. A plastic container labelled as “recyclable” will not in fact be recycled if it is put through a process intended for glass products, or through any other recycling process that is not functioning properly. Likewise, one (or more) of Woolworths’ plates will not in fact be composted if it is placed in a bin with material that is so wet it is anaerobic.
3. I find there is no material difference between the two terms, and an analysis of how both operate in a consumer environment supports the characterisation I have reached independently that the representations on the products were not representations as to future matters.

## Whether Woolworths had reasonable grounds

1. If, contrary to my conclusion, the representations as pleaded were representations relating to future matters, then it is necessary to consider whether Woolworths had reasonable grounds to make the representations.
2. In this alternative aspect of its defence, Woolworths accepted that the criteria set out in *Sykes*, as advanced by the ACCC, were the applicable criteria.

### Operation of s 4 of the ACL

1. I am satisfied Woolworths has adduced “evidence to the contrary” for the purposes of s 4(2) of the ACL. That is, it has adduced evidence sufficient to remove the operation of the deeming provision in s 4(2). That evidence is documentary rather than testimonial, and consists of documents relating to:
   1. Woolworths’ supplier relationship with Huhtamaki;
   2. the status of Huhtamaki as a worldwide supplier of, amongst other products, packaging products;
   3. a range of certificates and verification documents provided by Huhtamaki to Woolworths’ subsidiary, Woolworths Hong Kong, regarding the compostability and biodegradability of the Products;
   4. a number of email exchanges between Woolworths’ subsidiary and Huhtamaki about the certificates and verification documents provided, the packaging, and the composition of the Products; and
   5. a number of SSS and PS forms, which are internal Woolworths documents, for the Products.
2. I have not included in this list the expert reports of Professor Clarke and Messrs Leake and Brosig, on the basis that this was not information available to Woolworths or in existence at the time the representations were made (putting to one side the vexed question of actual reliance).
3. I do not consider that the terms of s 4(2) require any particular kind of evidence to be adduced by Woolworths. What type of evidence one might “reasonably expect” Woolworths to have adduced, as the ACCC submits, does not take the matter any further in a legal sense, and I do not see the observations of Katz J in *Blacker v National Australia Bank Ltd* [2000] FCA 681 at [89] as made any more broadly than observations about the situation in that proceeding before his Honour.
4. Contrary to the ACCC’s submissions, I do not consider that in order to remove the deeming effect of s 4(2), a representor must invariably adduce evidence through a witness or decision-maker. The provision simply cannot be read as impliedly requiring that. It requires “evidence” to the contrary, that is all. The “contrary” refers to the proposition in s 4(2) that a person is taken not to have reasonable grounds. I accept there may be a point at which the evidence adduced by a representor is so qualitatively weak or deficient that it does not meet the description of evidence “to the contrary”. I do not consider that is the situation in this proceeding. Woolworths has adduced a range of documentary evidence. It has chosen not to put forward a witness, which was its forensic choice. That may make it easier for the ACCC to discharge its burden of proof: I deal with this matter below. However, I find that Woolworths has adduced evidence “to the contrary” for the purpose of s 4(2).
5. If the deeming effect of s 4(2) was not engaged, the ACCC accepted that it bore the onus of proof to establish on the balance of probabilities that Woolworths did not have reasonable grounds to make the representations.
6. I reiterate that in this section of my reasons, and contrary to my earlier findings about the content of the representations and them not being related to future matters, I am treating the representations as being ones relating to future matters, and as comprising representations that:

… if the Products were used in the ordinary way and disposed of in a generally available manner (that is, a conventional landfill facility or a home composting system) they would biodegrade and compost within a reasonable period of time[.]

(Footnote omitted.)

1. This formulation is taken from [6] of the ACCC’s closing submissions.

### The February 2014 material provided by Huhtamaki to Woolworths Hong Kong

1. As I noted earlier, in February 2014 Ms Usagi Ho, then an employee of Woolworths Hong Kong, emailed a request for the “packaging claims” on Huhtamaki’s bagasse product range, so that Woolworths could “tell our customer how eco-friendly of this material and put it on the packaging”.
2. Ms Ho received an email back from Ms Shiela So at Huhtamaki, which stated:

Hi Usagi,

Below is the list of certificates we got for our bagasse products and attached for your reference.

1) Pulp specification from our raw material supplier

2) OK compost cert for EU market

3) BPI cert for USA market

4) In-house test report

5) FDA test report on bagasse item

6) HACCP and GMP of our bagasse

6) Compostability Test Report for AU standard AS4736 (executive summary bagasse)

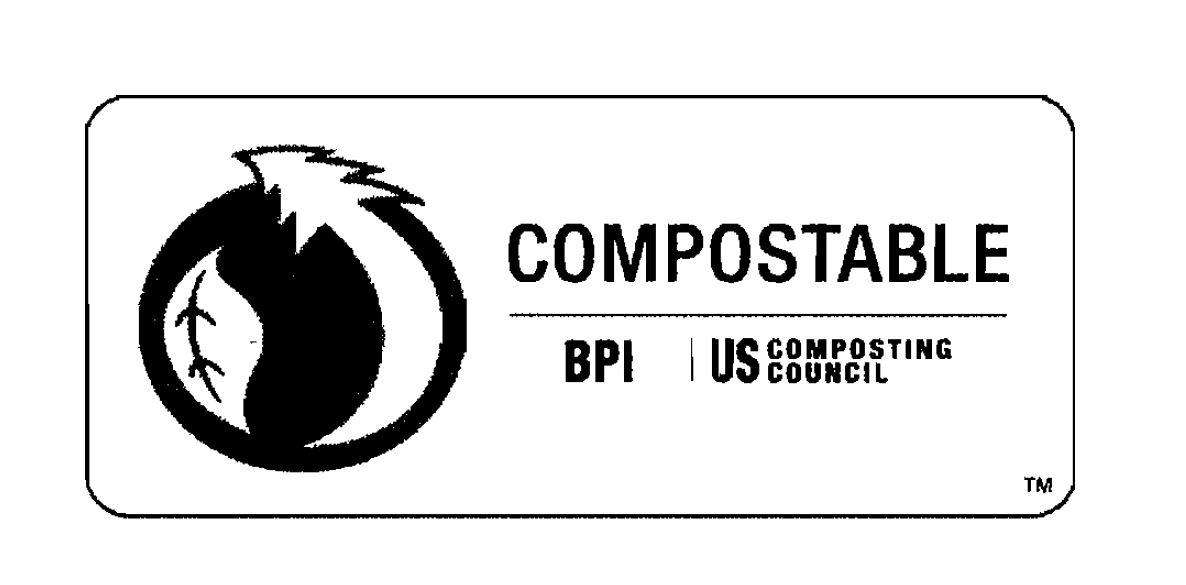
Enclosed please find the label and carton artwork we did for our sister companies, Huh-NZ and Huh-AU respectively for your reference.

Any questions, please let us know.

1. Since Ms Ho had asked for these documents, I am prepared to infer that when she received this material, she looked at it and considered it. I accept provision of this material may have contributed to the decision to award the supply contract to Huhtamaki (not that this fact is more than tangentially relevant to the issues in this proceeding).
2. Any consideration of the documents by Ms Ho is not necessarily enough, for the reasons I explain below, to satisfy the reasonable grounds test – either because of the contents of the documents, or because of the nature of the evidence about what state of mind can be attributed to Woolworths as a corporate entity.
3. In the following section I describe the material relevantly provided by Ms So to Ms Ho in the attachments to the February 2014 email correspondence set out above.

#### The “certificates” and reports

1. There were five documents which were headed “certificates”.
2. One was from a corporation named the Biodegradable Products Institute (BPI), which on the face of the document is connected to the US Composting Council. There is no evidence about either of these entities. This certificate on its face related to a number of products manufactured by GreenGood, including one described as “GreenGood’s thermoformed food service items made from NatureWorks PLA with a maximum thickness of 1.65 mm”. Cutlery was included in this list of GreenGood products. It also covered “GreenGood’s foodservice items made from bagasse with a maximum thickness of 1.027 mms”. The document suggests there was an application for certification by GreenGood, and the purpose of the certificate appeared to have been to authorise the use of the following logo:



1. On its face, the certificate authorised the use of that logo until 1 December 2013.
2. Using this BPI certification, Woolworths submits the cutlery in the present case has the same thickness as the cutlery described in this document, and the dishes appear to be slightly thinner. That would appear to be correct. There was some debate about a variation of .05mm in the thickness of the cutlery products, after Professor Clarke corrected his report. Even if the description of the cutlery thickness in the certificate varies by .05mm, that is not sufficiently material to affect my conclusions.
3. There were also four certificates from a Belgian corporation called Vincotte. They were entitled “Certificate for awarding and use of the ‘OK Compost Home’ conformity mark”. GreenGood was listed as the applicant for the certificate.
4. The product for which the first certificate was stated to be issued was “Natural fibre packaging”; “Maximum wall thickness: 0.98mm/561gsm”; “Colour: Natural White”; “No printing”. The certificate was expressed to be valid “[f]rom 29 July 2010 till 29 July 2015”.
5. The next three certificates were in the same form, also with GreenGood as the applicant, but contained different product descriptions. Two of these certificates were entitled to be for use of the “OK Compost” conformity mark, as opposed to the “OK Compost Home” mark. The second and fourth certificates contained a product description of “Natural fibre trays, plates, cups and lids”; the third contained a product description of “Natural fibre packaging”. The maximum wall thickness of the products was the same as the thickness listed on the first certificate, as were the validity dates of the certificates.
6. Next was an “in house test report”, set out on “Huhtamaki Josco” letterhead. The test date was “May 29 – June 1, 2013”, and on its face it is clear that what was tested were bagasse dishes of different sizes. It is apparent the testing was conducted for purposes unrelated to the available disposal methods for the dishes.
7. Following this were two test reports, identified as conducted by “Organic Waste Systems” (OWS), and each entitled “Final report compostability testing program on pulp molding product, natural fiber (thickness: 0.98 mm – grammage: 561 g/m2)”. They were similar in content and I use one as an example. From the cover page it appears the report was produced for GreenGood. The executive summary relevantly stated:

The quantitative disintegration of Pulp Molding Product, Natural Fiber in a thickness of 0.98mm and with a grammage of 561 g/m2 was evaluated in a pilot-scale aerobic composting test according to ISO 16929 (see report R-SW-1/10). After 12 weeks of composting 100% complete disintegration was obtained for material Pulp Molding Product, Natural Fiber (thickness: 0.98mm - grammage: 561 g/m2), which is well above the 90% pass level for disintegration as stipulated by EN 13432 (2000), ASTM D 6868-03, AS 4736 (2006) and ISO 17088 (2008).

Moreover the disintegration of Pulp Molding Product, Natural Fiber in a thickness of 0.98 and with a grammage of 561 g/m2 at ambient temperature was qualitatively determined (see report R-SW-1/5). After 8 weeks of composting at ambient temperatures the test material was completely disappeared from the slide frames. Material Pulp Molding Product, Natural Fiber in a thickness of 0.98 mm and with a grammage of 561 g/m2 will completely disintegrate in a regular home composting process.

1. Under “General Conclusion”, the report stated:

As a general conclusion it can be stated that material Pulp Molding Product, Natural Fiber in a thickness of 0.98 mm and with a grammage of 561 g/m2 does fulfill the evaluation criteria for material characteristics, biodegradation, disintegration and compost quality, which are outlined in CEN norm EN 13432 (2000) *‘Requirements for packaging recoverable through composting and biodegradation - Test scheme and evaluation criteria for the final acceptance of packaging’*, ASTM 6868-03 *‘Standard Specification for Biodegradable Plastics used as Coatings on Paper and Other Compostable Substrates’*, AS 4736 (2006) ‘*Biodegradable plastics - Biodegradable plastics suitable for composting and other microbial treatment*’ and ISO 17088 (2008) ‘*Specifications for compostable plastics’*. Test material Pulp Molding Product, Natural Fiber (thickness: 0.98 mm - grammage: 561 g/m2) does meet all requirements of the standards and can be called fully compostable.

Moreover, as material Pulp Molding Product, Natural Fiber in a thickness of 0.98 mm and with a grammage of 561 g/m2 does show complete disintegration at ambient temperature and biodegradation must not be demonstrated as this material is produced from natural fibers, it can be stated that Pulp Molding Product, Natural Fiber in a thickness of 0.98 and with a grammage of 561 g/m2 is also compostable under home composting conditions and is therefore eligible for OK Compost HOME certification.

1. As the ACCC points out, all these documents appear to be applicable mostly to the bagasse products only, and less to the CPLA cutlery. However, as I note above at [222], the first certificate issued by BPI purported to apply to CPLA cutlery. I accept none of the documents referred to the exact plate product or cutlery product packaged and sold by Woolworths. However, this is of no real significance, given that the material used to manufacture the Products was the same, and the thickness of the Products approximately the same (or less).
2. There is evidence of two more occasions on which Woolworths Hong Kong sought information about the materials comprising the impugned Products. The first was in July 2014, and the second in 2016.

### The July 2014 material provided by Huhtamaki

1. The context for the further provision of information by Huhtamaki to Woolworths Hong Kong is not apparent from the evidence. As with much of this evidence, Woolworths adduced no evidence of context.
2. Therefore, my findings are limited to what the documents establish on their face. I find they establish that in mid-2014 Huhtamaki provided Woolworths Hong Kong with two further certificates. One was again from Vincotte for use of the “OK Compost” mark on “Natural fibre trays, plates, cups and lids” of the same thickness as those to which the previous certificates applied, and apparently for the same validity period. The second was from BPI again and relevantly related to “GreenGood’s thermoformed foodservice items made from NatureWorks PLA with a maximum thickness of 1.65 mm, including cold drink cups & lids, cutlery and hot drink lids”, and “GreenGood’s foodservice items made from bagasse with a maximum thickness of 1.027 mms”. Ms So from Huhtamaki explained in her accompanying email that:

… BPI is the US standard and OK Compost is EU standard.

### The 2016 material provided by Huhtamaki

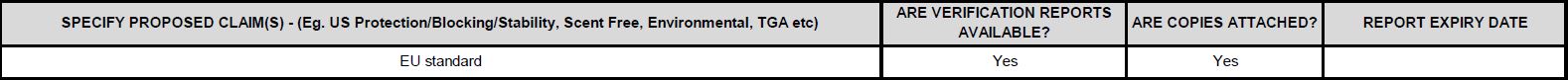
1. It is common ground that in 2016, there was a change in the manufacturer of the bagasse products for Woolworths. STG replaced GreenGood. There remained a connection to Huhtamaki: it is an agreed fact that STG is a partner factory to Huhtamaki. In email correspondence on 22 April 2016, Woolworths Hong Kong informed Huhtamaki of the following:

… make sure your new factory complete all testing and certificate for all skus, as required.

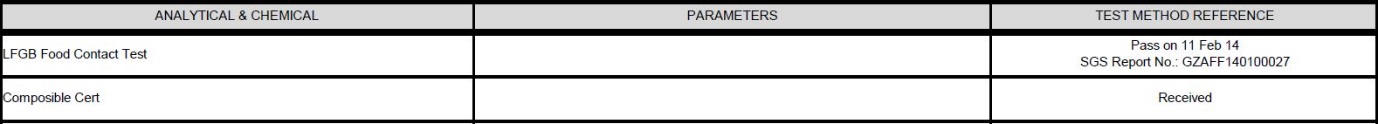
1. In response, Woolworths Hong Kong (but no longer Ms Ho, rather one Mr Chui) received two certificates, including a certificate issued by Vincotte in substantially the same form as the earlier “OK Compost” certificates. The products to which that certificate related were described as “Trays, bowls, plates and boxes; Maximum thickness: 0.775 mm; Colour: natural”. The period of validity of the certificate was “31 January 2013 till 31 January 2018”. The second certificate was entitled “Test Report” (and was described in Ms So’s email as a “food safe certificate”) and appeared to be testing the chemical composition of a sample of the bagasse plates.
2. In her email to Mr Chui, Ms So of Huhtamaki also stated “[w]e didn’t need to do the food safe testing for all items as long as the material is the same as confirmed in 2014”. A further inquiry from Woolworths Hong Kong was sent separately to obtain confirmation from Huhtamaki that the certificates and reports which had previously been sent related to the “bagasse range”. Included in this email chain were photos of the range which appear to show some of the impugned Products in July 2016.
3. The evidence suggests this inquiry was directly related to the bagasse products which comprise some of the impugned Products. However, for reasons I outline below, I do not consider that dislodges the evidence on which the ACCC relies to prove absence of reasonable grounds.

### The “Sample Submission Specification” forms and “Product Specification” forms

1. Woolworths submits the SSS forms or PS forms constitute evidence of its reliance on the information received from Huhtamaki. Again, there is no witness evidence to provide an express link between what was received from Huhtamaki and what was entered on these forms. Nor is there any witness evidence of the role played by these forms in the approval process leading to Woolworths deciding to display and make the Products available for sale.
2. The forms were materially the same, and had similar contents. One example will suffice. Taking the SSS form for the “Select Eco Bowl 20 PK”, the form contained detailed information about the product, including the name of the buyer, and the “sourcing contact” (which is stated to be Ms Ho). The “sourcing route” was identified as “Hong Kong Procurement”, and the “QA contact” was given as Sammi Tang, who was a participant in the July 2014 email chains in the evidence adduced by Woolworths to which I have referred above. As the supplier, Huhtamaki’s details appeared next on the form, with Ms So as the contact person, another person who appeared on the email chains in the evidence to which I have referred above.
3. Under the heading “Labelling & Packaging Details”, there were spaces for entries relating to the “retail claims” made on the product packaging. The following information appeared:



1. On the next page, still under this heading, the material of the product was identified as 100% “bagasse”, made in Thailand and supplied by Shandong Omega Pulp&Paper International Trade Co., Ltd. The form had an entry “N/A” against that part of the form referring to product and packaging labelling details according to Australian and New Zealand standards and regulations. This aspect of the Form was not explained. The ACCC made a particular submission about non-compliance with Australian standards, related to the requirements of Woolworths’ Environmental Claims Policy: see [257]-[268] below. I accept that the contents of the SSS and PS forms in evidence suggests that Woolworths did not have regard to any Australian standards concerning the compostability or biodegradability of the Products in its decision to offer them for sale, even if the OWS reports made reference to Australian standards. The SSS and PS forms were clear on their face that compliance with Australian standards was not a factor in Woolworths’ decision-making.
2. On the same page of the form the following information appeared:



1. I accept these forms constitute some evidence of Woolworths’ reliance on the information provided by Huhtamaki, and in particular the certificates. The forms disclose that Woolworths’ processes for recording the details of products it proposed to make available for sale included requirements to verify claims made on the labelling, in particular the “compostable” claim, and that this was done with respect to the Products.
2. How what is on these forms sits with the email exchange between Mr Carrig and Mr Hardingham, to which I refer below, is more problematic, and not just on the issue of environmental standards.

### The relevance of Woolworths’ bioplastics report and its 2009 Corporate Responsibility Report

1. The ACCC submits that the bioplastics report commissioned by Woolworths, which Woolworths received in early 2014, should have given Woolworths reason to doubt that it would be appropriate to claim the impugned Products were “biodegradable and compostable”. That report relevantly stated that that to be called compostable:

… packaging has to biologically decompose and disintegrate in a composting system (under either commercial or home composting conditions) to set levels within a defined period of time.

1. The bioplastics report did not apply to the bagasse products, but it did apply to the CPLA cutlery products. On the hypothesis on which this aspect of my reasoning proceeds (see [214] above), I accept this is the kind of qualified statement, in an expert report commissioned by Woolworths, which ought to have caused it to reconsider the claims on the packaging. That is because the representation about compostability involved (on this hypothesis) a time element which this report indicated needed to be present for the description “compostable” to be applied.
2. Despite Woolworths’ submissions, I do not consider this finding is unavailable because of the s 136 ruling applicable to the bioplastics report. What is important is the fact that the report made this statement and that there is no evidence Woolworths turned its (corporate) mind to how the contents of this report, and in particular what it said about making a claim a product is “compostable”, may have affected what claims could be made about the impugned Products. Without that kind of inquiry, Woolworths itself had no objectively reasonable basis for the representations (in the form I have accepted in this part of my reasons) that these Products would turn into compost within a reasonable period of time.
3. I also accept, on the hypothesis upon which this part of my reasons is based, that Woolworths’ 2009 Corporate Responsibility Report established it took a positive position about the need for precision in using the words “compostable” and “biodegradable”:

**Compostable plastic bags** are potentially recoverable through green or garden waste collection bins but collection can only be done with the support of local councils and commercial composters. There’s great potential for consumer confusion about what is compostable and how to correctly dispose of the compostable bags. The terms ‘biodegradable’ or ‘compostable’ are used loosely to describe many plastic films without having the appropriate testing and verification. The Australia Standard for biodegradable plastics only applies to plastics that biodegrade in commercial, not home, composting. The temperatures and operational conditions of a commercial composting facility are very different to those at home.

…

We have investigated biodegradable shopping bag options but have delayed any decision to use these products as we are concerned about the level of consumer awareness on suitable disposal of the bags. Current biodegradable bags that comply with the Australian Standard for biodegradable plastics (AS4736-2006) are not suitable for home composting. This means consumers are reliant on councils to provide a green waste collection service that will accept biodegradable plastics. Moreover, some commercial composting facilities have been unable to maintain the required temperatures and time required for biodegradation to take place.

(Original emphasis.)

1. This position is not consistent with Woolworths allowing its Hong Kong subsidiary to obtain general certificates for different products produced by Huhtamaki, in particular where those certificates, on their face, provided no detail about the conditions in which the compostability of those products were tested or the period of time taken for the products to compost. Furthermore, it is inconsistent with the fact that, on their face, the SSS and PS forms in evidence indicated that Woolworths did not have regard to whether the identified products complied with any relevant Australian standards.
2. Woolworths seeks to answer the ACCC’s use of this document by submitting that the paragraphs which I have extracted above at [249] are directed at plastic bags. That is true. However, they demonstrate a consciousness about the need for care in assessing what claims can be made about particular products, and a consciousness that composting processes need specific conditions to work. These matters were objectively, and centrally, relevant to the basis for Woolworths’ belief that the impugned Products would turn into compost in a reasonable period of time. However, there is no evidence they were addressed by anyone within Woolworths prior to, or after, making the impugned Products available for sale.

### The relevance of what was on the GreenGood USA website

1. As I have noted earlier in these reasons, it is common ground that GreenGood was the manufacturer of both the disposable dishes and cutlery at the start of the alleged contravening period. Huhtamaki was the parent company of GreenGood USA.
2. Huhtamaki was awarded the contract for the impugned Products on 24 March 2014. There is no clear evidence of who in Woolworths made the decision to offer the impugned Products for sale in Australia or when that decision was made, but I infer it was prior to this date.
3. The ACCC submits that in November 2014, being the start of the relevant period, GreenGood USA had the following statement on its website:

**Compostable definition**

A product that is “compostable” is one that can be placed into a composition of decaying biodegradable materials, and eventually turns into a nutrient-rich material. It is almost synonymous with “biodegradable”, except it is limited to solid materials and does not refer to liquids.

Composting occurs in nature every day as fallen leaves and tree limbs biodegrade into the forest floor. The EPA considers composting a form of recycling because it turns resources into a usable product.

Compost piles have been used by many farmers and gardeners for generations. Food, leaves, grass clippings, garden wastes, and tree trimmings (which amount to between 50 and 70 percent of waste in this country) can all go into the compost pile, where hungry microorganisms eat the waste to produce carbon dioxide, water and humus. The resulting compost is an excellent natural fertilizer proven by organic gardeners to restore soil fertility, control weeds, retain ground moisture and reduce soil erosion.

While backyard compost piles are well known, the newest application of composting is municipal composting, which works on the same natural principles, but is done on a much larger scale. Over 2,200 communities already compost their leaves, grass and yard trimmings. Approximately 55 additional communities compost or are about to compost all their organic trash at well-sited, professionally managed composting facilities.

Municipal composting requires minimal time, effort and labor, since most of the work is done by the microorganisms. Communities can also use or sell the resulting compost for agricultural and horticultural uses, or to restore depleted lands. Unlike landfills, a composting site can be continually reused without ever reaching capacity.

As with the term biodegradable, regulators recommend that the term compostable not be used unless the product is currently composted in a significant amount in the area where it is sold. Without the ability to actually compost the product, claim is considered to be meaningless and thus deceptive. They recommend that any product promoted as “compostable” should clearly and prominently disclose that the product is not designed to degrade in landfills.

There are no federal regulations regarding the use of the term “compostable”, but the Federal Trade Commission does give guidelines.

They say, “An unqualified claim that a product or package is compostable should be substantiated by competent and reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become part of, usable compost (e.g., soil conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device.”

Claims may be considered deceptive if: (1) municipal composting facilities are not available to a substantial majority of consumers or communities where the package is sold; (2) the claim misleads consumers about the environmental benefit provided when the product is disposed of in a landfill, or (3) consumers misunderstand the claim to mean that the package can be safely composted in their home compost pile or device when, in fact, it cannot.

(Original emphasis.)

1. It is clear much of what was said by GreenGood USA is consistent with the ACCC’s allegations in this proceeding. I have taken a different approach, based on the evidence before me, and critically because I do not consider s 4 of the ACL applies. Nevertheless, in this section of my reasons where I proceed on the basis that my approach to s 4 is wrong, it is clear that what was said by GreenGood was precisely the kind of information that those within Woolworths responsible for the decision to offer the impugned Products for sale in Australia should have been looking at when forming their opinions whether there was a sufficient and reasonable basis for the representations (as formulated by the ACCC).
2. I reject Woolworths’ submissions that because Huhtamaki did not draw Woolworths Hong Kong’s attention to these statements, or provide “guidance” to Woolworths Hong Kong in accordance with the content of those statements, that they can be put to one side. These were statements made by the manufacturer of the impugned Products. Some of them relate to the United States’ regulatory regime, so much can be accepted. However, they also indicated the need for caution in making representations about the time and circumstances in which products will turn into compost. That is the precise subject-matter of the representations allegedly made by Woolworths, on the alternative hypothesis with which I am currently dealing.

### The relevance of Woolworths’ Environmental Claims Policy and internal emails

1. As the ACCC submits, the contents of Woolworths’ Environmental Claims Policy was the closest the evidence came to identifying any person within Woolworths with decision-making responsibility for the affixing of the labels “biodegradable and compostable” to the impugned Products.
2. The relevant parts of the Environmental Claims Policy should be set out:

Woolworths Limited is committed to truth in advertising and acting in the best interest of its customers. We endeavour to always operate responsibly within the community, in accordance with the expectations of the community and requirements of the law.

…

The purpose of the Policy is to help our buying, advertising and marketing staff to ensure that the environmental claims they make on our products and catalogues are accurate, truthful and relevant. This will be achieved by ensuring that all environmental claims are adequately verified and represented appropriately to eliminate the potential for misleading customers or the public generally.

…

An environmental claim is a representation (a statement, picture, logo, etc.) that can potentially give the consumer the impression that the use, production, transport or delivery of the product/service benefits or has benefited the environment in some way. Examples of environmental claims include (but are not limited to) statements about environmental sustainability, recycling, recyclability, biodegradability, energy and water efficiency, carbon neutrality, zero carbon, reduced impact on the environment, protecting the natural environment, improving air quality and other similar representations.

…

Labels/brands associated with any of our Woolworths Limited businesses

Any environmental claim(s) and/or advertising made on product packaging, in catalogues, magazines, electronic or hard copy (including in-store) media must be supported and substantiated by a credible third party verification, certification or endorsement relevant and appropriate to the scope of the claim(s) and where applicable in accordance with Australian Standards or equivalent. For advice on acceptable third party verification, certification and endorsement refer to the Corporate Responsibility team.

…

**5.1 Approval and Sign Off of Environmental Claims**

All environmental claims or advertising made by Woolworths Limited’s brands and businesses must be referred to Corporate Responsibility team for advice and must be approved by the SMG responsible for the product sale or their nominee. Requests for advice and approval must be accompanied by all supporting documentation substantiating the claim(s) and must allow sufficient time for verification of the claim(s) and related documentation. Turnaround time will be determined on case by case basis and will depend on the extent of review and verification needed.

…

**7. Breach of the Policy**

Breach of the Policy will be treated as a breach of Woolworths Limited’s Code of Conduct.

In the case of Woolworths Limited’s agents, contractors and consultants, a breach of the Policy may result in termination of any existing contract or an action for damages.

(Original emphasis.)

1. The first version of this Policy was issued in June 2008, and the second in June 2014. It is apparent from the last section I have extracted that Woolworths takes this Policy very seriously, as might be expected.
2. It is also apparent from the evidence that the broad policy of securing “verification” for claims made about products was followed by Woolworths Hong Kong in relation to the impugned Products.
3. On the evidence, what did not happen was the referral of any approval of the labelling and packaging on the impugned Products to any person within the Senior Management Group at Woolworths.
4. Woolworths did not suggest to the contrary. Instead, it seeks to dismiss the Policy as an “internal policy” not capable of having any bearing on whether Woolworths had an objectively reasonable basis for the statements made.
5. The Policy is an important piece of evidence. The apparent failure to follow the process it set out meant that no one with responsibility for deciding whether the environmental claims made on the packaging of the impugned Products should be made on Woolworths’ behalf in fact turned her or his mind to that question, so that no state of mind on behalf of Woolworths was in fact formed. There was nothing to assess for objective reasonableness, because no belief was formed. This only matters if I am wrong on my preferred approach to the “future matters” issue, and s 4 is applicable.
6. Furthermore, the email exchange between Mr Carrig and Mr Hardingham confirms the absence of any opinion or belief in fact having been formed on behalf of Woolworths.
7. The email exchange occurred, as I have noted earlier in these reasons, in mid-March 2014, at a time just before Huhtamaki was awarded the contract to supply the impugned Products to Woolworths. I have set out the text of the email exchange at [37]-[38] above.
8. Woolworths attempted to suggest it was unclear that the exchange concerned the impugned Products. I reject that submission. The reference to “eco range” in Mr Carrig’s email makes it clear that is what Mr Carrig was inquiring about, although I accept Mr Hardingham’s focus on “bioplastics” is less consistent with Mr Hardingham understanding exactly what products Mr Carrig was specifically inquiring about. The focus on bioplastics may also be indicative of Mr Hardingham’s own lack of information about the different substances from which products might be manufactured. However, I am satisfied the exchange encompassed the impugned Products, whether or not it was limited to them.
9. It is also clear from this email exchange that Mr Carrig and Mr Hardingham had had a “conversation” regarding the “eco range” of products, and that other Woolworths employees may have been consulted about the claims on the packaging (see Mr Carrig’s reference to the “business team”). Evidence about these conversations, especially given their timing, would likely have been highly relevant to the issues arising under s 4. Although Woolworths contended s 4 did not apply, a contention I have accepted, it also sought to adduce evidence “to the contrary” to disengage the deeming effect of s 4(2) and to support its contention that it had reasonable grounds for making the representations as alleged by the ACCC (contrary to its primary case that no such representations were made). I accept the Court could infer, in accordance with the principles in *Jones v Dunkel* [1959] HCA 8; 101 CLR 298, that Woolworths elected not to call Mr Carrig or Mr Hardingham, or any other individual who was involved in the discussions which the email exchange proves occurred, because their evidence was unlikely to assist the case Woolworths sought to put against the ACCC. However, in the present circumstances, the drawing of such an inference is of little practical effect. I have already concluded Woolworths has adduced evidence “to the contrary” for the purposes of s 4(2), and that the ACCC otherwise has the legal burden of proof under s 4. At most, the absence of such witnesses makes me more comfortably satisfied that - if I had otherwise accepted the s 4 arguments contrary to my principal conclusions - the ACCC has discharged its burden of proof.
10. Therefore, I am comfortably satisfied, having regard to the contents of Woolworths’ Environmental Claims Policy and the email exchange between Mr Carrig and Mr Hardingham, that the conclusion I have reached at [299] below is the correct one. No person to whom Woolworths’ state of mind could be attributed consistently with the High Court’s observations in *Krakowski v Eurolynx Properties Ltd* [1995] HCA 68; 183 CLR 563 at 582-3, on which the ACCC relied, in fact formed any opinion or belief that Woolworths had reasonable grounds to make the representations alleged. If anything, those to whom Woolworths’ state of mind might have been attributed had expressed doubts about the claims on the packaging of the Products. It is fortunate for those people that Mr Brosig’s test proved what it did.

### Woolworths’ “reputable supplier” argument

1. Woolworths refers to what was said in *Cummings* at 566 about the ability to rely on evidence outside that given by the alleged representor to establish reasonable grounds, but in particular refers to the following statement from Dowsett J in *Danoz Direct* at [174]:

The applicant submits that the first respondent cannot demonstrate reasonable grounds merely by showing that it relied upon information provided by a supplier such as Thane. I do not accept that assertion as necessarily correct. In many cases a retailer will rely upon representations made by a manufacturer or wholesaler as to the quality and capacity of a particular product and will make representations based upon them. It cannot be seriously suggested that a pharmacist who recommends a product to a customer, acting upon information provided by a reputable manufacturer, lacks reasonable grounds. Similarly, it cannot be asserted that s 51A requires a retailer of electrical goods to carry out testing on a television set supplied by a reputable manufacturer in order to ensure that it has the qualities asserted in relevant promotional material, before he or she represents that it has such qualities. In my view, such representations may well be made on reasonable grounds if they are based upon information provided by a supplier. In each case, the question will depend upon the reputation of the supplier and past dealings between it and the retailer.

1. Woolworths makes the following submissions about Huhtamaki, and its relationship with that corporation:

Huhtamaki was and is a reputable global supplier. Huhtamaki’s Annual Reports for 2014-2017 and Sustainability Report for 2014 put this beyond doubt. The 2014 Sustainability Report stated Huhtamaki was the number one global operating food service packaging manufacturer. It also stated that:

In the beginning of April 2015, Huhtamaki has 68 manufacturing units and 23 sales offices in 34 countries. Mastering three distinctive packaging technologies, our 16,000 employees develop and make packaging that helps great products reach more people, more easily. In 2014 our net sales totaled EUR 2.2 billion.”

The Annual Reports confirmed that Huhtamaki had sound environmental policies:

(a) Huhtamaki is a signatory to the International Chamber of Commerce Business Charter for Sustainable Development.

(b) Approximately 64% of all Huhtamaki’s manufacturing units followed an externally certified environmental management system such as ISO 14001, the Eco Management and Audit Scheme or the internal Environmental Care Program.

(c) From at least 2015, Huhtamaki published an annual Corporate Responsibility Report, which detailed the group’s environmental performance.

(d) Huhtamaki’s internal controls related to environmental processes and procedures are audited both internally and externally.

(e) The Huhtamaki group spends between EUR 8-11 million annually on environmental operating costs. These costs consist mainly of expenses related to environmental protection equipment, and expenses related to waste management and waste water treatment.

(Footnotes omitted.)

1. It may be accepted that Huhtamaki is appropriately described, on the evidence, as a “reputable supplier” to Woolworths. It may also be accepted that the certificates and reports it provided to Woolworths Hong Kong demonstrated that according to at least some standards in Europe and the United States, the bagasse dishes and CPLA cutlery could be described as “compostable”.
2. On this aspect of the case, the key feature on which the ACCC relies is that for the labels “biodegradable and compostable” to have been used, Woolworths must have had reasonable grounds to believe the impugned Products would turn into compost within a reasonable period of time. Periods of time were simply not addressed by the certificates provided by Huhtamaki: the certificates were at too high a level of generality. It is true that the OWS reports relating to bagasse products (also passed onto Woolworths Hong Kong) did demonstrate how long the products tested took to turn into compost.
3. The observations of Dowsett J in *Danoz Direct* will always fall to be applied to particular circumstances, and in respect of particular evidence. In this context, the information was given to Woolworths Hong Kong by its (accepted) reputable supplier Huhtamaki but on the evidence not actively considered by any person within Woolworths itself. Yet Woolworths’ own documents show it was well aware of the subtleties surrounding claims that a product is “compostable”. The evidence to which I have referred above from Woolworths’ internal emails and its Environmental Claims Policy adds to this evidence of consciousness.
4. In these circumstances, the fact that Huhtamaki was a reputable supplier did not mean it was reasonable for Woolworths to make the representations the ACCC alleges without any active engagement with its own policies and standards. The “reputable supplier” argument is insufficient on the facts of this case, where there is evidence first, of Woolworths having its own policies and standards which reveal a more nuanced approach to environmental claims, or predictions of environmentally friendly outcomes, and second, that no one in Woolworths engaged in any consideration of whether the labelling on the Products was consistent with those policies and standards, and information in reports it had commissioned. In the circumstances of this case, these matters form part of assessing whether there was an objectively reasonable basis to support the representations the ACCC alleges were made.

### Documents and information which cannot on any view provide reasonable grounds

1. Amongst the material sent to Ms Ho, I find it is clear that there were several documents which could not on any view provide reasonable grounds for the representations as alleged by the ACCC.
2. Some of the material concerned the composition of the bagasse pulp used to make the dishes, although did not appear to directly concern the impugned Products. In one communication, entitled “Standard Quality of Bleached Bagasse Pulp”, the following statement appeared:

EPPCO’s meticulously treated wastewater is pumped back into the very field at least 5 sq. kilometers where sugarcance grows. The sludge from this process is also treated and returns to the land as fertile compost.

1. Obviously, that was a reference to what happens during the manufacturing process of bagasse products, and did not refer to how those products, once manufactured, might break down into compost.
2. Some of the material had no connection, or no discernible connection, with the labelling on the impugned Products. For example, one test requested on a “sugarcane container”, was said to have been conducted for the following purpose:

For compliance with the Food and Drug Administration Regulations for determining the components of paper and paperboard in contact with aqueous and fatty foods.

1. Other documents also related to the testing of bagasse products for suitability to hold hot foods and the like, such as the document entitled “Bagasse Box In House Test Report”.
2. Woolworths seeks to rely on some of the artwork examples provided by Huhtamaki for apparently similar products, which used the word “compostable” on the front. Aside from the possibility this kind of evidence could be used in Woolworths’ “reputable supplier” argument, which I have rejected, this kind of material could not possibly provide reasonable grounds for the alleged representations. It is simply an example of another product using one of the words which appeared on the labelling of the impugned Products.

## Findings on the material, taken as a whole

1. The ACCC submits there was no evidence about who was the relevant “decision-maker” within Woolworths in Australia, in terms of who made the decision to display and supply the impugned Products in Australian Woolworths stores. That submission is correct. I also accept the ACCC’s submission that there was no evidence demonstrating communication of the certificates and reports received by Woolworths Hong Kong from Huhtamaki to any relevant decision-maker within Woolworths in Australia.
2. There is no evidence at all, aside from the SSS and PS forms to which I have referred above, about who decided to place the statements on the packaging of the Products, or when that decision was made (save that it can be safely inferred this decision was made before the Products were made available for sale).
3. There is no evidence of any communication between Ms Ho and any person in Woolworths in Australia in relation to the labelling on the impugned Products and the use of the description “biodegradable and compostable”. There was email correspondence in March 2014 between Woolworths and Huhtamaki about approval of “drawings” by a Woolworths’ employee, but the parties’ agreed chronology indicates that the approval process for the packaging artwork for the products did not take place until later in 2014.
4. Accordingly, the ACCC submits that it has discharged its burden of proving that even if there was some information provided by Huhtamaki to Woolworths Hong Kong, the Court can be satisfied on the balance of probabilities that when the representations were made by Woolworths (in the form alleged by the ACCC) that there was no sufficient basis then known to Woolworths for making those representations.
5. I accept the ACCC’s submission that there is no evidence about the state of mind of those in Woolworths responsible for deciding to make the impugned Products available for sale, with the labelling as it was; and there is no evidence of actual reliance by any relevant decision-maker within Woolworths on the information received by Woolworths Hong Kong from Huhtamaki: see generally *Bathurst Regional Council* at [2827] (Jagot J). As to what is required to establish the state of mind of a corporation in circumstances where a matter such as reliance needs to be established, I accept the ACCC’s submission that the following statement of principle from the High Court in in *Krakowski v Eurolynx Properties Ltd* [1995] HCA 68; 183 CLR 563 at 582–583 is applicable:

As Bright J said in *Brambles Holdings Ltd v Carey* [(1976) 15 SASR 270 at 279; and see at 275-276, per Bray CJ; at 281-282, per Mitchell J]:

“Always, when beliefs or opinions or states of mind are attributed to a company it is necessary to specify some person or persons so closely and relevantly connected with the company that the state of mind of that person or those persons can be treated as being identified with the company so that their state of mind can be treated as being the state of mind of the company…”

1. In the absence of any witness, or any direct evidence adduced by Woolworths as to the range of persons who might be said to be identified with the company in this way, I accept the ACCC’s submission that the Environmental Claims Policy indicates approval for sale of a product containing environmental claims must be given by Woolworths’ “Senior Management Group” responsible for the product sale, or the Group’s nominee. There is no evidence this occurred in respect of the Products.
2. There were, as I have identified above at [229]-[230], some highly relevant statements in the Huhtamaki information, such as the executive summary and general conclusion sections of the OWS test reports in relation to bagasse products. What is missing, however, is evidence about who within Woolworths was aware of this information, understood it related to the impugned Products, and relied on it as part of making the decision that there was a sufficient basis to make the representations as alleged by the ACCC.
3. Instead what appears to have happened, I infer, is that no one within Woolworths in Australia undertook any consideration of whether there was a reasonable basis for the representations to be made on the packaging of the Products. There is also no evidence about precisely who even decided on the use of the phrase in question. Again, I emphasise these findings are made in the context of the representations being as alleged by the ACCC and as I have set out at [214] above. If, contrary to my own conclusions, that is what was alleged, and it was as to future matters, then I accept the ACCC has proven that Woolworths formed no opinion, let alone an objectively reasonable one, about whether it had a basis to make those claims. There was simply no inquiry made, on the evidence before me. Somewhere, in Woolworths’ documentary records, there may have lain documents that could have been examined, although they would have needed to have been examined for consistency with some of Woolworths’ existing policy positions, and to see whether they objectively established these Products would turn into compost in a reasonable period of time. None of that occurred, on the evidence. It was Ms Ho of Woolworths Hong Kong who sourced the Products and asked for the information from Huhtamaki, but on the evidence engaged in no evaluation of it. She cannot possibly be identified as the responsible person for the decision to make the representations on the packaging of the Products eventually sold in Australian Woolworths stores.
4. I accept there were *some* grounds for the alleged representations, based on the evidence I have described above. In particular, the certification from BPI. I reject the ACCC’s contentions that the fact that certification ended in December 2013 was of significance: as Woolworths submits, the composition of the products remained the same. It is not insignificant that the adjectival description “compostable” is what was certified as capable of being applied to the products identified in the certificate.
5. As I stated above, I accept the products referred to in the certificates do not appear to be exactly the same products impugned in this proceeding, however the products referred to in the BPI certification are CPLA and bagasse products. Again, as I have found elsewhere, it is the composition or constitution of the products which gives them their inherent qualities and which renders them capable (or incapable) of biodegrading and composting. Thickness may affect this, but here relative thickness is similar.
6. Next, given there was a change of manufacturer (but not supplier) during the relevant period, it is appropriate to consider whether any reasonable grounds continued to exist after STG took over. As I have described above, Woolworths Hong Kong asked for new evidence of the certifications in 2016, and received it. I thereby consider that *some* grounds for the representations continued to exist after STG took over the manufacture and supply of the Products to Woolworths.
7. I find, adopting the criteria in *Sykes*, that:
   1. Woolworths Hong Kong requested information about the impugned Products and received information from Huhtamaki that included information about whether similar products were biodegradable and compostable;
   2. that information included certifications of similar products from reputable organisations in the United States and Europe concerned with claims about whether material was compostable;
   3. some of that information also went to the time taken for products similar to the impugned Products to turn into compost, and could have gone some way to providing an objectively reasonable basis to support the representations as alleged by the ACCC;
   4. information was largely provided to Woolworths Hong Kong before the representations were made, and after the manufacturer changed;
   5. there is no evidence that anyone with decision-making responsibility for making the Products available for sale in Australia looked at that information;
   6. there is no evidence that anyone with decision-making responsibility for making the Products available for sale in Australia formed any belief about whether the impugned Products would biodegrade and turn into compost within a reasonable period of time;
   7. there is evidence which establishes on the balance of probabilities that Woolworths’ Environmental Claims Policy was not adhered to in respect of the supply and sale of the Products, which confirms what I have found above; and
   8. the fact that Huhtamaki could be described as a “reputable supplier” is not determinative on the facts of this case.
8. Thus, although Woolworths may have had records, mostly provided to its subsidiary, which provided *some* grounds for the representations as the ACCC alleges they were made, I do not consider Woolworths itself in fact had reasonable grounds in the circumstances, and nor were the grounds held by a person who can be attributed with the requisite state of mind.

## Summary of my conclusions on the alleged representations and on s 4 of the ACL

1. In summary, I have found the representations made by the words “biodegradable and compostable” affixed to the labels on the Products, read in the context of the packaging as a whole and the circumstances in which the Products were made available for sale both in store and online, were that the Products were capable of breaking down in landfill, and capable of being turned into compost.
2. I have found the labelling carried no representation as to a time period in which these processes would occur.
3. I have found the representations were not related to any future matters, but were representations as to present fact, based on the composition of the Products and their capacity to break down and be turned into compost.
4. If, contrary to these findings, the representations were a) in the form alleged by the ACCC, and b) were as to future matters, then I have found:
   1. Woolworths adduced evidence to the contrary for the purpose of disengaging the deeming effect of s 4(2); but
   2. the ACCC has discharged its burden of proving Woolworths had no reasonable grounds on which to make the representations.
5. That is because although there was information provided by Huhtamaki to Woolworths Hong Kong that provided some grounds to believe the impugned Products were capable of being turned into compost, and capable of biodegrading, including some information that the composting process could occur within a reasonable period of time, there is no evidence that any person to whom Woolworths’ state of mind can properly be attributed looked at this information and relied upon it, before or at the time the representations were made.
6. The absence of any direct evidence about the process followed by Woolworths to approve these Products for sale containing the claims as they were made (recalling this on the alternative hypothesis I have set out at [214] above) means it is easier to be satisfied on the balance of probabilities that Woolworths in fact formed no opinion about the existence or otherwise of a reasonable basis for the claims it made on the packaging of the impugned Products. There was an obvious failure in the circumstances to follow Woolworths’ own policy concerning the making of environmental claims, and the absence of any evidence from those involved in at least some aspects of the decision-making process supports the findings I have made.

# Whether Woolworths has contravened sections 18, 29 and 33 of the ACL

1. As I noted earlier in these reasons, the ACCC’s alternative s 18 case arose by way of an amendment to its Concise Statement, and is alleged in the alternative to its allegations under s 4.
2. Since I have determined that the representations were not representations relating to future matters, the ACCC can only succeed if I accept its alternative s 18 case. This is the second of the two-stage process to which I referred to at [84] above. It falls to be determined on the findings I have already made, namely that the representations made by the use of the phrase “biodegradable and compostable” on the packaging of the impugned Products were that the Products were capable of breaking down in landfill and were capable of being turned into compost: see [188] above.
3. It was common ground that the ACCC bore the onus of proving its allegations in its alternative case. To recap, those allegations, as expressed at [11] of the amended Concise Statement, are:

Further or alternatively to paragraphs 5 to 10 above, the Environmental Claim Representations were false or misleading or deceptive or likely to mislead or deceive because the Select Eco Products **were not biodegradable and compostable within a reasonable period of time when disposed of:**

i. **using domestic composting: or**

ii. **in circumstances ordinarily used for the disposal of such products, including conventional Australian landfill.**

(Emphasis added.)

1. This formulation in bold followed the formulation of the “Environmental Claim Representations” alleged in [4] of the Amended Concise Statement.
2. In answer to this allegation, Woolworths denies having made the representations as alleged. I have made findings consistent with Woolworths’ position on the nature of the representations: see [188]-[191]. The representations which I have found were made on the labelling of the impugned Products were, in my opinion, not false, or misleading, or deceptive.
3. Woolworths then also contends in its Concise Response (at [11]) that in any event, and in answer to the ACCC’s case as alleged, the impugned Products “were, in fact, biodegradable and compostable”. In its closing submissions, Woolworths further contends the evidence established the Products would biodegrade and compost “no slower than many other forms of organic waste”. For the reasons I set out below, I find that to be the case.
4. The findings to which I have just referred go further than they need to. The ACCC bore the onus of proof on the allegations of contravention of ss 18, 29 and 33 of the ACL in this proceeding. It has proven neither that the representations as alleged were made, nor even if they had been, that they were false or misleading or deceptive, or likely to be misleading or deceptive. That is because the ACCC has failed to prove that the impugned Products would **not** biodegrade in landfill within a reasonable period of time, and it has failed to prove that the impugned Products were **not** compostable within a reasonable period of time using domestic composting (landfill being irrelevant because the parties agreed no organic material composts in landfill). To be clear, the ACCC had to prove the negative and has failed to do so.
5. However, on Woolworths’ evidence, I am also satisfied on the balance of probabilities of the positive proposition: namely that the impugned Products **will** biodegrade in landfill within a reasonable period of time, and **are** compostable within a reasonable period of time using domestic composting (landfill being irrelevant because the parties agreed no organic material composts in landfill).

## Section 18: Were the representations false or misleading?

1. There was no real dispute on the evidence that the Products were capable of biodegrading, and capable of being turned into compost. Little if any emphasis during the trial was placed on whether the Products were capable of biodegrading in landfill, or “rubbish dumps”, because this fact was accepted as between the parties and their experts, as I set out below.
2. The real dispute was about the circumstances in which the Products might be turned into usable compost, and over what time period. Given the nature of the representations I have found were conveyed (see [188]-[191]), it is not necessary to make detailed findings on these matters. As I set out below, there was in substance an agreed position between the parties and their experts about the capabilities of the impugned Products.
3. Notwithstanding my findings, given the way the case was argued, it is appropriate that the Court explain at least in summary form why, even if the representations were made in the form alleged by the ACCC, the ACCC has not discharged its burden of proving that the alleged representations were false or misleading or deceptive, or likely to mislead or deceive consumers.

### On the representations as the Court has found them: evidence of the Products’ capacity

1. As I have found, the representations made on the labelling of the Products were that the Products were capable of breaking down in landfill and were capable of being turned into compost.

#### Biodegradability

1. Mr Nolan’s opinion on the biodegradability of the Products was:

As the disposable cutlery and disposable dishes are organic and biodegradation of organic material occurs under aerobic and anaerobic conditions, the products will biodegrade in landfill.

The rate of degradation will be slower than fresh and waste vegetable and fruit, fresh and waste meat, grass and paper in all landfill types and will be much slower in best practice dry landfills as is the case in the general environment.

Most waste landfilled over the reference period was disposed of to best practice dry landfills.

1. Further, in terms of the Products being placed into a home composting system, Mr Nolan’s opinion was:

Both product categories should biodegrade at 20°C to 30°C in a home composting environment.

The time taken to biodegrade and disintegrate will vary widely based upon the factors identified in Section 7.3.2.

1. The reference to “Section 7.3.2” was a reference to that section of Mr Nolan’s report where he set out his opinions about how long the composting process would take under various conditions (industrial, laboratory and “pilot” home composting and operating home composting systems).
2. Mr Nolan confirmed his opinions in his oral evidence:

[MR MOORE:] If you could turn to paragraph 5.4.2, which is page 334? --- Yes, I have that.

You will see you set out there a definition of biodegradability. The definition actually appears over the page:

*The ability of organic substances to be broken down by microorganisms in the presence of oxygen, aerobic to various things. Alternatively, the breakdown of organic substances by microorganisms without the presence of oxygen, anaerobic to carbon dioxide, methane, water and biomass.*

That’s a definition which you adopt as an appropriate definition for biodegradability; correct? --- Yes.

And can I ask you to turn to paragraph 6.3.1.2 of the report which is page 339. And just if you have a look at what you say there at 6.3.1.2.1. And am I correct in understanding what you’re saying is that, because the products in issue in these proceedings are organic and biodegration of organic materials occurs under aerobic and anaerobic conditions, they are biodegradable including in landfill? --- Yes.

…

[MR MOORE:] 7.4.5.1, which is on page 347. You will see a heading towards the top of the page Part 3 Operating Home Composting Systems. And the first paragraph there:

*Both product categories should biodegrade at 20 to 30 degrees in a home composting environment.*

You see that? --- Yes, I do.

And is it correct that that’s consistent with the broader proposition you agreed to a moment ago, which is that these products are biodegradable and therefore they will biodegrade, including in a home composting system?---Yes.

Yes. And so they are biodegradable in accordance with your definition that you give in your report? --- Yes.

1. Professor Clarke expressed a similar conclusion. In his report, he stated:

The character and composition of each of CPLA and bagasse are such that each is an organic material with the current propensity to biodegrade and to compost. Bagasse and CPLA are each biodegradable and compostable materials.

For illustration, a relevant measure of biodegradability or compostability is whether the material concerned will degrade or compost in a similar time frame to a similarly constituted article that is made of obviously organic, biodegradable material. I expect that the Products will decompose in a manner, and over a timeframe, which is no longer than a similarly shaped product made of soft wood (in the case of the CPLA cutlery) or paper (in the case of the bagasse plates). This will be the case in whatever environment that these products are placed - industrial or home composting, or in a landfill.

1. Mr Leake’s opinion was (as to both the dishes and the cutlery):

Bagasse is a natural, fibrous by-product of sugarcane processing and as a natural, organic matter, is well-known to be biodegradable. In my experience, it is widely used in composting, especially in North Queensland and it is widely sold in all states as a mulch material.

My understanding, based on the literature, is that CPLA is a bioplastic deliberately designed to be biodegradable. A good summary of this literature is available in Karamanlioglu (2013).

As a general matter, bagasse and CPLA are readily biodegradable, and hence compostable, organic materials. Being derived from sugarcane and corn starch respectively, they can also be described as being derived from renewable resources.

(Footnote omitted.)

1. Thus, the experts’ unanimous opinions, which I accept, were that the impugned Products were capable of breaking down in landfill, or in “rubbish dumps” (and, in fact, in a compost situation as well). As I have observed at [190] above, in my opinion the reasonable consumer would understand biodegrading and composting are different processes, even if she or he did not have much knowledge about how those processes worked. Even if consumers thought the impugned Products might “biodegrade” in compost, and the phrase was said to carry a representation of that kind, it would not be false or misleading or deceptive, on the evidence of all the experts in this proceeding.

#### Compostability

1. The same unanimity in expert opinions is apparent on the question of whether the impugned Products were capable of turning into compost.
2. By reference to the materials from which the impugned Products were made (bagasse and CPLA) Mr Leake’s opinion was:

Bagasse and CPLA are very suitable to be composted in a range of ways. This is because:

(a) **Bagasse** - Bagasse is a ligno-cellulose fibre derived from sugar cane. It is the waste product after the sugar juice is extracted. It is then processed further to make a white fibre that is incorporated into the plates and bowls relevant to this Report, in a process very similar to wood fibre being used to make paper.

(b) **CPLA** - CPLA is a form of “PLA” or polylactic acid, a bioplastic made from a variety of biological sources including corn starch co-polymerised with an aliphatic polyester made from fermenting glycerol. It is a readily biodegradable material, that has been crystallised in order to make the end-product more stable so that it can be used without disintegrating too rapidly. Nonetheless, it is a hydroscopic material and enzyme pathways exist to respire this material. When composted with food and other wastes it is said to break down into low-molecular weight compounds within 2 weeks.

In my view, for a product to be deemed “compostable”, then at the end of composting it need not be 90% destroyed but the residues should pass the definition set out at paragraph 58 above.

Bagasse would meet that definition for the following reasons:

(a) it will degrade and leave no toxins;

(b) the resulting material will provide structure;

(c) it will be non-objectionable in appearance; and

(d) it will be beneficial to soil.

CPLA would meet that definition for the following reasons:

(a) CPLA is useful for composting because it is a highly energetic compound that is good for microbes;

(b) while degrading it will provide structure in the compost, but will ultimately degrade to non-objectionable material;

(c) CPLA and its intermediate breakdown products are not eco-toxic; and

(d) it breaks down to form useful humins and humic acid which are useful in soil as a source of organic matter.

(Original emphasis.)

1. He then expressed this opinion about the compostability of the Products themselves, based in large part on the results of Mr Brosig’s test:

I have read the report of Mr Brosig setting out the results of the trial he conducted at my request. I have considered the results of Mr Brosig’s trial and I draw the following observations and conclusions from them:

(a) A merchantable compost which includes the bagasse plates and CPLA forks has been achieved over the course of the trial, being a period of approximately 6 weeks.

(b) Each of the bagasse plates and the CPLA forks have biodegraded and decomposed.

(c) In relation to the CPLA forks, one would typically expect that the crystallised form of the PLA would take longer than the bagasse plate to decompose for the reason that the polymer bonds have to break up before degradation occurs. The CPLA fork, however, contains talc. Talc is an inert, simple, clay mineral that absorbs water. In this product, the talc acts as a hydroscopic agent - that is, the forks are absorbing water, such that they swell and turn into a paste-like substance. This preliminary step is called disintegration. Disintegration means to break into pieces. The disintegration of the forks increases the biodegradability of the material, because the disintegration increases the surface area of the material for the microbes to attack. It appears to me that it is the initial hydrolysis step that disintegrates the product. Based on Mr Brosig’s observation of the fork turning into a paste, I believe the structure of the material has been disrupted through a process of hydrolysis, and has become unrecognisable rapidly. The larger surface area meant that the degradation could occur quickly. The fork disintegrated and then decomposed more quickly than I would expect a wood chip to have done in the same environment.

(d) I consider the Products to be readily degradable in an open windrow, commercial composting context. Further, in my view, they will degrade in a home or neighbourhood compost situation, albeit, in all likelihood, at a slower rate. In a good home composting environment, achieving a 50-60 °C temperature, complete disintegration and at least partial decomposition is likely in 5 or 6 weeks. At an ambient temperature home compost, I estimate that a similar degree of decomposition would occur in 8 or 10 weeks.

(e) Based on Mr Brosig’s observations and the literature referred to in this Report, I regard the Products to be properly described as biodegradable and compostable, including for a range of varied home and commercial composting environments. In a home environment the time frame may be longer for certain users than a commercial environment, but the disintegration and degradation would occur in a home environment.

*Bagasse plates*

As regards the bagasse Products, on the basis of Mr Brosig’s report and the literature referred to in this Report, I consider that the production of a visually acceptable compost is likely to occur within about 8 weeks in any reasonable home composting conditions and faster in commercial compositing conditions.

…

*CPLA cutlery*

I had believed from the literature that CPLA is biodegradable in some period of time. On the basis on Mr Brosig’s report, I now consider that decomposition in an industrial composting pile is likely to commence with absorption of water and disintegration within a fairly short time, probably 2-4 weeks, after the commencement of composting.

(Footnote omitted.)

1. I make findings about Mr Brosig’s test below.
2. In addition to the opinions I have quoted above, Professor Clarke referred (at [64] of his report) to the OWS report which was the basis for the “OK Compost Home” certification obtained by GreenGood, to which I have already referred. Professor Clarke was prepared to accept the validity of the testing in the OWS report, and to use it as a basis for his opinion regarding the compostability of the bagasse dishes, and further that they would compost within a 12 week period. At [56]-[57] of his report, Professor Clarke also appeared to accept and agree with the outcome of the OWS CLA report (which tested the compostability of a CPLA plate). He was not cross-examined to suggest the OWS reports did not provide a proper basis for these opinions. Professor Clarke’s conclusions on the compostability of the Products were:

In relation to the bagasse plate Product, I consider that it will degrade in a home composting environment in a similar manner to sugar cane degrading in a field, but in all likelihood, more quickly. As is apparent from the OWS Bagasse Report, the bagasse plates disintegrated (to pieces of less than 2mm) in a composting environment over the 12 weeks of the test. Ultimately, though, rates of disintegration are not significantly relevant to this analysis because the bagasse is constituted by natural fibres. Whether there is any residue (of a size greater than 2mm or otherwise) left after 3 months or 6 months or 12 months is not strictly relevant (other than for the aesthetic appearance of the compost), because the bagasse is made of natural fibres, which will biodegrade and enhance soil.

The CPLA fork Product however, is not constituted by fibres. As noted above, it will degrade to some components of the micro-organisms, carbon dioxide and water.

1. By reference to certificates and reports in Mr Nolan’s evidence (listed at Table 4-2 of Mr Nolan’s report), Professor Clarke also described (at [95] of his report) bagasse and CPLA as “inherently biodegradable and compostable”.
2. Mr Leake’s opinion about whether the impugned Products were capable of turning into compost was contained in the extract of [122(d) and (e)] of his report which I have quoted above at [321]. Specifically on the dishes, made of bagasse, Mr Leake stated:

In most types of composting situations involving plant material, I would anticipate the bagasse bowls to degrade in much the same way as cardboard or heavy paper. They would first darken in the first week or two, then become more and more fragile until becoming virtually unrecognisable after about 8 weeks. If shredded and if entering commercial composting of conventional “green bin” waste, this time frame would likely be shorter.

Any residue would be non-toxic humus, beneficial as organic matter in soil, and be aesthetically unobjectionable.

I consider that the bagasse products would provide solid physical humus to promote soil structure and root growth.

1. As to the cutlery, and on the basis of Mr Brosig’s test, Mr Leake altered his opinion, favourably, about how well, and how rapidly, the CPLA products would turn into usable compost:

I had believed from the literature that CPLA is biodegradable in some period of time. On the basis on Mr Brosig's report, I now consider that decomposition in an industrial composting pile is likely to commence with absorption of water and disintegration within a fairly short time, probably 2-4 weeks, after the commencement of composting.

The talc component absorbs water (as talc is a simple hydroscopic, clay mineral and all clay minerals have an affinity with water). When placed in a humid environment, clays will absorb water vapour. When clays absorb water they swell with considerable pressure, called the “swelling pressure”. The degree of pressure would disrupt the CPLA and cause it to disintegrate in a short time, as observed by Mr Brosig and also in the “hotbin” trial referred to a paragraph 131 below. The sooner disintegration occurs, the more rapidly biodegradation can commence because the surface area is increased.

I would expect that the CPLA residues would be stained brown or black, becoming increasingly unrecognisable and partially degraded, like any other composting component after an 8-12 week composting cycle.

At the completion of composting (8-12 weeks), any residue would not be harmful to the environment, and will properly form part of the structure of the resulting compost, either as humus or as fine particulate matter that continues to decompose in the receiving environment (eg soil).

(Footnote omitted.)

1. Mr Nolan’s opinions regarding the compostability of the Products were divided up as I have indicated above at [314], because he took the approach of assessing how the materials of which the impugned Products were made would turn into compost by reference to the different situations in which the composting process might occur. That was not an inappropriate approach, given the evidence about the differences in rates at which the materials would break down, this being an important aspect of the ACCC’s case. His opinion was expressed this way at 7.4.6.1 of his report:

The time for compost sourced from typical household organic wastes with products listed in the agreed facts to meet the home compost system biodegradation, disintegration and quality requirements have been estimated for three system categories. These are:

* well managed hot ‘thermophilic’ home composting system - within 180 days;
* poorly to moderately managed ‘hot’ thermophilic home composting system - greater than 180 days; and
* low maintenance composting system at ambient temperatures with grass clippings and leaves only - greater than 180 days and possibly greater than two years.

1. It is apparent Mr Nolan was not disputing that the impugned Products were capable of being turned into usable compost, but was focussed on how long that composting process would take and under what conditions it would occur. I return to the differences of opinion between Mr Nolan on the one hand and Mr Leake and Professor Clarke on the other, and Mr Brosig, below. For present purposes it is sufficient to note the premise of this opinion of Mr Nolan was that the Products were in fact capable of being turned into usable compost. The area of disagreement concerns the conditions required for composting to occur, and the time period over which that process would occur.

### Conclusion

1. There was no real disagreement at trial that the impugned Products were capable of biodegrading in landfill, or a “rubbish dump”, and were capable of being turned into useful and usable compost. There is no need to go to any of the contested evidence to reach this conclusion.
2. On the representations as I have found them to have been made, the ACCC’s s 18 case must fail.

### On the representations as alleged by the ACCC, has the ACCC proved its case?

1. My conclusions that the ACCC has also not discharged its onus of proof on its own formulation of the alleged representations are based largely on the expert evidence adduced by Woolworths, which I found persuasive. I have canvassed some of that evidence already. What remains is to put that evidence in the context of the test conducted by Mr Brosig, which is primarily relevant to the ACCC’s formulation of the alleged representations. As I have noted, this evidence is of sufficient weight to satisfy me of the positive propositions I have set out at [307] above.
2. I did not find Mr Nolan’s evidence to the contrary to be persuasive: see [395]-[409] below.
3. In its reply submissions (at [8]), Woolworths describes the “main argument”, in terms of factual debate, as whether, if there was a representation conveyed that the Products would compost *within a reasonable period of time*, what was that period of time and how connected was it to the quality of the composting system being used?
4. I accept Woolworths’ submissions about what the evidence shows concerning the amount of time the Products were likely to take to turn into usable compost. I say “usable compost” because I accept Mr Leake’s evidence, in preference to Mr Nolan’s, that one of the functions that compost performs is to continue to break down once in the soil, and thus contribute nutrients and the like to the soil after it has been applied. I accept that, contrary to Mr Nolan’s evidence (which I set out below), there is no need for a lengthy or specific “curing” period before compost becomes usable.
5. I accept the critical question on this issue is the one posed by Woolworths at [10] of its reply submissions: accepting that the Products (like other compostable materials) may have composted more slowly in colder or less well-managed composts, were the Products “out of line such that they would not properly be regarded as “compostable” (such that their description is false)?” In my opinion, not only has the ACCC failed to prove that is the case, but Woolworths has established the contrary is true.

### The Brosig test

1. It should be noted that there was a wholesale objection by the ACCC to the admissibility of Mr Brosig’s expert report concerning his compost trial evidence. I overruled this objection for reasons I gave at the time, during the trial.
2. I ruled that Mr Brosig’s evidence was admissible for the following reasons:

* whilst it appeared the ACCC was not put on notice of Mr Brosig’s evidence and test until around a month before the commencement of the trial, it was apparent that the ACCC’s main concern was its inability to adequately test the evidence. This issue could be addressed in cross-examination, and I noted both Mr Brosig and Mr Leake (who drew some conclusions from Mr Brosig’s test in his own report) were both available for cross-examination;
* I was not persuaded that r 34.50 of the *Federal Court Rules 2011* (Cth) was applicable to Mr Brosig’s evidence in this proceeding, and noted that the parties did not refer me to any ACL cases where that rule had been successfully invoked;
* I was not persuaded that I could find as a matter of admissibility that Mr Brosig’s evidence was irrelevant for the purposes of s 56(2) of the Evidence Act; and
* I was not satisfied, for the purposes of s 135 of the Evidence Act, that the probative value of Mr Brosig’s evidence was outweighed for the reasons put forward by the ACCC.

1. As I explain below, I consider Mr Brosig’s test was relevant to Mr Leake’s opinion on the compostability generally of the impugned Products. It was also of relevance to the contentious issue between the parties about the amount of time that the impugned Products would take to produce usable compost (and, indeed, what that compost would look like, and be composed of).
2. For the reasons I set out below, I find Mr Brosig’s test had considerable probative value in establishing that the impugned Products were not only capable of being turned into compost, but in fact did turn into usable compost within a comparatively short period of time. I further find that Mr Brosig’s test provides an adequate foundation for a finding that even outside an industrial composting situation, and in a home compost (whether well or poorly maintained, so long as it is not anaerobic), the impugned Products were likely to turn into useful compost within a reasonable period of time.
3. In composting systems that are neglected or maintained so poorly that they are anaerobic, no composting will occur at all, no matter what material is put in. Evidence about what would occur to the impugned Products in these situations is of no probative value in determining whether the representations I have found were made, or the representations the ACCC alleges were made, were false or misleading or deceptive, or likely to mislead or deceive. No material capable of composting will in fact be turned into compost in those situations – whether one is referring to an apple, paper, leaves or the impugned Products.

#### The way Mr Brosig came to conduct his test

1. Mr Leake’s evidence explains how Mr Brosig came to conduct his test.
2. Mr Brosig is the Site Manager of Greenchip Recycling, and Greenchip is a client of Mr Leake. Greenchip is an industrial composter of green and other waste, including grease trap waste and food waste. Mr Leake has visited Greenchip’s facilities on many occasions and is familiar with their operations, and has dealt with Mr Brosig about once a month either over the phone or in person. He and Mr Brosig discuss, amongst other matters, composts. Mr Leake’s evidence was he found Mr Brosig to be “very straight-forward and to have a good working knowledge of the composting processes and things that affect them”. In seeing Mr Brosig give evidence, I formed the same opinion as Mr Leake, although obviously based on much less experience than Mr Leake. Nevertheless, I give some weight to the fact that how Mr Leake described Mr Brosig was how he appeared during his evidence. This fact increases my preparedness to rely not only on Mr Brosig’s evidence, but on the test he conducted.
3. In his report Mr Leake described how, after he had been retained as an expert witness in this proceeding, his opinion was that it was necessary to have the impugned Products tested so that he could have some “first-hand knowledge to support the theoretical views in the literature and also the variable results in the literature as to rates of decomposition of material such as that of the Products”. This led him to contact Mr Brosig, and to ask him to do what Mr Leake described as a “simple trial”. At [119]-[121] of his report, Mr Leake described what samples of the Products and instructions he gave to Mr Brosig:

On 20 June 2018, I attended Greenchip’s Recycling facility. Having obtained permission from the Managing Director, Terry Corrigan, to ask Mr Brosig to do a simple trial for me, I met with Mr Corrigan and Mr Brosig. In that meeting I handed Mr Brosig four forks and two plates (each being one of the Products the subject of the proceeding) and said words to the following effect:

*“These products are alleged to be compostable and biodegradable. The plate is made from bagasse and the fork is a bioplastic. Please would you conduct a trial for me. This is for a court case, so it is important. I want you to place these materials in a net citrus bag, add about 5 litres of fresh compost to it, cable tie the opening and attach coloured rope so you can identify it in the windrow. Dig the bag into the windrow about 500 mm. I'd like it inspected every week initially and then every two weeks. At each inspection, spread out the contents and take a photo of the condition of the objects and record the date. I also want you to record the degree of decomposition using a 1- 6 scale.”*

I then typed out the instructions and printed them in Greenchip Recycling’s office and left the copy with them. A copy of the instructions I provided to Mr Brosig is provided at **Annexure 6** to this report.

Mr Brosig showed me some plastic net bags that he had. I inspected those bags and was happy that one of those plastic net bags would be used.

(Original emphasis.)

1. The instructions in Annexure 6 were as follows:

Biodegradability demonstration Trial

Use new compost as fresh as possible < 2 weeks.

Take about 5 litres compost and mix in the paper plate and plastic fork objects. Take photo and note date.

Place inside the orange net bag

Cable tie opening and attach a length of coloured rope (for visibility.

Dig into a pile about 500-700mm and place bag in covering with compost leaving coloured rope showing at the surface.

At every turning carefully retrieve the bag so as not to tear. Conduct the turn.

Inspection-  
Cut off cable tie and spread contents out onto a tray or similar shallow container.

Spread out and take photo of condition of the objects. Note date.  
Take note of the degree of decomposition using the following terms-  
1. Original colour, unaltered  
2. Darkened only  
3. Darkened and softened  
4. Darkened and starting to disintegrate  
5. Darkened and hardly recognisable  
6. Completely unrecognisable.

#### The conduct of the test and its results

1. Mr Brosig described his conduct of the test at [19] of his report:

In accordance with Mr Leake’s instructions, on 29 June 2018, I:

(a) took the forks provided to me by Mr Leake and broke them up into smaller pieces of approximately 2-3cm each by snapping them with my fingers. I did this to simulate a wood chipper;

(b) also tore one of the plates into smaller pieces of approximately 3-4 cm (some pieces were bigger than others). I left the second plate intact;

(c) took approximately 5 litres of newly formed compost made at Greenchip Recycling, and mixed the pieces of forks and plates into that composting mix. By newly formed compost, I mean compost formed from inputs that had recently (that is, in the few days prior to 29 June 2018) been accepted by the facility. The inputs in the composting mix consisted of an equal amount of green waste and cattle hair, and a small percentage of grease trap waste;

(d) placed the resulting mix into a mesh bag and tied a cable tie around the top of the bag;

(e) tied a coloured rope around the bag to ensure I could identify the bag in the compost during inspections; and

(f) dug a hole in one of the windrow compost piles at Greenchip Recycling, which had been formed on 18 June 2018, approximately 500 mm deep and placed the bag in the hole. I covered the bag with compost mixture, leaving the rope hanging out of the windrow compost.

1. I find Mr Brosig’s description was broadly in accordance with Mr Leake’s instructions. The ACCC did not suggest otherwise, although it made some submissions critical of the test to which I refer below. However, one notable variation was that Mr Brosig left one of the plates intact. That is not insignificant, given some of the ACCC’s submissions about the uncertainty accompanying whether the Products would break down.
2. Mr Brosig described how he regularly turned the windrow compost in which the test bag was located, and inspected it, noting the scale of decomposition. His evidence in relation to the CPLA forks was that by 10 July 2018 (less than two weeks after he had placed the items in the bag):

[T]he forks turned to a cream-like substance to touch and completely decomposed by 19 July 2018 as they were “practically disappeared” as I noted in my written comments.

1. As to the plates, and the overall contents of the bag, Mr Brosig reported that:

By 10 August, the plates has completely decomposed and there was “no visible sign of any subject matter” as I noted in my written comments. There was no difference between the plate left intact and the plate which I initially tore into pieces.

On 10 August 2018, the contents of the bag looked like any other bag of composted materials Greenchip Recycling would sell. The forks and plates originally put into the bag were not recognisable at all.

1. Mr Brosig then expressed the following opinion, on which he was not challenged in cross-examination:

From my experience, I believe that the forks and plates would have composted more quickly had the Products not been placed in the mesh bag, as the Products were somewhat isolated in the bag. This meant that the Products were not getting the best access to fresh microbes. I also believe that using more mature compost (rather than fresh compost less than 2 weeks old) would have increased the rate of decomposition.

1. It is useful to set out two examples of photographs Mr Brosig annexed to his report, showing the contents of the bag on different dates he inspected it during the test.
2. The first photograph was taken during an inspection on 2 July 2018. Mr Brosig identified the degree of decomposition (using Mr Leake’s scale) as “1”. He also deposed “I observed that the forks were still intact but somewhat discoloured. I also observed that the plates were discoloured but intact”:



1. The following photograph was taken during an inspection on 10 August 2018. Mr Brosig identified the degree of decomposition (using Mr Leake’s scale) as “6”, and deposed that there was “[n]o visible sign of any subject matter approx. 6 weeks to break down completely”:



#### The experts’ opinions about Mr Brosig’s test

#### Mr Leake

1. I have referred to what Mr Leake said in his report about Mr Brosig’s test above. In cross-examination, he reaffirmed his views of what the test had shown. For example:

Yes. But the concept of bagasse in an – in what I’ve called a natural state, can arise, say, in the Queensland setting, sugar cane, for instance?---It’s sold all over the – the country as – as mulch, yes.

Right. And the performance of sugar cane compared with this – the process product in the case, would be different, won’t it, in a compost setting, that’s to say? --- No. I think they would be – **you know, from Mr Brosig’s trial, they – they composted fairly readily**.

(Emphasis added.)

1. Mr Leake rejected some of the points put to him by senior counsel for the ACCC about what were contended to be flaws in the Brosig test:

So what I put to you is that it’s not fair to compare the kind of grease trap waste which would be processed by the green chip company with the kind of ordinary fat deposit that comes from a home kitchen?---I think it is directly. Fat is fat. These things are collected from kitchens, these liquids. They’re taken to treatment plants and they’re dewatered so that they become thicker and they contain peas, beans, carrots; you can see it all in the product.

1. Otherwise, there was some cross-examination about issues including the method chosen in the instructions given by Mr Leake to Mr Brosig, the failure to retain the end product and how the test could have been performed differently. None of those matters affected the quality and clarity of Mr Leake’s evidence, which was high. His clear views about the importance of the outcome of the Brosig test are matters to which I have given considerable weight.

#### Professor Clarke

1. Professor Clarke regarded Mr Brosig’s test as valid, and it was clear he regarded the test as being of considerable significance. In his report he expressed the following opinion (at [71]), with some parts of this paragraph having been removed because Woolworths did not rely on a second report by another individual to whom Professor Clarke referred:

Ashurst Australia has provided me with a copy of the expert report of Mr Lothar Brosig. Further, I am instructed that the products which were the subject of Mr Brosig's trial were the CPLA and bagasse Products. I have considered that report and draw the following observations and conclusions from it:

(i) I note that the trial method used is one of observation. Whilst I note there is no set control and the trial may not be exactly replicated, I regard the trial as valid because, as discussed above, there is no universal, standard test for compostability.

(j) The results are clearly indicative of properly compostable products. Each of the bagasse plates and CPLA forks are fully degraded after 6 weeks. I regard this as very conclusive. I note that the 6 week timeframe for the bagasse plates to fully degrade is faster than the time it would take most fibrous plant materials to biodegrade and compost.

…

(i) As regards the bagasse plates, these materials are clearly compostable. Although composed of natural fibres, and therefore not subject to the biodegradability requirement set out in the composting standards for plastic materials (e.g., AS5810), the bagasse plates would also meet this biodegradation requirement.

(ii) … From those results, it is my conclusion that the bagasse plates and CPLA forks are unequivocally biodegradable and compostable. I also conclude that the bagasse plates and CPLA forks will biodegrade and compost in both home and commercial environments.

1. In cross-examination, Professor Clarke was asked only a few questions about his views of the Brosig test, and he did not depart from the opinions he had expressed in his report.
2. As Woolworths submits, Professor Clarke’s qualification about the Brosig test not being able to be exactly replicated needs to be read with his answer in cross-examination on this point. In that answer, he made it clear that what he meant was he would expect some variation, as in any experiment. Professor Clarke stated that in such circumstances, there would always be some “random variation in result”. This does not diminish what I take to be his considered agreement with the importance of the Brosig test to the issues at hand.

#### Mr Nolan

1. Mr Nolan was critical of the Brosig test. In his reply report, he accepted the test showed the tested products would “disintegrate over time”, but stated that the test provided no information about the “biodegradation and compost quality”.
2. Mr Nolan explained the difference between disintegration and biodegradation in cross-examination. He agreed (and I accept) that “disintegration” refers to the breakdown of material into smaller particles and “biodegradation” refers to the consumption by the microbes of the organic material in a product, which is measured by the reduction in the mass of a product.
3. Consistent with the approach he adopted with his own opinion, Mr Nolan’s response to the Brosig test referred to compliance with a relevant European standard for industrial composting systems, on which Mr Brosig’s test provided no evidence. Mr Nolan was also critical of the conditions in the windrow into which the bag of products was placed, saying the temperature and the depth at which the bag was placed would likely have increased the rate of disintegration, as would have the tipping, spreading and replacement activities conducted by Mr Brosig during his inspections. Mr Nolan’s overall conclusion on the test was:

This demonstration trial was for a municipal/industrial composting facility and hence the results cannot be directly be extrapolated to a home composting environment. The trial did not report on biodegradation and compost quality. These are characteristics that are assessed for the relevant standards and certification systems. Furthermore the trial did not demonstrate that not more than 10% of the original dry weight of the test material failed to pass through a 2 mm screen as per the EN13432 standard.

1. The latter sentence was the gravamen of Mr Nolan’s general approach to assessing the compostability of the impugned Products: his opinions were based on measuring the compliance of the Products with relevant composting standards and certifications.
2. In cross-examination Mr Nolan said he could not say whether what was produced by Mr Brosig’s trial would be suitable for use as compost, in large part because he was lacking information about the “biological state” of the product, and only had photos. It is correct that the test results had not been retained by Mr Brosig (or Mr Leake, or Woolworths), so no testing could be undertaken on them. Mr Nolan then gave these answers in cross-examination:

And you don’t know, because you don’t have information as to – I think you’re saying – what the biological state of the product is. If you’re talking about the other matters you referred to in a standard, whether it would cause nitrogen drawdown and the like?---Yes. I have no information. All I’ve got is some photos.

No. No. **And you likewise have no information to suggest that it’s not suitable. You just have no information about that?---Correct.**

Yes?---And the only information within his report is that, you know, their process for the organics typically takes 60 to 70 days.

Yes. **And there’s nothing in Mr Brosig’s trial that would suggest to you that either the CPLA product or the bagasse product took longer than other organic materials to compost?---No**.

**You’re agreeing with me?---Yes, I am.**

(Emphasis added.)

1. The parts in bold are important to my conclusions about the probative value of Mr Brosig’s test, and also my conclusions about the ACCC’s failure to discharge its burden of proof.
2. On its face, Mr Brosig’s test demonstrated that samples of the impugned Products broke down relatively quickly, and completely, in an industrial composting facility. Mr Brosig said the resulting material constituted merchantable compost. Mr Leake agreed.
3. While Mr Nolan was correct that the material resulting from the trial could not be measured against any standards, or be independently tested, as he conceded he could not state the product produced in Mr Brosig’s test was **not** suitable for use as compost. To remove the probative value of Mr Brosig’s test, that was what the ACCC needed to prove – whether the representations were as I have found them to be, or in the form contended by the ACCC. In both cases, the ACCC’s burden on the alternative s 18 aspect of its case was to prove that the impugned Products were not capable of turning into usable compost; or would not turn into usable compost within a reasonable period of time if placed in an available composting environment, including (but not restricted to) home composting.
4. Furthermore, Mr Nolan agreed that the samples of the Products used in the Brosig test did not take any longer to break down and compost than other organic materials. This is a significant concession. Again, if the ACCC wished to remove the probative value of a concession such as this, it needed to establish that the impugned Products, in fact, took longer to break down than other organic materials and/or did not break down into compost that was as usable as that produced from other organic materials. After all, as I have found at several points in these reasons, representations such as those about the impugned Products cannot be measured against some standard of perfection, or measured divorced from the reality of the practical environment into which the Products might be placed. They would be placed into an environment with other organic material, with that other organic material itself potentially being highly variable in the amount of time it might take to break down and turn into usable compost.
5. Overall, I did not find Mr Nolan’s criticisms of Mr Brosig’s test persuasive. His approach was too rigid, failing to recognise the practicalities of various composting environments. He too readily insisted on some kind of theoretical and scientific rigour in a test which was essentially a pragmatic one, done in pragmatic way by a person (as I find below) who was highly experienced in working with compost on a day-to-day level, and in that context, very much knew what he was doing.
6. The ACCC made the following submissions, based on Mr Nolan’s opinion about the flaws and difficulties he saw in the Brosig test:

Mr Nolan explained in detail the problems with the Brosig trial. In particular, the trial did not determine anything about the length of time required to compost the Products relative to any other organic products: there was no comparator used. Further, as Mr Leake said, the trial was intended only to see if the disintegration process commenced and nothing further. That was the reason given by Mr Leake for the compost product not having been retained for inspection. Further, the trial concerned only thermophilic industrial conditions. Professor Clarke accepted that a non-thermophilic compost would take longer to compost the Products, but he provided no time frame.

(Footnotes omitted.)

1. As Woolworths points out in its reply, this is not an accurate summary of Mr Leake’s evidence concerning the purpose of the Brosig test. I have referred to the evidence in his report at [343] above about why he asked Mr Brosig to conduct the trial, but Mr Leake also gave the following oral evidence during cross-examination:

Right. And the performance of sugar cane compared with this – the process product in the case, would be different, won’t it, in a compost setting, that’s to say?‑‑‑No. I think they would be – you know, from Mr Brosig’s trial, they – they composted fairly readily.

So in the industrial setting, there’s an anticipated similarity, is there?‑‑‑In – in a well-managed compost setting, yes, I believe they are about the same. Yes.

But the reference that you make is to Brosig itself in considering that similarity and having some authority?‑‑‑Yes. Well, inasmuch as that is representative of a well-managed thermal composting, I think you can draw a parallel there.

1. Whether or not Mr Leake used the word “disintegrate”, it is clear he was also interested in using Mr Brosig’s test to see if and how the samples of the Products turned into usable compost.
2. And this lengthier passage from Mr Leake’s cross-examination should also be set out:

Now, you didn’t get him to use a comparator like paper?‑‑‑No.

Why not?‑‑‑It was just a simple – the – the question I had in mind is just how long these things would take to disintegrate, not in comparison with anything else, but just how long they would disintegrate, because I had seen conflicting stories in the references that I was reading.

And you would say that’s a relevant basis for testing the products?‑‑‑Yes.

Now, it’s obviously an industrial environment in which this was done and industrial waste was added, as we know, but it’s not the same as organic waste of a kind which would be known in a home environment, is it?‑‑‑Well, the only difference really is going to be whether they – what temperatures they achieve.

But you’re not suggesting that the content here, which involved grease trap waste and animal hair is equivalent to food waste in a home environment?‑‑‑Yes. It would be very similar. You know, I personally put chop bones in compost and fat and things like that.

But you didn’t then cause him to actually use conventional food waste?‑‑‑They use a variety of organic wastes, yes.

But you didn’t ask him to use typical food waste known to the home composter?‑‑‑No. No, just to insert it into his normal composting program.

And it’s not entirely fair, is it, to liken kitchen fat to a grease trap fat that would be processed in industrial compost?‑‑‑They’re exactly analogous. That’s – that’s what it is.

I’m sorry? We have to go just a little bit slower. You have to allow me to finish the question, otherwise the transcript won’t record properly your answer?‑‑‑I apologise.

So what I put to you is that it’s not fair to compare the kind of grease trap waste which would be processed by the green chip company with the kind of ordinary fat deposit that comes from a home kitchen?‑‑‑I think it is directly. Fat is fat. These things are collected from kitchens, these liquids. They’re taken to treatment plants and they’re dewatered so that they become thicker and they contain peas, beans, carrots; you can see it all in the product.

1. Thus, while it is correct to point out that Mr Leake himself described the purpose of asking Mr Brosig to do the test as to see if the samples of the impugned Products would “disintegrate”, it is clear from his evidence in context that he wanted to see if the impugned Products would turn into usable compost, because no test of such a kind had been done on them and he could not find a directly comparable test in the literature especially in relation to CPLA products. As the rest of the evidence in this extract shows, Mr Leake was taking a pragmatic approach, and in that sense I find he was taking an approach which aligns more readily with the way consumers might treat the impugned Products, having purchased them on the basis that they were capable of being composted, or (alternatively) would turn into usable compost in a reasonable period of time. Contrary to the views expressed by Mr Nolan, consumers would not be testing the chemical composition of the resulting compost. They would not necessarily know whether it was in an optimum condition to use as a mulch, or as a fertiliser. Rather, I find, unless they were in a comparatively small minority who approached their composting exercises with scientific rigour, consumers would be looking at whether the organic material in their composts had broken down to a suitable level to put on the garden. That is precisely what the impugned Products looked like after Mr Brosig’s test. As Mr Leake stated in his evidence set out above, the materials found within the composting environment into which Mr Brosig put the bag were broadly comparable with what many people might in fact put into their home composts.

#### Mr Brosig’s evidence at trial

1. Mr Brosig was a straightforward witness: a man of considerable experience in industrial composting and a person whom I assessed as speaking truthfully, as the incident to which I refer at [380]-[385] below indicates. He is a practical man, and the making of compost is a practical matter. That is not to gainsay there is a science in the analysis of it, and in particular in the analysis of what kinds of products made from organic materials can be turned into usable and useful compost and under what kinds of conditions. However, Mr Brosig is concerned more with reality than theory, and that is, I consider, also the focus of the issues in this proceeding.
2. In cross-examination Mr Brosig was questioned about a number of aspects of his test. I found his answers straightforward, and he clearly indicated where the limits of his knowledge were. For example, this evidence given in cross-examination about why he broke the plates up:

Now, you also tore one of the plates into smaller pieces. Why did you do that?‑‑‑I did that to see if that would make any difference.

Okay?‑‑‑Because the plates to me appeared like they had type of a wax coating on them. And if you look at the photographs on that report you will see that they did take a while to start to break down. But once they did start to break down they just disappeared.

Just returning to the forks that broke up, they would likely disintegrate more quickly in smaller parts than in its full size?‑‑‑They may. I don’t – I can’t offer comment on that because I don’t really know. In hindsight, I probably should have left one in – one intact and the other one not.

1. He answered a series of questions about the variation in temperature in different parts of the windrow into which the bag of products was placed in a straightforward manner, without any apparent concern whether the answers helped or hindered either the weight to be given to his test, or their effect on the issues in the proceeding. The same is true about the series of questions put to him in cross-examination about how he took the pictures of the bag’s contents (with his iPhone).
2. It was apparent from these kinds of answers that Mr Brosig was indeed conducting an experiment, with no fixed idea about what the outcome might be.
3. He was asked about why he did not retain the contents of the bag, and gave this evidence:

Now, were you given any instruction about – after the process finished on 10 August, were you given any instruction about retaining the sample so it could be observed?‑‑‑No.

Why did you decide to tip the contents into the windrow at the end of the trial?‑‑‑I was under the assumption that the job was done.

1. There was no artifice about Mr Brosig, and I accept his evidence entirely. That opinion is not affected by what I find below to have been a memory failure on his part concerning whether he had seen, and read, the Court’s Expert Evidence Practice Note and the Expert Witness Code of Conduct prior to finalising his report and affidavit.
2. The ACCC submitted that the following evidence in cross-examination meant that Mr Brosig “accepted that he was unaware of any obligations to conduct his experiment as an independent expert witness” and that accordingly the report of the test could not be said to come from an “independent perspective”:

And ostensibly you completed the test by 10 August. Is that right? Which I see from paragraph 29?‑‑‑That’s right, yes.

Or 28. Now, is it the case that the – if you wouldn’t mind going to annexure A, which is page 535. Now, the – is it the case that the first time that you received any letter of instruction from Ashurst was on 12 August?‑‑‑I would say it’s probably about right, yes.

Yes. And did you – when you received that, did you notice the attachment 1 at page 539?‑‑‑What did you say?

Yes. Did you notice – when you received the letter on 12 August, did you look at attachment 1 at page 539?‑‑‑I don’t think I’ve seen these papers before.

You haven’t seen them before. So when you say “these papers”, you mean the papers starting at 539 – if you flip through from 539 onwards, through to 552, do you say that you’ve never seen those pages before?‑‑‑No, I don’t think so.

The answer is no?‑‑‑No.

Thank you. Now, were you aware of having any – were you aware in the course of – sorry. I will start that again. Are you aware of having any special obligations to the court as a witness?‑‑‑No.

1. Annexure A on page 535 of the Court Book was the letter from Ashurst to Mr Brosig, dated 12 August 2018, containing his instructions, describing his role as an expert witness in the proceeding and attaching a copy of this Court’s Expert Evidence Practice Note (starting at page 539 of the Court Book, which Mr Brosig was asked about in cross-examination) and the Expert Witness Code of Conduct.
2. In re-examination, and after a series of questions put with some difficulty and subject to several objections, senior counsel for Woolworths managed to get Mr Brosig to a point, in a reasonably (but not entirely) non-leading way, where he gave the following evidence regarding the letter of instructions from Ashurst:

Well, I’ve obviously seen it, because I’ve signed it, but I must have had a bit of a brain fade or something somewhere along the way and, yes, forgotten about it.

1. Although this aspect of Mr Brosig’s evidence in cross-examination and re-examination was mentioned in submissions, no large point of this was made by the ACCC, and rightly so. Mr Brosig is, I infer, not a person who is often called to give expert evidence. Whether or not Mr Brosig pored over the documents sent to him by Ashurst, including this Court’s Practice Note, might be doubted. What is not in doubt is that he was an honest and straightforward witness, who conducted an experiment in the way Mr Leake asked him to, with no personal or professional stake in its results and, as far as I can tell from his oral evidence, no agenda about what the preferred outcome of the test might be. The fact that there were several things that could be said about how the test might have been done better or differently is, in my opinion, a solid indication that Mr Brosig took a pragmatic and straightforward approach to what Mr Leake asked him to do, without really inquiring into what might have been riding on the test he conducted.
2. The timing of Ashurst’s letter to Mr Brosig is insignificant, and the ACCC did not suggest otherwise in final submissions. There had been conversations between Ashurst and Mr Brosig on 3 August 2018, as the letter indicated. Mr Leake was the person who gave Mr Brosig the instructions for how to conduct the test and he was not cross-examined to suggest there had been any “set-up”, or anything in the least unprofessional or contrary to the Expert Witness Code of Conduct about what he had instructed Mr Brosig to do.
3. I accept Mr Brosig’s evidence that he had a memory lapse (or – in his words - a “brain fade”) and had indeed seen the documents annexed to his expert report before. As I say, it may be the case Mr Brosig did not spend a long time looking at them. That does not affect the credibility or reliability of his evidence, or his independence: it is merely indicative of his practical disposition, and possibly an understandable aversion to long letters from lawyers.

#### Conclusions on the Brosig test

1. I accept the opinions of Mr Leake and Professor Clarke that, in a practical sense, Mr Brosig’s test was probative of the capacity of the Products to turn into usable compost. I accept their opinions (and especially Mr Leake’s) that it was also probative of what the Products might do in a home composting environment.
2. I reject the ACCC’s criticisms of the Brosig test. It may be accepted there were other, possibly more comprehensive, ways the test could have been conducted. The fact remains that the ACCC bore the onus of proof and had conducted no test of its own. Its criticisms that a better or more thorough test could have been conducted should be seen in that light, and when that is done, they have little merit.
3. The test was not only adequate for its purpose, but as I have found, and Mr Leake and Professor Clarke concluded, it was also of significant value in establishing that the impugned Products were not only capable of turning into usable compost, but in fact did so in a period of time that was comparable to other organic materials.

### Application of the test results to compostability of the impugned Products

1. Woolworths submits (at [58] of its written submissions):

… Mr Brosig’s test is of course indicative of the time that the Products would take in an industrial system, but is also indicative of the time that the Products would take to compost in a well-managed home compost system. For a home system that is not well-managed, the time will be longer, but so will the time taken for other compostable products.

(Original emphasis.)

1. I accept that submission. Mr Brosig’s test had probative value for the time the impugned Products would take to turn into useful and usable compost outside an industrial composting system setting. Although that precise time cannot be derived from his test, given the comparatively quick decomposition into useful compost which occurred during his trial, I am prepared to infer that the impugned Products were, on the balance of probabilities, likely to turn into useful compost within a reasonable period of time – that is, within a matter of months rather than years. Of course, that finding is not necessary because the ACCC bears the onus of proof to establish the falsity of the representations as it alleges those representations were made. I am not only persuaded it has not discharged its burden of proof, I am positively satisfied that the impugned Products were capable of, and do, break down into useful compost, and will do so outside an industrial composting facility in a home composting environment. How long they take to break down will depend on how closely and properly managed the home composting environment is, which I explain below.

### The ACCC’s evidence and the arguments it made

1. In this part of my reasons, I make findings based on the ACCC’s characterisation of the nature of the representations. I do so in case I am wrong in my principal findings about the nature of the representations made.

#### The absence of a test by the ACCC

1. I consider the absence of a test conducted by the ACCC is of some importance in assessing whether it has discharged its onus. It otherwise needed to rely on inferences from other trials and tests referred to in the evidence of Mr Nolan, and on discrediting Mr Brosig’s test and discrediting the evidence of Mr Leake and Professor Clarke. That is hardly a satisfactory basis for the regulator to discharge an onus.
2. It might have been possible for the ACCC to discharge its onus in this way, but it was clearly a more circuitous route. No evidence was adduced about why a trial was not conducted by the ACCC: it would have been the most straightforward way to establish falsity.
3. The absence of a test conducted by the ACCC means the only direct evidence about what happens to these Products when placed into a composting environment comes from the test conducted by Mr Brosig.

#### Mr Nolan’s evidence

1. In this proceeding, the experts did have different backgrounds and experience, and this is of some relevance to the weight I have given to their opinions. Where a choice needed to be made between expert opinions, generally I have preferred the evidence of Mr Leake, and Mr Brosig, over the evidence of Mr Nolan. I did not find Mr Nolan’s evidence as easy to follow or to comprehend as that of Mr Leake. His reports were difficult to follow, because of the numbering and the way they were broken up. I found Mr Nolan’s evidence lacked some of the practical approaches and insights which in my opinion are important to understanding the circumstances in which materials break down into compost, and the variety of ways in which compost might be used by consumers.
2. I found Mr Nolan also appeared to have less experience and knowledge about how consumers might approach their composting efforts, when compared to Mr Leake. His information seemed to be rather more derived from secondary sources. As Woolworths submits, Mr Nolan is an environmental engineer, with a CV that emphasises his experience in hydrogeology (described as his “core technical skill area”), and in environmental auditing and consulting in relation to waste management facilities. I did find it surprising when he was asked during cross-examination about the product “Dynamic Lifter” that Mr Nolan did not seem familiar with what is a common home garden fertilising product.
3. In contrast, Mr Leake and Mr Brosig had a great deal of practical, on the ground experience which I found reliable: they spoke much more directly about what happens to organic materials during the composting process, from their own first-hand experiences. Mr Leake has written a book which addresses the topic of home composting, and is plainly experienced with that process (with all its variations) and with home composters (with all their variations). Mr Brosig works with compost in his day-to-day working life. I have also had regard to Professor Clarke’s evidence, which I found clear and sound, although more theoretical.
4. It should be emphasised that the key differences between Mr Nolan’s opinions on the one hand, and Mr Leake’s, Professor Clarke’s and Mr Brosig’s on the other, relate to:
   1. first, the time the Products would take to turn into usable compost; and
   2. second, what kind of conditions would be required in a home composting situation for this to occur.
5. At [77]-[91] of its written submissions, Woolworths made cogent and persuasive submissions about the difficulties with Mr Nolan’s evidence. Given this part of my reasons is not my principal reasoning, I do not propose to set those submissions out, or set out in detail the evidence to which they refer, subject to one matter which I consider of particular importance. Suffice to say I accept those paragraphs of Woolworths’ submissions in their entirety. They establish that, when weighed against the evidence of Mr Leake, Mr Brosig and Professor Clarke, and Mr Brosig’s test, Mr Nolan’s opinions are not to be preferred.
6. The one aspect of Mr Nolan’s evidence that should be referred to in more detail is his opinion about “curing” of compost. That is because Mr Nolan’s opinion that it was desirable to cure compost before it could be used was responsible for the lengthier estimates of time he gave in relation to how long it would take the Products to turn into usable compost. My conclusion that his position on curing renders his opinion substantially less relevant is sufficient in itself to prefer Woolworths’ experts.
7. As I have set out above, Mr Nolan’s estimates for the impugned Products (including his allowance for curing) were that they would turn into usable compost:
   1. “within 180 days” for a “well managed hot ‘thermophilic’ home composting system” (Mr Nolan subsequently clarified this estimate by stating that it was “indicative” only);
   2. “greater than 180 days” for a “poorly to moderately managed ‘hot’ thermophilic home composting system”; and
   3. “greater than 180 days and possibly greater than two years” for a “low maintenance composting system at ambient temperatures with grass clippings and leaves only”.
8. Mr Nolan explained, and it was not disputed by Woolworths, that “curing” refers to the process for producing a more biologically stable product at the end of the composting process. Another way to describe a cured compost would be to use the phrase “mature compost”. He agreed that depending on what the compost was being used for, more mature compost might be required – for example, if seedlings were being planted. Mr Nolan agreed that in a home composting environment for use as mulch around mature trees (to take an example) a lengthy curing period would not be required.
9. Although Mr Nolan did not break the time periods to which I have referred in [401] above down into immature and mature compost periods, it is apparent from parts of his cross-examination about the curing periods applied in some of the trials in the secondary sources to which he referred that curing periods may take months and not weeks, and sometimes a large number of months, depending (for example) on the temperatures in the locations where the compost was being made (that is, cold versus warm climates).
10. It was Mr Nolan’s insistence on periods of curing which was in substantial part responsible for his estimates of how long the impugned Products would take to turn into usable compost in a home composting environment. I do not accept that periods of curing after organic material has broken down to a visually acceptable mulch kind of product is, in Australian conditions, an accepted part of the home composting process so that it can necessarily be factored into what constitutes a “reasonable time” for certain organic materials to turn into usable compost. This, of itself, makes Mr Nolan’s estimates insufficiently reliable.
11. On the matter of curing, Mr Nolan’s opinion also conflicted with the opinions of Mr Leake and Mr Brosig. Mr Leake said his estimates included short curing periods “of a week or so”. His opinion was that extended curing periods were not necessary before compost could be put to normal uses in a home or agricultural environment. Mr Brosig’s evidence was that Greenchip did not undertake any separate process of curing. Compost was identified as ready to sell, and indeed was sold, based on visual inspection: which, as I have noted, is how he conducted the trial for Mr Leake. As I prefer the evidence of Mr Leake and Mr Brosig, for the reasons I have given, this is another basis on which Mr Nolan’s evidence, and his estimates, are insufficiently reliable to have any weight placed on them.

#### A further issue with Mr Nolan’s estimates and the ACCC’s case

1. It was inherent in the ACCC’s case that the estimates given by Mr Nolan took the period of time for composting of the Products outside a “reasonable” period of time.
2. I do not agree. There was no qualitative evidence produced by the ACCC about what “reasonable” could mean in this context: that is, for example, there was no evidence about consumer expectations of what time their organic material should break down in their home composts (whether well or poorly managed).
3. If Mr Nolan’s particular views on curing are set to one side, as I have found they should be, then it would seem the periods of time for the impugned Products to turn into usable compost within a home composting environment might, on his own estimates, be around six months where the compost was “well-managed”. I fail to see why that is an unreasonable period of time for anyone but an eager home composter. In any event, there is no evidence about how many purchasers of the impugned Products would fall into such a category, nor any evidence about how many would even be regular or keen home composters.

#### The evidence of other tests

1. In his reports, Mr Nolan referred to a number of other trials and tests involving products made from the same or similar substances as the impugned Products. He attached those papers to his reply report, and some considerable time was spent in evidence by the experts debating these studies. All of the papers were admitted into evidence subject to a ruling under s 136 of the Evidence Act, and were not admitted as proof of facts or opinions about the time taken by PLA, CPLA or bagasse products to turn into usable compost. I have set out above why Mr Nolan’s use of these tests does not persuade me his opinions should be accepted.

#### The ACCC’s point about how many plates and cutlery could be composted at once, and whether this makes the representations misleading

1. I accept, as the ACCC submits, that the nature of the impugned Products and the fact they were sold in packets of 10, 20 and 100 items suggests at least in some circumstances, that a large number of the Products might have needed to be disposed of at once. The ACCC submits that, in circumstances where a consumer sought to compost the Products, “[p]utting in a quantity of these Products would invariably slow down, or stop, the composting process”, and that there were no directions or instructions on the packaging of the Products advising consumers of the need to limit the number of Products placed into a composting system at the same time. It is true that Mr Brosig’s test did not simulate what would happen when a large number of the impugned Products are placed into a composting system.
2. However, this really comes back both to the nature of the representations made (which I have found to be different to that alleged by the ACCC) and to the question of onus. Even if the representations were as the ACCC alleges, it has not proven on the balance of probabilities that a large number of the impugned Products would not break down in a home composting situation. The samples of the Products used in Mr Brosig’s test turned into material Mr Brosig would be prepared to sell as compost within six weeks. It is not difficult to infer that a much larger number might still turn into usable compost within several months on the same basis – that is, in a form Mr Brosig might sell as usable compost, and further, in a form Mr Leake would also class as usable compost.

#### The use of Australian standards

1. Mr Nolan’s evidence relied heavily on standards, and in particular the standard AS 5810, which I have referred to above. It is unclear whether the standard has any application to bagasse products, and it is unnecessary to decide that question. That is because, fatally to any reliance being placed on this standard, the ACCC did not allege, and it is not the fact, that Woolworths represented the impugned Products complied with AS 5810, or with any other applicable standard.
2. Insofar as Mr Nolan relied on the contents of Australian and other international standards to identify when a product should be considered “compostable”, that would be an incorrect approach. The question is what a consumer would understand by the use of the word, and there is no evidentiary basis on which the Court could find the reasonable consumer would understand that the word “compostable” as used on the labelling of the impugned Products was referring to how that word may be defined in an Australian or other applicable standard.

#### Other factors

1. I also accept Woolworths’ submissions that the certificates, and reports (such as the OWS reports) supplied to Woolworths Hong Kong by Huhtamaki, most of which were adduced without any s 136 limitation, have probative value in establishing that the impugned Products do biodegrade and do turn into usable compost within a reasonable period of time. Although the certificates and reports do not relate precisely to the Products, they relate to products made from the same materials. They are not as probative as some of the other evidence to which I refer, but they give added support to the conclusions I have reached.
2. The ACCC’s case on any contravention of s 18 must fail.

## Sections 29 and 33

1. Woolworths is correct to submit, as it did in its reply submissions, that the ACCC made few submissions on the alleged contraventions of ss 29 and 33 of the ACL. The only substantive submissions made appear in [131] of the ACCC’s submissions:

Accordingly, in the absence of Woolworths having established actual (subjective) reliance on (objectively) reasonable grounds, the representations are by the operation of s 4 deemed to be misleading, and contravened the following sections of the ACL:

(a) s 18, as the representations were made in the course of trade or commerce;

(b) s 29(1)(a), as the representations were to the effect that the Select Eco Products were of a particular standard, quality and value;

(c) s 29(1)(g), as the representations were to the effect that the Select Eco Products had particular performance characteristics and benefits; and

(d) s 33 as the representations concerned the nature, characteristics and suitability for purpose of the goods.

(Footnote omitted.)

1. These allegations must fail for the same reasons as the s 18 allegations fail: the representations were not as alleged, they did not relate to future matters and even if they were as alleged, they were not false, misleading, or deceptive, or likely to mislead or deceive. Indeed, on the evidence I have found they were accurate.
2. There are further problems with these brief submissions, as Woolworths points out. Insofar as s 29(1)(a) is concerned, there was no representation as to the Products being of an indicated or certain standard or quality: see *Gardam v George Wills & Co Ltd (No 1)* [1988] FCA 289; 82 ALR 415 at 423 (French J); *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595 (Perry J); *Australian Competition and Consumer Commission v Safety Compliance Pty Ltd (in liq)* [2015] FCA 211; ATPR 42-493 (Farrell J). Insofar as s 29(1)(g) is concerned, the ACCC did not specifically allege what “performance characteristics” or “benefits” Woolworths represented the impugned Products had, other than what was conveyed by the phrase “biodegradable and compostable” itself. This allegation must fail for the same reasons the s 18 allegation fails. The same observation can be made about the terms of s 33.
3. The positive findings I have made about the characteristics of the impugned Products would also mean the alleged contraventions of these provisions must fail. This is the likely reason little time was expended by the ACCC on submissions about these provisions: they stand or fall with the s 18 allegations, at least at a basic level. More may indeed be required, but what this might involve was not developed by the ACCC, which had the onus of proof.

## Overall conclusion

1. The ACCC has not proven that, by the labelling on the impugned Products, Woolworths made the representations the ACCC alleged it to have made. The representations that were made did not relate to future matters, were as to the inherent qualities or capacities of the Products, and were in any event accurate.
2. If I am wrong in my conclusions, and the representations were as the ACCC alleged, and did relate to future matters, then Woolworths adduced evidence to the contrary for the purposes of s 4(2) of the ACL, so as to disengage the deeming effect of that provision. However, the ACCC has proven that Woolworths did not have reasonable grounds for the representations which it alleges were made.
3. If I am wrong in my conclusions, and the representations were as the ACCC alleged but did not relate to future matters, the ACCC has not proven (on its alternative s 18 case) they were misleading or deceptive or false. Indeed, I have found they were accurate, on the basis of Mr Brosig’s test and the evidence of Mr Leake and Professor Clarke.
4. Accordingly, the ACCC’s application must be dismissed. It is appropriate to make orders for lump sum costs and to give the parties an opportunity to agree on what the lump sum figure should be. Failing agreement, the question of costs will be referred to a Registrar for determination.

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| I certify that the preceding four hundred and twenty-three (423) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. |

Associate:

Dated: 5 July 2019