

[2008] FCA 1428

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**Australian Competition and Consumer Commission**  
Applicant  
and  
**GM Holden Ltd (ACN 006 893 232)** Respondent  
Federal Court of Australia

26 August 2008, 18 September 2008. Perth

Siopis J

Counsel for the Applicant: Mr W Keane

Solicitor for the Applicant: Corrs Chambers Westgarth

Counsel for the Respondent: Mr BD Luscombe

Solicitor for the Respondent: Mallesons Stephen Jaques

Siopis J

1 During the period July 2007 to September 2007, the respondent (**GM Holden**) published

advertisements promoting its range of Saab motor vehicles. The advertisements contained a headline statement "Grrrrreen". The advertisements also stated that "Every Saab is green. With carbon emissions neutral across the entire Saab range". The advertisements went on to state that "Saab will plant 17 native trees on your behalf in the first year as a carbon offset".

2 The advertisements were published in a number of newspapers and magazines during July 2007 and August 2007. On 12 August 2007, **GM Holden** decided to cease submitting the advertisements for publication. However, due to an earlier booking which could not be cancelled, there was a further publication of the advertisement in the Qantas magazine for September 2007.

3 On 28 August 2007, the applicant (the Commission) wrote to **GM Holden** advising that it was concerned that the advertisements could mislead consumers as to the carbon neutrality of the Saab range of motor vehicles.

4 On 4 September 2007, **GM Holden** responded to the Commission's letter and disputed that the advertisements were misleading. **GM Holden** went on to say that it had already withdrawn the advertisements from publication.

5 Notwithstanding **GM Holden's** advice that it had withdrawn the advertisements from publication and no further publication occurred after September 2007, the Commission decided that the conduct called for a more emphatic response.

6 On 16 January 2008, the Commission commenced an application against **GM Holden** in respect of the advertisements. The Commission alleged that by publishing the advertisements, **GM Holden** had represented that the Saab motor vehicles were carbon neutral and that in the first year following purchase of any Saab motor vehicle, **GM Holden** would plant 17 native trees on behalf of the purchaser of that motor vehicle which would offset the carbon dioxide emissions for the life of that motor vehicle. It was alleged that the advertisements were misleading or deceptive in that the carbon dioxide emissions from any vehicle in the Saab range would not be neutral over the life of that motor vehicle and that the tree planting referred to in the advertisements would not provide a carbon

dioxide offset for more than a single year's operation of any Saab motor vehicle.

7 It was further alleged that the conduct of **GM Holden** in publishing advertisements in those terms was misleading or deceptive conduct in contravention of s 52 and s 53(c) of the Trade Practices Act 1974 (Cth) (TPA). The Commission sought by way of relief a declaration that **GM Holden** had contravened the TPA, an injunction restraining **GM Holden** from making further representations in the impugned terms, and ancillary orders including corrective advertising and an order requiring **GM Holden** to appoint an independent assessor to make recommendations for improvements to its current education, training and trade practices compliance programmes. **GM Holden** filed a defence denying that the advertisements were misleading or deceptive and denying liability.

8 The parties have agreed to settle the litigation and have filed an agreed statement of facts and proposed consent orders setting out the terms of their agreement. The parties have asked the Court to make orders in the terms of the consent orders.

9 The agreed statement of facts is in the following terms:

"1. The Respondent was at all material times a trading corporation within the meaning of the Trade Practices Act 1974 (Cth) ('Act') and carrying on business and engaging in trade or commerce in Australia as a wholesale supplier of motor vehicles, including the Saab brand of motor vehicle, under the name 'Saab Australia'.

2. During the period 27 July 2007 to 1 September 2007, advertisements (Advertisements) were published for the purpose of promoting the Respondent's range of new, demonstrator and approved pre-owned Saab motor vehicles (Motor Vehicles in the Saab Range). Copies of each of the Advertisements published are attached as Annexures A and B.

3. One or other of the Advertisements was published in the following publications on the following dates:

(a) Good Weekend magazine (Sydney Morning Herald edition) on 28 July 2007 and 11 August 2007;

(b) Good Weekend magazine (The Age edition) on 28 July 2007;

(c) Wish magazine on 3 August 2007;

(d) Australian magazine on 28 July 2007;

(e) The Bulletin magazine on 26 July 2007;

(f) Qantas magazine in September 2007;

(g) The Sydney Morning Herald newspaper on 27 July 2007 and 10 August 2007;

(h) The Age newspaper on 27 July 2007;

(i) The Courier Mail newspaper on 28 July 2007;

(j) The Adelaide Advertiser newspaper on 28 July 2007; and

(k) The West Australian newspaper on 28 July 2007.

4. The Respondent caused the Advertisements to be published. On 12 August 2007, the Respondent decided to cease submitting the Advertisement for publication. However, due to an earlier booking made in July 2007, the Advertisement was published in the Qantas magazine for September 2007.

5. No Motor Vehicle in the Saab Range is carbon neutral, over the life of that motor vehicle.

6. Planting 17 trees will not provide a carbon dioxide offset for more than a single year's operation of any Motor Vehicle in the Saab range."

(Original emphasis.)

10 Further, the consent orders which the parties propose are in the following terms:

"Upon the Court noting the Undertaking given by the Respondent to the Applicant pursuant to section 87B of the Trade Practices Act 1974 (Cth) (Act) (copy attached), THE COURT, by consent:

1. Declares that the Respondent:

(a) by causing advertisements (Advertisements) to be published in:

(i) Good Weekend magazine (Sydney Morning Herald edition) on 28 July 2007 and 11 August 2007;

(ii) Good Weekend magazine (The Age edition) on 28 July 2007;

(iii) Wish magazine on 3 August 2007;

(iv) Australian magazine on 28 July 2007;

(v) The Bulletin magazine on 26 July 2007;

(vi) Qantas magazine in September 2007;

(vii) The Sydney Morning Herald newspaper on 27 July 2007 and 10 August 2007;

(viii) The Age newspaper on 27 July 2007;

(ix) The Courier Mail newspaper on 28 July 2007;

(x) The Adelaide Advertiser newspaper on 28 July 2007; and

(xi) The West Australian newspaper on 28 July 2007,

(b) which contained representations in relation to the Respondent's range of new, demonstrator and approved pre-owned Saab motor vehicles (Motor Vehicle in the Saab Range) that:

(i) the Respondent had taken measures so that carbon dioxide emissions from any Motor Vehicle in the Saab Range would be neutral, over the life of that motor vehicle; and

(ii) in the first year following the purchase of any Motor Vehicle in the Saab Range, the Respondent would plant 17 native trees on behalf of the purchaser of that motor vehicle (Tree Planting) which would offset the carbon dioxide emissions for the life of that motor vehicle,

when:

(iii) the carbon dioxide emissions from any Motor Vehicle in the Saab Range would not be neutral, over the life of that motor vehicle; and

(iv) the Tree Planting would not provide a carbon dioxide offset for more than a single year's operation of any Motor Vehicle in the Saab Range,

(c) has in trade or commerce engaged in conduct that was likely to mislead or deceive in contravention of section 52 of the Act and represented that Motor Vehicles in the Saab Range had performance characteristics or benefits that they did not have in contravention of section 53(c) of the Act.

2. Orders that the Respondent pay the Applicant's costs, to be taxed if not agreed.

Trade Practices Act 1974

**UNDERTAKING TO THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION GIVEN FOR THE PURPOSE OF SECTION 87B**

BY

**GM HOLDEN LTD** (ACN 006 893 232)

Persons Giving this Undertaking

1. This Undertaking is given to the **Australian Competition & Consumer Commission (ACCC)** by **GM Holden Ltd** (ACN 006 893 232) (Holden) of 191 Salmon Street, Port Melbourne in the state of Victoria, under section 87B of the Trade Practices Act 1974 (Cth) (TPA).

Background

2. Holden is a corporation that carries on business that includes being a wholesale supplier of the Saab brand of motor vehicles in Australia under the name "Saab Australia".

3. In January 2007, Holden launched its Saab carbon offset program, which was promoted by way of media release, promotional materials and letters sent to customers following the purchase of their Saab vehicle.

4. Between 27 July 2007 and 1 September 2007, one or other of two versions of an advertisement with the headline statement "Grrrrreen" that promoted the Saab range of vehicle (Advertisement) was published in newspapers and magazines across Australia. Holden caused the Advertisement to be published.

5. The advertisement referred to Holden's range of Saab new, demonstrator, and approved pre-owned motor vehicles (Motor Vehicle in the Saab Range). A copy of the Advertisement is annexed to this Undertaking at Annexure A. Another version of the Advertisement referred to "used" vehicles in the body copy but was otherwise substantially similar to the version of the Advertisement described above and annexed at Annexure A to this Undertaking.

6. One of the two versions of the Advertisement was published in the following newspapers and magazines across Australia:
- a) The Sydney Morning Herald on 27 July 2007 and 10 August 2007;
  - b) The Age on 27 July 2007;
  - c) The Courier Mail on 28 July 2007;
  - d) The Adelaide Advertiser on 28 July 2007;
  - e) The West Australian on 28 July 2007;
  - f) Good Weekend magazine (Sydney Morning Herald edition) on 28 July 2007 and 11 August 2007;
  - g) Good Weekend magazine (The Age edition) on 28 July 2007;
  - h) Wish magazine on 3 August 2007;
  - i) The Bulletin magazine on 26 July 2007;
  - j) The Australian magazine on 28 July 2007; and
  - k) Qantas magazine September 2007 edition.
7. In July 2007, a version of the Advertisement was published on the website <http://www.saab.com.au>.
8. On 12 August 2007, Holden decided to cease submitting the Advertisement for publication and replaced it with an amended version of the advertisement. However, due to an earlier booking made in July 2007, the Advertisement was also published in the Qantas magazine for September 2007.
9. On 28 August 2007, the ACCC wrote to Holden to raise its concerns that the Advertisement could mislead consumers as to the carbon neutrality characteristics of the Motor Vehicles in the Saab Range, and requested a response from Holden by 4 September 2007.
10. Holden replied to the ACCC's letter on 4 September 2007 stating that, although it did not agree that the Advertisement was misleading, it had already separately determined to cease publication of the Advertisement. Holden advised the ACCC that the Advertisement would not be published again.

11. While noting Holden's response, the ACCC determined that a more comprehensive resolution was appropriate. Accordingly, on 24 December 2007, the ACCC sent a further letter to Holden noting Holden's response and advising that it had decided to institute proceedings in respect of the Advertisement. In the letter the ACCC invited Holden to consider whether it wished to resolve the matter by offering the ACCC undertakings under section 87B and requested Holden to respond by 9 January 2008.

12. On 9 January 2008, the ACCC sent a further copy of the ACCC's letter of 24 December 2007 by facsimile to Holden with a request for Holden's response as soon as possible.

13. For various reasons, including Holden's normal company-wide shutdown over the Christmas holiday period, Holden missed the opportunity to respond to the ACCC's letter of 24 December 2007 and the ACCC's facsimile of 9 January 2008. Holden had not responded to the ACCC by 16 January 2008.

14. The ACCC instituted proceedings in the Federal Court of Australia against Holden on

16 January 2008 under WAD 16 of 2008 in the Perth registry for alleged breaches of sections 52 and 53(c) of the TPA (Proceedings).

15. Holden intended to promote the Saab carbon offset program accurately and did not intend to mislead customers about that program.

16. However, Holden accepts that consumers could have interpreted the Advertisement to mean that planting 17 native trees on behalf of the purchaser of that motor vehicle would offset carbon dioxide emissions for the lifetime of the vehicle.

17. Holden also initiated, of its own accord, to plant or cause to be planted an additional 12,500 native trees. Holden is of the view that those 12,500 native trees will be more than enough trees to offset the carbon emissions for all new, demonstrator and approved pre-owned or used Saabs sold to the public during the period from 27 July 2007 to 12 August 2007 (inclusive) based on a 10 year vehicle life. (The Australian Bureau of Statistics Motor Vehicle Census, 31 March 2007.)

18. Holden agreed to the Federal Court of Australia making declarations in respect of the Proceedings in the terms set out at

[para 10 above].

19. In addition, in order to resolve this matter with the ACCC, Holden has offered the following Undertakings to the ACCC pursuant to section 87B of the TPA and the ACCC has agreed to accept the Undertakings.

#### Commencement of Undertakings

20. This Undertaking comes into effect when:

a) the Undertaking is executed by Holden; and

b) the ACCC accepts the Undertaking so executed.

21. Upon commencement of this Undertaking, Holden undertakes to assume the obligations set out in Paragraphs 22 and 23.

#### Undertakings

22. Holden undertakes to refrain from re-publishing either version of the original Advertisement.

23. Within 3 months of the commencement of this Undertaking, Holden undertakes that it will, at its own expense:

a) train all Saab marketing staff in relation to misleading or decep-

tive conduct in the context of "green' marketing claims for the purpose of ensuring that the Saab marketing staff are aware of responsibilities and obligations under sections 52 and 53 of the TPA; and

b) cause, at its own expense, an independent third party to include this training in the scheduled annual review of Holden's existing Trade Practices Compliance Program to be conducted by 30 December 2008.

#### Acknowledgements

24. Holden acknowledges that the ACCC will make this Undertaking available for public inspection.

25. Holden acknowledges that the ACCC will from time to time publicly refer to this Undertaking.

26. Holden acknowledges and accepts that this Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct that is the subject of the ACCC's concerns."

(Original emphasis.)

11 The role of the Court in determining whether to approve the consent orders reflecting a settlement reached in litigation, including the settlement of claims made by the ACCC in respect of contraventions of the TPA, was considered by French J in [Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc \(1999\) 161 ALR 79](#) (REIWA). French J observed at 87, at [20]:

"A general principle of judicial restraint in the scrutiny of proposed settlements was enunciated early in the history of the Trade Practices Act. It is not the function of the court to impede settlements between parties legally represented and able to understand and evaluate the desirability of agreeing to a settlement nor to refuse to give effect to terms of settlement by refusing to make orders or accept undertakings where they are within the court's jurisdiction and are otherwise unobjectionable: [Trade Practices Commission v Milreis Pty Ltd \(No 2\) \(1978\) 32 FLR 234 at 243 \(Franki J\)](#)."

12 Further, in REIWA at 86, at [18], French J, in referring to the Court's power to approve settlements and make consent orders, observed:

"In the exercise of that power the court is not merely giving effect to the wishes of the parties, it is exercising a public function and must have regard to the public interest in doing so. This principle applies to the resolution of private litigation by consent orders or undertakings. A fortiori it applies to proceedings brought by the Crown or public or statutory authorities to enforce the law in the public interest. The court has a responsibility to be satisfied that what is proposed is not contrary to the public interest and is at least consistent with it."

13 The primary relief sought in the consent orders is for a declaration. In my view, the Court has the jurisdiction to make the declaration in the circumstances because the Court is exercising judicial power in quelling a controversy between the parties. It is apparent from the pleadings and preceding cor-

respondence that the question of whether the advertisements were misleading or deceptive was a disputed issue between the parties. There is also utility in making the declaration that the respondent has contravened the TPA because it marks the Court's disapproval of the conduct of **GM Holden**. It also serves to define and publicise the type of conduct which constitutes a contravention of the TPA ([Australian Competition and Consumer Commission v Midland Brick Co Pty Ltd \(2004\) 207 ALR 329 at 333](#)).

14 Further, para 22 of the Undertaking given by **GM Holden** dispenses with the need for the Court to enjoin **GM Holden** from republishing the advertisements. In my view, it is not in dispute that **GM Holden** of its own accord decided to withdraw the advertisements from publication before the ACCC first made complaint about the advertisements. In those circumstances, whilst it is open to a Court to issue injunctions under the TPA even in circumstances where there is no threat that a respondent will engage in the contravening conduct, in my view, the public interest is sufficiently protected in this case by **GM Holden** giving the undertaking in para 22 of the Undertaking. Likewise, **GM Holden's** undertaking to train staff in relation to compliance with the TPA, in my view, precluded the need for an order of court to be made in this respect.

15 I have given consideration to whether I should withhold approval of the settlement because there was no order or undertaking that **GM Holden** engage in corrective advertising. However, I have decided, applying the principle of judicial restraint referred to in [11] above, that withholding approval on that basis, is not warranted in the circumstances of this case. First, the publication of the last of the advertisements occurred more than a year ago. Secondly, there was only a very limited publication of the advertisements before they were withdrawn. The continuing impact of the statements made in the advertisements, therefore, is likely to be very limited. Accordingly, it does not appear that corrective advertising would be of any demonstrable benefit at this late stage. Thirdly, in respect of the number of Saab motor vehicles that were sold during the period when the advertisements were likely to have had the most impact, **GM Holden** has planted enough additional native trees to offset the carbon emissions of those vehicles based on a 10 year vehicle life. I note that



the ACCC does not take issue with the statement contained in para 17 of **GM Holden's** Undertaking.

16 It follows that I will approve the making of orders in the terms of the consent orders.

Upon the Court noting the Undertaking given by the Respondent to the Applicant pursuant to s 87B of the Trade Practices Act 1974 (Cth) (the Act)

BY CONSENT THE COURT ORDERS THAT:

1. It is declared that the Respondent:

(a) by causing advertisements (Advertisements) to be published in:

(i) Good Weekend magazine (Sydney Morning Herald edition) on 28 July 2007 and 11 August 2007;

(ii) Good Weekend magazine (The Age edition) on 28 July 2007;

(iii) Wish magazine on 3 August 2007;

(iv) Australian magazine on 28 July 2007;

(v) The Bulletin magazine on 26 July 2007;

(vi) Qantas magazine in September 2007;

(vii) The Sydney Morning Herald newspaper on 27 July 2007 and 10 August 2007;

(viii) The Age newspaper on 27 July 2007;

(ix) The Courier Mail newspaper on 28 July 2007;

(x) The Adelaide Advertiser newspaper on 28 July 2007; and

(xi) The West Australian newspaper on 28 July 2007,

(b) which contained representations in relation to the Respondent's range of new, demonstrator and approved pre-owned Saab motor vehicles (Motor Vehicle in the Saab Range) that:

(i) the Respondent had taken measures so that carbon dioxide emissions from any Motor Vehicle in the Saab Range would be neutral, over the life of that motor vehicle; and

(ii) in the first year following the purchase of any Motor Vehicle in the Saab Range, the Respondent would plant 17 native trees on behalf of the purchaser of that motor vehicle (Tree Planting) which would offset the carbon dioxide emissions for the life of that motor vehicle,

when:

(iii) the carbon dioxide emissions from any Motor Vehicle in the Saab Range would not be neutral, over the life of that motor vehicle; and

(iv) the Tree Planting would not provide a carbon dioxide offset for more than a single year's operation of any Motor Vehicle in the Saab Range,

(c) has in trade or commerce engaged in conduct that was likely to mislead or deceive in contravention of section 52 of the Act and represented that Motor Vehicles in the Saab Range had performance characteristics or benefits that they did not have in contravention of section 53(c) of the Act.

2. The Respondent pay the Applicant's costs, to be taxed if not agreed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

(c) Thomson Legal and Regulatory Limited ABN 64 058 914 668

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