Australian Competition & Consumer Commission

# Carbon claims and the Trade Practices Act

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**Important notice**
This guideline is designed to give you basic information; it does not cover the whole of the Trade Practices Act and is not a substitute for professional advice.

Moreover, because it avoids legal language wherever possible, there may be generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining how the Act applies to that conduct.

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# Introduction

As climate change gains more attention around the world, a new focus on carbon emissions has emerged. Messages about global warming are everywhere urging us to reduce our carbon production to help the planet.

As consumers gain awareness of their carbon 'footprint' and start to look for ways to reduce their impact on the planet, a new generation of environmental claims around reducing carbon emissions are emerging—and subsequently an entire new market of carbon offset trading has appeared.

Many businesses use carbon offsetting to differentiate themselves and their products from their competition. Keen to display their 'green' credentials, some businesses are now examining their carbon footprint, taking steps to reduce it and purchasing offsets to compensate for the environmental impact of their activities.

Consumers can also choose to purchase carbon offsets for their activities as well as a wide variety of 'carbon neutral' products—everything from food and drink, to clothing and credit cards. Consumers can also offset their air travel and even attend 'carbon neutral' events.

As the green industry and the presence of carbon offset marketing grows, concerns are emerging about what consumers and businesses are really purchasing when they buy carbon offsets and carbon offset products. The increase in carbon neutral or 'low carbon' claims has created confusion. As there are no universally accepted definitions of these terms, understanding of the terms varies among consumers.

Currently, methodology used for assessment of carbon reduction, neutrality and footprints is varied. Which carbon offsets legitimately reduce carbon dioxide or other greenhouse gases and how to measure such reductions are subject to debate.

That is why it is essential consumers are provided with accurate and full information about carbon offset claims associated with products or services, in order to make informed decisions. Providing consumers with 'the full picture' is essential to ensuring they are not misled.

# Carbon claims and the Trade Practices Act

The purpose of this guide is to inform businesses about their obligations under the *Trade Practices Act 1974* (the Act). It examines some issues surrounding carbon offset and neutrality claims, and how they are affected by the Act.

This publication is intended to inform both businesses who are providers of offsets, and businesses that promote their green credentials using purchased carbon offsets. It aims to improve the accuracy of information provided to consumers about carbon–related claims, and contains a checklist of things to remember when making this type of claim. It also includes a list of where to find further information on aspects of carbon claims outside the scope of the Act.

The development of a credible and transparent carbon offset market and straightforward carbon offset marketing will assist Australia to reach its climate change goals. However, false or deceptive claims damage consumer perception of carbon offsetting, thereby damaging the emerging industry.

Carbon claims should alert and inform consumers to exactly what is being offset and how. If accurate and easily understood, carbon claims demonstrating a business's approach to environmental issues and carbon offsetting will assist consumers to purchase according to their preferences.

Vague, unsubstantiated, confusing or misleading information will reduce consumer confidence in carbon claims thereby disadvantaging ethical traders. The Australian Competition and Consumer Commission (ACCC) aims to prevent unscrupulous traders 'greenwashing' their advertising and exploiting consumers' willingness to pay a premium on goods that reduce the impact on the environment. The ACCC will vigorously pursue any claims which breach the Act.

# 1. The Trade Practices Act

The Act applies to all forms of marketing, including claims on packaging, labelling and in advertising and promotions across all mediums (print, TV, radio and internet). Consumers are entitled to rely on any carbon offset claims you make and expect these claims to be truthful. You should ensure that any claims you make are accurate and appropriately substantiated.

## What does the law say?

There are several provisions of the Act affecting the carbon claims you make.

### Misleading and deceptive conduct

The Act prohibits misleading and deceptive conduct and conduct that is likely to mislead or deceive. An important consideration in determining whether conduct may be misleading is the overall impression formed in the consumer's mind. It is the consumer's impression that is important, not your intentions when crafting your advertising message.

Note that the conduct only needs to be **likely to** mislead or deceive; it does not matter whether you **actually** misled anyone or whether you **intended** to mislead. This means unlawful misleading conduct could result from inadvertence, carelessness or mismanagement. Therefore, you should take the utmost care to ensure that your claims are accurate and truthful and not likely to mislead in any way.

It is important to note that misleading conduct can also include silence, if (in all the relevant circumstances) there is an obligation to say something, or if a reasonable expectation is created that certain matters will be disclosed.

EXAMPLE

If you advertise offsets that sequester carbon through tree planting, but fail to disclose that the planting of those trees will not occur for several years, this could constitute misleading by silence.

Bear in mind that your audience is likely to vary in age, education and experience, so you should consider more susceptible members of your audience when putting together your campaign.

## False or misleading representations

The Act also contains a series of prohibitions against a range of specific representations. Breaching these prohibitions can result in serious penalties under the Act and, where criminal proceedings are taken, can include fines of up to $1.1 million.

One prohibition that is especially relevant to carbon offset claims states that businesses must not falsely represent goods or services as having sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have.

Those most relevant to carbon claims are:

- **Sponsorship**—businesses should not give the impression they have the backing of another party when they do not. The unauthorised use of a trademark or logo may breach this provision.
- **Approval**—businesses should not claim to have approval from a government agency or licensing board when no such approval has been given; where such approval has lapsed; or where the approval relates to other matters.
- **Performance characteristics**—businesses should not falsely claim that their product or service has certain capabilities or effects they do not have. For example, overstating the impact in relation to a product or service of any particular offset program in place.
- **Benefits**—businesses should not claim that a product or service has carbon-related environmental benefits if these claims cannot be substantiated.

The Act also requires that you do not engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, suitability for purpose or the quantity of goods.

Finally, the Act requires that when making a representation about future matters you must have **reasonable grounds** for making it. This could include claims of aspirational goals for carbon neutrality, such as ‘going carbon neutral by 2030’ or carbon offsets that may take decades to realise, such as plant sequestering. Claims such as these should only be made if there are reasonable grounds for making them.

# 2. Carbon offset claims

**Carbon offsets** are simply credits for emission reductions achieved by projects such as tree planting or energy efficiency projects. By purchasing these credits you can apply them to your own emissions and reduce your net impact on the environment.

Carbon offsets are used to counteract the negative environmental impact of your carbon emissions by achieving a reduction in emissions elsewhere. So you could, for example, offset the emissions from your electricity or fuel usage for a year.

**Carbon neutrality** is, broadly speaking, achieved by reducing and offsetting a business or individual's carbon dioxide equivalent ($CO_2$-e) producing activities and requires comprehensive accounting of the carbon footprint.

At present, there are no mandated standards regarding carbon offsets and carbon neutrality in Australia. However, there are various recognised standards and an emerging consensus of 'best practice' in the area, that may help consumers and business assess claims.

The Australian Government has committed to developing a national carbon offset standard by the end of 2008. This commitment includes setting minimum standards for the generation, verification and retirement of offset credits.

The current absence of a mandated standard does not mean that carbon offset claims are unregulated. Any carbon offset claim you are considering needs to be assessed against the requirements of the Act. Failure to abide by the rules set out in the Act can result in serious penalties.

**If you are a purchaser of offsets**—when making claims about your organisation's carbon neutrality, or about products and services you have offset, be aware that inappropriate or poor quality offsets may leave you at risk of having unsubstantiated carbon offset claims and therefore risks breaching the Act.

**If you are a provider of offsets**—you should be aware that poor quality offsets may leave you at risk of misleading people about the nature of your service and therefore breaching the Act.

With so many methods of creating an offset, from energy efficiency schemes such as distributing compact fluorescent light bulbs to methane flaring from landfills, comparison between offsets can be difficult. These projects all attempt to reduce $CO_2$ emissions but do so with varying degrees of quality. Judging which are of good quality or value can also be complicated.

Below are some factors that can be problematic and should be considered when selecting appropriate offsets on which to base your claims:

## Additionality

A basic requirement for a legitimate carbon offset is 'additionality'—the idea that benefits of the carbon reduction under the project were 'in addition' to those that would have happened anyway, perhaps because of regulatory requirements or other pre–existing circumstances.

Various stakeholders propose many different additionality 'tests' but demonstrating the additionality of a carbon offset means to show that the emission reductions being accredited as offsets are not 'business as usual'.

EXAMPLE

**A routine upgrade of equipment, or changes in response to a regulatory requirement cannot be regarded as additional.**

Additionality is important in evaluating if an offset project leads to real and measurable greenhouse gas reductions. Without additionality, a particular reduction is not legitimately able to be tied to another specific emission and therefore the climate impact is not offset—even though some reduction may have occurred. Such an offset is then problematic when making a carbon offset claim.

## Timing and forward credited offsets

When offsets are forward credited, the buyer pays and has the offsets credited to them upfront, although the offsets will be produced in the future. Clearly, forward crediting carries the risk of claiming credits that may not eventuate. Liability for these risks should be carefully considered when purchasing carbon offsets.

To help mitigate the risk of unsubstantiated carbon claims, it is a good idea to obtain a contractual commitment from the offset provider to secure replacement credits if the project doesn't deliver anticipated emissions reductions.

Forward credited offsets can be a risky proposition so you should look for offset providers that fully disclose both the risks and how those risks are managed.

Offset providers offering credits that are not already realised, (or that may take long periods of time to be realised) such as tree planting, should disclose this fact to consumers. Similarly, offset providers that accumulate the purchases of several customers and wait until a threshold has been reached, before planting for example, should inform consumers that the emissions reductions they are purchasing have not yet occurred and will not occur until the threshold has been reached.

## Double counted offsets

Double counting occurs when an offset is not 'retired' and two or more businesses claim the same emissions reduction. Unfortunately, it is all too easy to double count emissions reductions when offsets are not retired by the offset provider at the point of sale.

EXAMPLE

An offset provider contracts to plant 10 000 trees for a customer purchasing carbon offsets. The offset provider plants 10 000 trees but does not retire them as offsets and later sells the same carbon sequestered by the 10 000 trees as an offset to a second customer.

Buying a carbon offset represents purchasing an environmental outcome—a specific reduction of carbon emissions. If this environmental outcome does not occur, then the purchaser has not received the reduction they paid for and has been misled. In turn, this could result in a consumer being misled when purchasing carbon neutral products that were supposedly offset using these credits.

To offset an emission the offset credit must be retired in some way. Simply purchasing an offset but not retiring it does not offset your specific emission. To ensure that your emissions are offset and therefore your carbon offset claims are substantiated, make sure the offsets you purchase are retired at point of sale.

## Permanence and risk management

An emissions reduction project may not be entirely secure or may involve a range of risks. For example, a reforestation project may have risks from fire or pest infestation. As with forward crediting, obtaining some form of guarantee that purchased credits will be maintained and replaced if destroyed, or alternatively, that the prospect of some degree of damage has been factored into the credit calculation, may help alleviate the potential for misleading conduct based on poor risk management.

## Low-quality offsets

There are varying degrees of quality among carbon offsets, and poor quality offsets are problematic as they may not be able to substantiate your carbon offset claims. Different methods of offsetting have different levels of certainty, longevity and timeliness. Some are permanent and immediate, others slow and potentially temporary. Ensure any offsets you purchase are of good quality and actually achieve the reduction in emissions you are seeking. Purchasing poor quality offsets could result in the credits you purchase being unsuited to your purpose.

Although there is no mandated standard for offsets, there are many recognised standards by which to compare offsets. There are also various sources of independent verification of the types of things discussed above. Further information and resources for comparing quality of offsets is provided in chapter 5.

## Co-benefits

Co-benefits from emission reduction projects might include such things as the reduction of other pollutants, an increase in habitats for biodiversity, reducing reliance on fossil fuels in the economy or educational benefits from the installation of new energy efficient technologies. However, while co-benefits are an important aspect of an offset's environmental credentials, they should not be used to compensate for essentially poor quality offsets.

EXAMPLE

An offset project based on planting shrubs and grasses may have co-benefits of providing shelter for wildlife, however the project itself may be of questionable quality if it does not sequester as much carbon as claimed.

## Standards, accreditation and logos

As mentioned, there are many standards for carbon offsetting, the calculation of carbon neutrality, and many sources of accreditation and verification for offsets. If you make claims about your product or service being compliant with a certain standard, ensure you adhere to that standard. If your product or service does not meet the requirements for the standard or has not been given accreditation, you risk breaching the Act.

Also be aware that images can be representations. In particular, some images may suggest carbon-related benefits to consumers. For example, the use of a symbol or official-looking logo might give consumers the impression of certification from an independent third party. If this is not the case, the use of the image risks misleading people.

As good practice, when using the logo of a scheme that not many consumers will be familiar with, provide opportunity for consumers to easily find further information on the scheme identified with the logo to help alleviate potential confusion.

# 3. Carbon neutral and low carbon claims

Carbon neutral is a term increasingly employed by businesses looking to promote themselves or their products to environmentally conscious consumers. However, there is no universally accepted definition of the term. Despite its widespread use, there is diverse opinion and expectation about what it should entail.

As there is no standardised and readily available definition, the term 'carbon neutral' may convey a wide range of meanings in the minds of consumers. Therefore, this term should not be used indiscriminately. As with any term that may be unclear or uncertain, extra care should be used to ensure consumers are not misled.

## What is covered by a claim of carbon neutral?

Although carbon neutrality is not defined, as previously mentioned, you must keep in mind the overall impression your advertising creates in the minds of your target audience.

Carbon neutral may be taken by consumers as an absolute term, that is, it may suggest to consumers that the equivalent of all the $CO_2$-e emissions of a business have been eliminated through emissions reductions and offsets. Similarly, when applied to a product, the term may create an impression that emissions from the complete lifecycle of the product have been taken into account. If this is not the case, you should explain exactly what is covered by your claim of carbon neutrality to avoid the risk of misleading consumers.

To prevent confusion, clearly explain how and what you have offset. Be specific—a clear statement about which elements of the product lifecycle, or your business activities have been offset will help avoid consumer confusion.

Providing full details of your scheme will assist consumers to understand it, and therefore reduce the risk of misleading them. You may also wish to direct consumers to sources of further information explaining your offset program.

Bear in mind that the term itself may suggest to consumers that the net climate impact of the business or product is zero and this impression may be difficult to dislodge, so if this is not accurate, consider alternatives.

EXAMPLE

A business may have the emissions created from manufacturing a motorcycle offset up to the point of sale, but not the emissions that will be generated in the use of the motorcycle. Advertising that 'the carbon emissions from the making of this motorcycle have been offset' may be more accurate and less potentially misleading than making a claim that it is 'carbon neutral'.

## Scopes

The concept behind the term 'scopes' comes from the Greenhouse Gas Protocol (GHG Protocol), a widely used international accounting tool used to understand and quantify greenhouse gas emissions. Emission sources are categorised into three 'scopes' for reporting purposes.

While the inclusion of all three scopes is not expressly required, it is important to consider them, to ensure accuracy of your carbon neutrality claims.

The scopes are defined as:

**Scope 1—direct emissions:** greenhouse emissions created directly by you, from sources that are owned or controlled by you.

**Scope 2—indirect energy emissions:** greenhouse emissions created by your use of purchased energy.

**Scope 3—other indirect emissions:** greenhouse emissions which are a result of your activities, but occur from sources not owned or controlled by you such as those products and services you utilise.

EXAMPLE

If you ran a limousine service your scope 1 emissions might include those from the fuel used in running your business. Scope 2 emissions would include the electricity used in running your office, garaging and maintenance of your vehicles. Scope 3 emissions are quite broad, and may include the emissions generated in the manufacture of your vehicles, emissions from employee travel to and from work and emissions from work-related air trips.

Currently there is no mandated methodology as to which scopes must be included in a claim of carbon neutrality. However as discussed previously, the term 'carbon neutral', when applied to either a business as a whole or a product of that business, may give the impression that you have taken into account all three scopes. An unqualified claim of carbon neutrality risks misleading consumers if you have only considered scope 1.

It is essential that whatever you decide to include in your offsetting, it is made clear to consumers. If you decided in the previous example to only offset your scope 1 emissions, advertising that you have offset the emissions from the fuel used by your limousines, rather than advertising your company as carbon neutral, could avoid misleading consumers.

## Footprint calculators

Footprint 'calculators' are often advertised as a means by which consumers can assess the amount of carbon emissions they generate with particular activities, such as for a flight, and then offset their emissions on this basis. There is no legislated methodology for the calculation of carbon footprints, so when using such a tool on a website or elsewhere you should be clear about how the calculator works and what is and is not included in your calculator.

Various assumptions are made to develop a calculator which estimates the average emissions from a particular activity, and these should be disclosed to the consumer.

EXAMPLE

When developing a calculator to estimate emissions from car travel, you may use an estimate of the emissions from a medium-sized car over a given distance. However, a car may use different amounts of fuel over that distance depending on the speed it is travelling, passengers and luggage it is carrying, etc.

Clearly setting out what assumptions you have made in your calculator, such as the type and size of car and the speed at which it is travelling may reduce the risk of misleading consumers.

If you provide incomplete or insufficient information to consumers they may make assumptions about what is included, and potentially be misled. Explanation and substantiation of your calculator will reduce this risk.

## Future statements

To make a claim about a future matter, you must have reasonable grounds for making the representation. Without a robust implementation strategy, making claims about aspirational goals such as 'going carbon neutral by 2030' may place your organisation at risk of engaging in misleading and deceptive behaviour. The overall impression generated by such claims may be that more is being done than the actual outcomes reflect.

If challenged, your organisation may be required to establish that there was a reasonable basis for making this claim. A structured implementation strategy including interim goals and periodic reassessment may help substantiate this claim.

## Low carbon claims

A 'low carbon' claim conveys little information to the consumer as it is ambiguous and broad. The term is meaningless without context or comparison. It might mean 'lower carbon' than other similar products or it could be understood by consumers as 'low in emissions', or so low as to be virtually carbon-free.

EXAMPLE

An isolated claim of 'low carbon' on a juice bottle is problematic. It is unclear whether the juice bottle has lower emissions than other products in its class perhaps because of recent upgrades to the manufacturing plant resulting in energy efficiency, or perhaps the emissions from the manufacturing of the juice have been offset so as to make it almost carbon neutral.

Claims about relative performance in a class of products also have the potential to mislead consumers into thinking a product is good for the environment when in fact, the product or service may be inherently harmful to the environment.

EXAMPLE

Marketing a car as 'low carbon' when it has had 50 per cent of its emissions from manufacture offset, might be true in relation to other products in its class but it may still embody more carbon than other product substitutes and therefore risk misleading consumers into thinking it is more beneficial to the environment than it actually is. Ensure your claims are specific, for example, a simple statement that '50 per cent of the emissions from manufacture have been offset' would be less problematic.

# 4. Things to remember when making carbon claims

- Think about the **message** that will be taken away by your target audience when producing your advertising. Even if you have the best of intentions, if your claims are misleading you could still be at risk of breaching the Act.
- Provide accurate and complete information to consumers on which to base their purchasing decisions. Misleading conduct can include **silence**. It is essential that your consumers have the full picture.
- **Clarify** your carbon claims. There are many varied standards of measurement, accounting and accreditation, so when making claims based on these, be sure to explain to consumers what you refer to and where to find further information.
- When making claims of **carbon neutrality**, spell out exactly what is included in your claim to avoid misleading consumers. Be aware that there is no universal definition of carbon neutrality and that consumer understanding of the term may vary.
- If you are making statements as to the future, ensure you have a **reasonable basis** for making them. Think about how you would answer a query about your future statement and on what basis you made it.

This is a complicated and continually developing area and the penalties for misleading consumers are serious. Keeping the above points in mind when making carbon claims not only makes good business sense—it may help you avoid unlawful or criminal conduct.

# 5. Further information and referrals

## Department of Climate Change

The Department of Climate Change is responsible for implementing Australian government policy on climate change, and administers the Greenhouse Friendly™ program.

Greenhouse Friendly™ is composed of two interrelated parts—

- The first part involves product and service certification, where certified products and services are eligible to be labelled with the Greenhouse Friendly™ logo. The certification is subject to an objective independent verification process.
- Secondly, Greenhouse Friendly™ provides accreditation for approved abatement projects. These abatement projects must occur in Australia, and must generate additional, permanent and verifiable greenhouse gas emissions reductions or sequestration.

Besides the Greenhouse Friendly™ program, the Department of Climate Change is responsible for developing the national carbon offset standard. The standard will be developed by December 2008 and will include setting minimum standards for the generation, verification and retirement of offset credits.

You can find further information on the Greenhouse Friendly™ program and climate change policy matters at www.climatechange.gov.au.

## Department of the Environment, Water, Heritage and the Arts

The role of the Department of the Environment, Water, Heritage and the Arts is to provide the Australian government with policy advice and program management which protects or promotes the protection of the environment and Australia's heritage.

You can find further information on environmental science and policy at www.environment.gov.au.

## Office of the Renewable Energy Regulator

The Office of the Renewable Energy Regulator is a statutory authority established to oversee the implementation of the government's Mandatory Renewable Energy Target (MRET). The aim of MRET is to increase the production of renewable energy.

For information on MRET and Renewable Energy Certificates go to at www.orer.gov.au.

## Environment Protection Authority Victoria

The Environment Protection Authority Victoria is a state government body which aims to protect, care for and improve the environment.

You can find information on carbon offsets and some of the issues surrounding the carbon offset market and also help evaluating claims of carbon neutrality at www.epa.vic.gov.au.

For help finding and comparing carbon offsets you can visit Carbon Offset Guide Australia at www.carbonoffsetguide.com.au. This online resource is an independent directory of offset providers created by Global Sustainability at the Royal Melbourne Institute of Technology and the Environment Protection Agency Victoria and is updated every three months.

## GreenPower

The GreenPower accreditation program is managed by the New South Wales Department of Water and Energy on behalf of the Australian Capital Territory, New South Wales, Queensland, South Australian, Tasmanian, Victorian and Western Australian governments and sets out the rules for GreenPower renewable energy products. It independently audits GreenPower retailers' sales and purchases to make sure they are meeting the accreditation and environmental criteria.

Information on GreenPower accredited renewable energy can be found at www.greenpower.gov.au.

# Contacting the ACCC

## ACCC Infocentre

| | |
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| Infoline: | 1300 302 502 |
| Website: | www.accc.gov.au |
| Small business helpline: | 1300 302 021 |

For other business information, go to www.business.gov.au

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service: www.relayservice.com.au.

TTY or modem users—phone 133 677 and ask for 1300 302 502.

Voice-only (speak and listen) users—phone 1300 555 727 and ask for 1300 302 502.