Environmental Defenders Office

Submission to the Australian Association of National Advertisers (AANA) regarding Environmental Claims Code

February 2023

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

Submitted by email to: aanasubmissions@aana.com.au

For further information on this submission, please contact:

Kirsty Ruddock/Clare Saunders
Managing Lawyer/ Solicitor- Safe Climate (Corporate and Commercial)
T: 02 9262 6989
E: kirsty.ruddock@edo.org.au; clare.saunders@edo.org.au

EXECUTIVE SUMMARY

The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Australian Association of National Advertisers (**AANA**) Environmental Claims Code review.

As part of a national community legal centre specialising in public interest environmental law, the work of the EDO Safe Climate (Corporate and Commercial) lawyers includes examining greenwashing by companies.

Key trends that we have seen include:

a. Companies use of the word "clean" to describe fossil gas.
b. The use of net zero targets by the fossil fuel industry which claim that emissions reductions will be achieved by carbon offsets or carbon capture and storage technology while actual emissions are increasing.
c. Companies claiming to recognise and respect First Nations Peoples and their interests, rights and culture whilst undermining those interests, rights and cultures and failing to properly engage with First Nations Peoples.

In order to hold companies accountable for their environment claims, and to prevent misleading claims being made, we request that the AANA significantly strengthen the wording of the AANA Environmental Claims Code (**the Code**).

Summary of key recommendations: in relation to the Code

1. The Practice notes should align with the case law on what is misleading or deceptive under the Australian Consumer Law (**ACL**), in particular in relation to the use of headline statements and the overall impression of the advertisement.
2. The Practice notes should align with case law under the ACL in relation to use of disclaimers and fine print, which state that prominent claims can still mislead even if used with disclaimers.
3. The Practice notes should ensure net zero claims are consistent with the recommendations of the UN High Level Expert Group on Net Zero Emissions Commitments of Non-State Entities report entitled "Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and regions".
4. Claims should be assessed against the overall life cycle of products and environmental footprint of a company when making broad environmental claims.
5. As many environmental claims relate to scientific concepts, it is important that science and expert scientific advice is used to assess claims.

We set out **below** our responses to the key issues identified in the discussion paper.

Questions in the Discussion Paper

1. Changes to the definition of 'Environmental Claims' in the Code

The definition of an environmental claim should be broadened to include not just claims about a product or service, but also claims about the process or manufacturing of products, or the industry itself. This will ensure that the definition is sufficiently wide to capture the situation contemplated in the Minerals Council advertisement outlined in the Discussion Paper, and advertisements made by lobby groups to promote particular industries. This is because in the EDO's view, the claims made by the Minerals Council about the rehabilitation of land after mining promoted the environmental and sustainability credentials of the mining industry as a whole.

2. Are changes required to the Practice Notes?

Guidance from case law

The EDO is of the view that changes are necessary to the Practice Notes to ensure that they capture the essence of what is misleading or deceptive conduct under the Australian Consumer Law **(ACL**).

While we appreciate that the Code intends to operate in a non-legalistic way, incorporating legal principles is crucial to ensuring that the Environmental Claims Code (**the Code**) operates in a way that is consistent with the ACL.

Headline statements

When considering the ACL, Courts often examine the overall impression created by prominent headline statements, rather than taking each statement in isolation. As Burley J said in *Homart Pharmaceuticals Pty Ltd v Careline Australia Pty Ltd* [2017] FCA 403, because the focus is on the "overall impression", it is erroneous and artificial to take an unduly analytical approach to the consideration of the question of the misrepresentation.[1] Courts have taken this approach because headline statements can mislead consumers, particularly where an advertisement is brief and will not be examined in detail, for example, advertisements on television or in the media.

Courts have also considered whether the advertisement conveys a "dominant message." Again, this has been found to be important because "Identifying the dominant message is an important first step in determining what representations are made by an advertisement, as a consumer may take in only this general thrust".[2]

Disclaimers

The question of whether a prominent headline statement is misleading or deceptive depends on whether any qualifications to it, or disclaimers, have been sufficiently drawn to the attention of the consumer and whether that information is sufficient to negate the risk that the headline claim

[1] *Homart Pharmaceuticals Pty Ltd v Careline Australia Pty Ltd* [2017] FCA 403 at [188].
[2] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [43], cited in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640.

might mislead or deceive.[3] For example, qualifications to a headline statement that are found at the end of information, or once the consumer has clicked through to another page of a website where final payments are made, have usually been found insufficient.[4] Case law provides significant guidance on the use of disclaimers. Courts have found statements to be misleading where the disclaimer is so small that it does not qualify a headline statement sufficiently. For example, in *ACCC v Singtel Optus* [2011] FCA 87 a prominent representation stated that there were unlimited downloads, but these were subject to significant qualifications that were not clearly disclosed either in the three print versions of the advertisement or the television version.

With respect to the print versions, the disclaimers were in small print on the reverse side of the page that the headline statement was on, one was in a light colour against a light background and the others included an asterisk directing the consumer to the Optus website to view the full terms and conditions. The disclaimer on the television advertisement was described by the Court as "…in such small printing and for such a short time with no soundtrack to the same effect that the [disclaimer] is not noticeable on an ordinary viewing".[5]

In *ACCC v Jetstar Airways Pty Ltd* [2015] FCA 1263, the Court found that Jetstar fares, advertised at a prominent headline price, misled the consumer because it disclosed additional booking and service fees on a progressive basis, the result of which was that the headline price was qualified and increased 'bit by bit'. The Court found that the price given for the fare would have been taken as the final fare, and that the qualification to that fare did not encompass the booking and service fee at the very end of the booking process.

A disclaimer must be sufficiently prominent and clear to prevent a primary statement from being misleading or deceptive. This requires the disclaimer to be in close proximity to the headline statement, preferably on the same page.

EDO recommends that the Practice Notes should incorporate legal principles derived from case law considering misleading or deceptive conduct to ensure that the Code is consistent with the ACL and is sufficiently broad to capture all misleading advertising. To that end, the Practice Notes should provide clear guidance as to when headline statements will be misleading. The Practice Notes should also provide clear guidance on the use of disclaimers.

Guidance from ACCC

The ACCC Guide 'Green marketing and the Australian Consumer law' (**ACCC Guide**) provides useful guidance that could be of significant assistance to the Panel in determining environmental claims and, where appropriate, could be referred to in the Practice Notes.[6] For example, the ACCC Guide states that there should be a good faith basis for making an environmental representation which should be **substantiated** with scientific or test data. This is a key issue as often the advertising company responds but provides no scientific data to support their claim. It also cautions

[3] *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2015] FCA 1263; [2016] ATPR 42-523 at [40] (Foster J) and endorsed in *Viagogo AG v ACCC* [2022] FCAFC 87 at [45].
[4] *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2015] FCA 1263; [2016] ATPR 42-523.
[5] *ACCC v Singtel Optus* [2011] FCA 87 [3]-[14] (North J).
[6] Green marketing and the Australian Consumer Law (accc.gov.au).

advertisers about the overall impression they create noting "In other words, it is not enough for each representation to be technically or narrowly correct. It is just as important to look at the overall impression created in the minds of average consumers in the target audience".[7] This approach is crucial to ensuring that the decisions of Ad Standards are consistent with the ACL.

According to the ACCC Guide, pictures can be representations, and environmental images may be capable of making a sweeping environmental claim of environmental benefit that may be misleading. It also says that claims using endorsements or certifications should be used with caution.

The Guide also provides guidance on the use of key terms such as "green", "environmentally safe", "energy efficient", "recyclable" or "renewable". It is EDO's view that the ACCC Guide would assist the Panel in determining the correct use of these terms when used prominently, including as headline statements.

The following case studies highlight the importance of clarifying the use of headline statements and key terms.

a. Australian Gas Network case study

Australian Gas Networks (**AGN**) Case Study shows the difficulties in not providing clear guidance in the Practice Notes to assist the Panel on the use of headline statements.

The AGN website includes the prominent headline statement "The future of Australian gas is renewable" with a green flame depicted underneath. The fact that the gas distributed by the AGN to some Australian homes is produced from blending fossil gas with 10% renewable hydrogen is only disclosed some pages into the website. Most consumers viewing the website would gain the overall impression that currently, "renewable gas" is made entirely from renewable hydrogen. They would not appreciate that gas currently supplied by AGN to some locations is only a 10% renewable blend, and that the advent of 100% "renewable gas"– being 100% renewable hydrogen – supplied to all locations is at best no more than an aspiration by 2050.

This highlights the importance of including all information necessary for the consumer to have an accurate understanding of environmental claims up front and in close proximity to the headline statement. It is not sufficient for information to be provided on a piecemeal basis.

b. Ampol case study

The Ampol case study involved the use of offsets and the term "carbon neutral fuel". While the case study highlights key issues with the use of offsets, the main concern is around the use of headline claims that the fuel was carbon neutral. The details of the fact that carbon neutral fuel involved an offset were not clear from the original advert. Without clicking through to further information a consumer would not find more information about the nature of the offsets.

The use of offsets

The ACCC Green Claims Guide again contains information about the use of the term "carbon neutral" and refers to claims needing to be factually based and not overstated. It also notes "you should also consider the entire life cycle of the product when making claims about carbon

[7] Ibid, pg. 7.

neutrality". It discusses the use of carbon offset activities and the importance of distinguishing between past activities and those that are planned.

Carbon offsetting is a concept many companies use to claim that they have counterbalanced their emissions or to claim that their products are "carbon neutral". This typically involves making a small payment towards climate solutions projects – most commonly planting or protecting trees – in return for a notional "carbon credit". Advertising is commonly promoting offsets along flights, car petrol, home gas, meat, and even plastic packaging.[8]

A carbon credit is calculated to remove or avoid 1 tonne of CO2 which is the same as the amount emitted in the product. Offsets also vary in quality and effectiveness.[9] For example, growing trees reduces less carbon than ensuring old forests remain unlogged.[10] There can also be major issues associated with ensuring forests remain as carbon sinks, with the impacts of climate change leading to greater bushfires and therefore risks to the permanency of some forests as a carbon sink.[11]

While these offset projects can be valuable in fighting climate change, they are also highly unregulated, and there is also simply not enough space to plant the number of trees required to counterbalance growing emissions.[12] Therefore, it is not accurate to claim that the emissions from product are actually offset, and in fact this could be harmful to the reductions needed to address climate change.[13] It would therefore be more accurate for these schemes to say they are a contribution to addressing climate change rather than reducing its impacts or being carbon neutral.

Thus, the Practice Notes and ACCC Green Claims Guide should directly address environmental claims that companies make about the use of offsets, particularly in conjunction with the use of the term "carbon neutral" or "net zero" to ensure that representations in advertising about offsets are not misleading.

Changes to Section 1 and Practice Notes

Specific changes should be made to Section 1 and the Practice Notes to reflect the comments made above. In particular, EDO **recommends** the following:

Section 1(a)

The Practice Note to Section 1(a) should include information about the use of headline statements as indicated above and the need to ensure that information that qualifies or provides a disclaimer to a claim is as prominent as the claim itself. This would mean claims such as "carbon neutral" or "renewable" cannot be qualified or in a disclaimer in a location such as in fine print, some pages

[8] The legal risk of advertising carbon 'offsets' (clientearth.org).
[9] Concerns About Carbon Offset Quality (offsetguide.org) and CSSN Position Paper: Net Zero, Carbon Removal and the Limitations of Carbon Offsetting (cssn.org).
[10] Forests and Decarbonization – Roles of Natural and Planted Forests (frontiersin.org).
[11] Using forests to manage carbon: a heated debate (theconversation.com).
[12] There aren't enough trees in the world to offset society's carbon emissions – and there never will be (theconversation.com).
[13] Now we know the flaws of carbon offsets, it's time to get real about climate change (theconversation.com).

into a website that a reader may not read, some clicks further into a website or at the point of purchase.

Section 1(b)

Section 1(b) should be clarified to ensure that disclaimers are not placed several pages or clicks into websites but are as prominent as the headline statement. Section 1(b) should also provide guidance as to the use of small print.

Section 1(c)

Section 1(c) should incorporate the whole of life cycle approach to the product to prevent companies claiming that the entire product or service is "carbon neutral" when in fact, carbon neutrality only applies to one aspect of the product's life cycle.

Rule 11.4 of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (**CAP Code**) adopts the whole of life cycle approach, stating:

> *Marketers must base environmental claims on the full life cycle of the advertised product, unless the marketing communication states otherwise, and must make clear the limits of the life cycle. If a general claim cannot be justified, a more limited claim about specific aspects of a product might be justifiable. Marketers must ensure claims that are based on only part of the advertised product's life cycle do not mislead consumers about the product's total environmental impact.*

EDO recommends that Section 1(c) should incorporate similar terms to those used in the UK CAP Code.

3. What changes to the overall Code or Practice Notes could be made to assist in interpretation and Compliance with the Code?

Overall, the Practice Notes should make it clear that legal principles applicable to misleading or deceptive conduct under the ACL and the ACCC Green Claims Guide can be of assistance in interpreting the Code. In particular, principles relating to headline claims and disclaimers, should be clarified (as discussed above at question 2).

Further suggestions are as follows:

Legitimacy of net zero claims

EDO recommends clear guidance as to what, from a scientific perspective, should be included in a "net zero claim". The UN High Level Expert Group on Net Zero Emissions Commitments of Non-State Entities report entitled "Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and regions" (**UN HLEG report**) provides authoritative guidance on this issue.[14] It outlines, in particular, 10 recommendations that assist in assessing legitimate net zero claims. Notably, the UN HLEG report states that the "net zero by 2050" target was designed to address the

[14] Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions (un.org).

need to limit warming to below a 1.5°C increase from pre-industrial levels. This is based upon tipping points which could be triggered if temperatures rise beyond that point. A net zero position simply serves to *maintain* temperatures to whatever degree of warming we reach in the interim. As such, legitimate net zero claims must be coupled with plans that are consistent with pathways that limit warming to between below 1.5°C - 2°C (as developed in the Paris Agreement).[14]

There are also other authoritative guides to what constitutes a legitimate net zero claim including the UN Race to Net Zero, "Get Net Zero Right Guide".[15] It poses six questions to ask about net zero commitments to determine whether they are legitimate:

1. Is it "about now"? This question addresses whether there is a commitment to a 50% reduction in emissions by 2030.
2. Is there a plan? Is there a clear plan of what action will be taken in the next five years, with interim and longer- term targets?
3. Is it fast enough? Does the company plan reach net zero before 2050?
4. Can you see progress? Does the company report publicly on its progress annually against its scope 1, 2 and 3 emissions
5. What does it cover? Does the net zero commitment cover all greenhouse gases emissions including scope 3 emissions?
6. It is just offsetting? This question addresses the role that offsetting plays in the net zero plan, whether the company is reducing actual emissions or simply using offsets to substitute or delay decarbonisation.

Common terms

We suggest that AANA should work with the ACCC to update the ACCC Green Claims Guide to ensure that many of the common terms used in environmental claims such as "carbon neutral" are clarified in both the Code and Guide to provide guidance to advertisers. These concepts should be incorporated into the AANA Environmental Claims Code and Practice Notes. It could then be a useful resource for both organisations and to provide stronger guidance to advertisers.

Medium of advertising

The Practice Notes should also consider the medium of advertising and how this may affect whether the advertisement is misleading. Again, legal principles from relevant case law would assist. For example, courts have found that television advertisements are transient, consumers frequently pay them low attention, and that they are not an ideal mode of delivery of complicated information.[16] This is analogous to advertisements on Facebook, billboards, or other similar social media sites such as Instagram and YouTube and is particularly relevant to environmental claims which are based on highly technical information. The EDO therefore recommends that further guidance be provided in the Practice Notes on how the advertising medium may impact on whether a representation is misleading.

[15] Get Net Zero Right (unfccc.int).
[16] *Singtel Optus Pty Ltd v Telstra* [2004] FCA 859 at [38], *ACCC v Global One Mobile Entertainment Pty Ltd* [2011] FCA 393 at [53].

4. Where broad, general claims of environmental benefit (e.g. sustainable, green) are made, should the product or company's overall environmental footprint be taken into account when assessing the accuracy of the claims?

It is the EDO's view that the company's overall environmental footprint should be taken into account when the company makes broad claims of environmental benefit so that the company cannot generate the overall impression that its business is of benefit to the environment when, in fact, that relates to a small aspect of its business.

Broad and general claims

In relation to broad claims, the ACCC Guide states that "Broad or unqualified claims can be risky as they are ambiguous and do not explain any specific environmental benefit". It then lists common claims of concern:

- Green
- Environmentally friendly or environmentally safe
- Energy efficient
- Recyclable
- Carbon neutral
- Renewable or green energy

The Advertising Standards Agency in the UK (**ASA**) published guidance notes on environmental claims, including guidance on the use of broad and unqualified claims.[17] The guidance notes state that "To avoid the risk of exaggeration, marketers should be wary of making absolute claims and should use qualified claims such as "cleaner" and "greener".

An example of a finding that broad claims are ambiguous and are misleading is the 2008 Shell tar sands advertisement. Here, the ASA found that an advertisement representing that a Canadian tar sands oil project was "sustainable" was misleading. The advertisement was published in the Financial Times alongside Shell's financial results. It claimed that Shell was harnessing its technical expertise "to unlock the potential of the vast Canadian oil sands deposit" and that "continued investment in technology" is one of the key ways to "secure a profitable and sustainable future".

The ASA found that green claims must not be vague or ambiguous by the use of terms such as "sustainable", "green" and "non-polluting" and that because "sustainable" lacks a universal definition, it was likely to be unclear to consumers. The ASA also found that Shell had not provided any data showing how it was effectively managing its carbon emissions from its oil sands projects.[18]

Where broad claims are made, EDO recommends they should require robust substantiation by scientific testing and data. In New Zealand, the Advertising Standards Agency Complaints Board

[17] Environmental claims: General "Green" claims - ASA | CAP (asa.org).
[18] Advertising not sustainable, authority tells Shell (wwf.mg).

concluded that an advertisement by Firstgas Group published on television and YouTube claiming to produce "zero carbon gas" was misleading because the claim had not been substantiated.[19]

Overall environmental footprint

In relation to a company's overall environmental footprint, it is the EDO's view that it is **vital** that claims include all aspects of a company's business. Silence about, for example, carbon intensive parts of a company's operations, such as those of Glencore, is potentially misleading because it creates the impression that the company as a whole is environmentally beneficial when in fact, its core business is coal mining. It is a well-established legal principle that silence may constitute misleading or deceptive conduct.

In this regard, the approach that Ad Standards has taken in Australia diverges from equivalent overseas bodies which have taken a stronger approach to advertising that seeks to cherry-pick and promote only parts of its business in its advertising, without explaining the whole picture of its business. In particular, Ad Standards' ruling on Suncorp ignored the importance of headline claims, and assumed that consumers are able to methodically research other parts of a company's business such as their Climate Plans to scrutinise and verify the company's claim. In reality, consumers are more likely to read a headline statement, and gain an overall impression, rather than undertake their own research via the company's website in order to test the veracity of the claim.

In contrast to Ad Standards' approach, the Dutch Advertising Standards considered the whole of Shell's business in fossil fuels when it ruled on a Shell advertisement claiming that Shell was "the driver of energy transition" and "we're changing". The Dutch regulator concluded the following:

> *The Commission considers it plausible that the average consumer will interpret the contested statement in such a way that Shell is currently undergoing a process of change in which it is changing its core strategic activity, also known as its core business, and is already investing to a significant extent in renewable energy at the expense of fossil fuels. After all, the announcement that Shell is turning into one of the biggest drivers of the energy transition implies that this process has already started and that a real change in the core business is taking place.* ***However, as acknowledged, it has been established that, in addition to investing in transition projects, Shell is currently maintaining its investments in fossil fuels and is only very slowly phasing them out.***[20] *In that situation, the Commission considers it unjustifiable for Shell to refer to itself as "one of the biggest drivers of the energy transition", giving the impression that it is an initiator and accelerator of the transition.*[21]

In October 2022, the ASA banned certain climate advertisements by HSBC Bank on the basis that they were misleading. The advertisements claimed that HSBC was aiming to provide $1 trillion in

[19] ASA Complaints Board NZ (squarespace.com).
[20] Complaint 2021/00576/A, All rulings of the Advertising Code Committee and the Board of Appeal since 2007, Opinion of the Commission, para 3.
[21] Ibid and Shell may not call itself "driver of the energy transition", rules Dutch ad watchdog.

financing to help clients transition to net zero and that they are planting 2 million trees to help contain carbon.

The ASA concluded that these claims would be taken to mean that HSBC was making, and intended to make, a positive overall environmental contribution as a company. However, the advertisements did not make clear that HSBC was continuing to significantly finance investments in industries that emitted notable levels of carbon dioxide and other greenhouse gases. The ASA found that this was material information that would affect a consumer's understanding of the company. By omitting this information, the ASA determined that the advertisement was misleading.

Related to the need to consider a company's overall environmental footprint is consideration of its overall capital expenditure and whether this aligns with its environmental claims. In EDO's view, a company should not make environmental claims if it allocates a small percentage of its capital to environmentally beneficial projects and a significant percentage of its capital to high-emitting projects. For example, the US Federal Trade Commission (**FTC**) found that Chevron misled consumers when claiming that it produces "ever-cleaner" or "clean energy" while spending less than 0.2% of its capital expenditures on renewable energy sources. The FTC found that Chevron had made other misleading environmental claims, including its use of deceptive jargon such as "reducing emissions intensity" while continuing to increase overall oil and gas extraction.[22]

5. Where claims of carbon emission reductions are made in advertising should advertisers be required to specify the extent to which this is achieved by carbon offsetting?

It is EDO's view that offsets do not constitute carbon emission reductions and should not be used in advertising to claim that they do. At best they can be viewed as a contribution to addressing climate change rather than the basis for a "carbon neutral" or "net zero" claim.

This is confirmed by the UN High-Level Expert Group on Net Zero Emissions report (**UN HLEG Report**), commissioned by the UN engaging a number of expert scientists and other policy experts to outline recommendations in relation to what constitutes a legitimate net zero claim. In relation to offsets, the UN HLEG Report notes that there is no system to define and ensure standards for the integrity of offsets or carbon credits and states:

> *As a result, too many non-state actors are currently engaging in a voluntary market where low prices and a lack of clear guidance risk delaying the urgent near-term emission reductions needed to avoid the worst impacts of climate change.*

[22] Accountability groups file first of its kind FTC complaint against Chevron for misleading consumers on climate action (earthworks.org).

The UN HLEG Report prioritises urgent and deep reductions of emissions across their value chain. They state that high integrity carbon credits cannot be counted in a non-state actor's emission reductions required by net zero pathways, only for beyond value chain mitigation.[23]

This is consistent with the Intergovernmental Panel on Climate Change (**IPCC**) findings. The IPCC has specifically stated in the Sixth Assessment Report that there are significant risks around use of carbon offset/sinks particularly under scenarios with increasing CO2 emissions:

> *While natural land and ocean carbon sinks are projected to take up, in absolute terms, a progressively larger amount of CO2 under higher compared to lower CO2 emissions scenarios, they become less effective, that is, the proportion of emissions taken up by land and ocean decrease with increasing cumulative CO2 emissions. This is projected to result in a higher proportion of emitted CO2 remaining in the atmosphere (high confidence).*[24]

Other climate groups and bodies have cautioned against the reliance on offsets in net zero plans. As the EDO has previously highlighted to Ad Standards, the Science-based Targets initiative under its "Net Zero Standard" does not accept the use of offsets to contribute towards near-term emissions reduction targets, with credits only being accepted in relation to the neutralisation of residual emissions or to finance additional climate mitigation beyond absolute reduction targets.[25]

Similarly, the Investor Group on Climate Change in its publication "Corporate Climate Transition Plans: A guide to investor expectations" (**IGCC Guide**) states that "over-reliance on offsets and nature-based solutions potentially delays efforts to abate emissions within a company's value chain and may not account for the limited land and space available to host additional tree coverage or overestimates carbon storage potential."[26]

The Climate Action 100+ Net Zero Company Benchmark takes a similar view, stating that "the use of offsetting or carbon credits should be avoided and limited if at all applied" in its scoring methodology for the decarbonisation strategy indicator.[27]

A United Nations Environment Programme article summarised this well:

> *If we are serious about averting catastrophic planetary changes, we need to reduce emissions by 45 per cent by 2030. Trees planted today can't grow fast enough to achieve this goal. And carbon offset projects will never be able to curb the emissions growth, while reducing overall emissions, if coal power stations continue to be built and petrol cars continue to be bought, and our growing global population continues to consume as it does today.*[28]

---

[23] Integrity Matters: Net Zero Commitments By Businesses, Financial Institutions, Cities and Regions (un.org),https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf, pg. 19.
[24] IPCC, Sixth Assessment Report, Climate Change 2021: The Physical Science Basis - Summary for Policymakers.
[25] SBTI, Does SBTi accept all approaches to reducing emissions? (sciencebasedtargets.org).
[26] IGCC, Corporate Climate Transition Plans: A guide to investor expectations (igcc.org.au).
[27] Climate Action 100 +, How does the Benchmark account for the use of offsets or carbon credits? (climateaction100.org).
[28] UNEP, Carbon offsets are not our get-out-of-jail free card (unep.org).

Offsets programs worldwide have recently been the subject of significant criticism. In Australia, significant integrity issues with offsets were raised under *Carbon Credits (Carbon Farming Initiative) 2011* (Cth) by Professor Andrew Macintosh.[29] The Australian Academy of Science recently reviewed the four ACCU generating methods criticised by Professor Macintosh and found similar issues and opportunities for improvement to the methodologies.[30]

There are similar concerns surrounding the international carbon market which has no unified governance structures or common accounting and verification standards and is highly fragmented as a result. It currently consists of private entities such as Gold Standard and Climate Action Reserve which establish different eligibility criteria for certifying projects and trading credits. This means that companies can use cheap, low-quality carbon credits as offsets where the credits in question have little carbon impact because, for example, the project would have happened otherwise or is not permanent. Research into Verra offsets revealed that 90% of rainforest offsets are worthless and do not provide any beneficial carbon impacts.[31]

Companies using offsets should also be required to publish details of the offsets and any applicable scheme and the costs of the offsets. There is a considerable difference in the prices charged in the voluntary offsets market which impacts on the quality of the offset obtained.[32] Many companies are not prepared to pay for more expensive high-quality offsets, and it is important that any advertising is transparent around the costs of some of the cheaper international offsets, versus the costs of more high-quality products.

6. Are any changes required to section 2 of the Practice Notes? If so, why are changes required and what specific changes are required?

The Practice note at 2(a) refers to the use of partial information. It is important that this part of the note is amended to ensure that partial information or cherry-picking information or silence can all be misleading (see answer to question 4 above). In particular, partial information should include green claims that refer to only part of a business, rather than the whole operation.

Practice Note 2(b) should also note the need to be clear around the use of climate offsets for example, given the significant concerns expressed around their actual benefit in reducing emissions. Companies should not be allowed to rely on offsets in relation to claim they are "net zero" or "carbon neutral" until there is a verified system to define and ensure standards for both the integrity of the credits themselves and how non-state actors claim them is not yet in place as noted in the UN Expert Group Report at recommendation 3.[33]

---

[29] Australian National University, Australia's carbon market a 'fraud on the environment' (law.anu.edu.au).
[30] Australian Academy of Science, Review of Four Methods For Generating Australian Carbon Credit Units (science.org.au).
[31] Revealed: more than 90% of rainforest carbon offsets by biggest certifier are worthless, analysis shows (theguardian.com).
[32] In the quest for carbon offsets, (almost) anything goes (greenbiz.com).
[33] Integrity Matters: Net Zero Commitments By Businesses, Financial Institutions, Cities and Regions (un.org), pg. 19.

7. **Environmental claims can cover a range of complex issues including carbon emissions, waste diversion or reduction, increased circularity, ecosystem impact, biodiversity and more. What independent certification or substantiation standards, schemes or tests exist in relation to each type of environmental claim? Should any of these standards or tests be adopted in the Environmental Claims Code to substantiate each type of environmental claim?**

Net zero claims

Environmental claims in relation to emissions reductions and net zero emissions should be assessed against the **UN HLEG report** (referred to above).

Other guides which set out good practice in emissions reductions net zero claims include **Clean Energy Wire factsheet** "How to unpick a company net zero target in 7 steps" which post the following questions to determine their legitimacy:

1. Does the company publish complete emissions data?
2. Does the company's net zero target cover all of its emissions?
3. Does the company have concrete plans to quickly reduce its own emissions without relying on carbon offsets?
4. Is the company's net zero in line with the Paris Climate Agreement?
5. Does the company plan to exit oil, coal and fossil gas?
6. Does the company promote renewables in its energy procurement?

The **IGCC Guide** (referred to above) provides the following principles of credible climate transition plans (which are essentially corporate plans to achieve net zero):

1. Set comprehensive, science-based quantitative targets across material emissions scopes.
2. Outline a strategy to deliver targets.
3. Set sector-specific commitments and actions aligned with 1.5°.
4. Ensure investment commitments (capital expenditure) align with targets.
5. Commit to annual transparent disclosure and monitoring with external verification.

Industry-generated standards

The use of what are effectively industry-generated standards such as Climate Active[34] reduces the viability of an environmental claim. Most environmental claims on packaging or websites do not provide details of the standard, including what they consist of and how they work. This makes it difficult for the consumer to verify any environmental claim, particularly if it is made on packaging or advertisements on Facebook or other similar sources. This also applies to claims around packaging and recycling such as "ocean plastic" as well as net zero/carbon neutral claims.

[34] Climate Active | About Us (climateactive.org.au).

An example of an industry-generated standard is that used to promote so-called "ocean bound plastic" which the plastic industry has defined as "any plastics located within 50km from shores where waste management is inefficient and therefore could end up in the ocean".[35] The issue here is that the average consumer would likely understand the term "ocean bound plastic" to mean plastic that is in the ocean or on the shoreline without being able to verify that assumption. Without the self-generated industry standard appearing on the packaging, consumers would purchase the product erroneously assuming that doing so is of direct benefit to the marine environment.

The use of a standard in the sustainability area is problematic, as it is often necessary to determine whether the standard, particularly if it is industry generated, has a scientific basis. In some cases, companies have relied on international industry-generated guidelines to substantiate environmental claims despite those guidelines causing environmental harm.

For example, *ACCC v Kimberley-Clark Australia Pty Ltd* [2019] FCA 992 concerned whether representations that Kleenex wipes were "flushable" was misleading or deceptive on the basis that the wipes were not suitable for flushing because they did not properly disintegrate and caused sewerage systems to block.

Kimberley-Clark Australia assessed the flushability of the Kleenex wipes against guidelines published by the disposables industry's international bodies entitled "Guidelines for Assessing the Flushability of Disposable Nonwoven Products" and found that the wipes satisfied the criteria set out in the guidelines despite the fact that the Kleenex wipes caused sewerage systems blockages.

EDO recommends that companies should not be permitted to rely on industry-generated standards to substantiate environmental claims because there is a clear lack of impartiality due to industry's concern to protect its own interests.

8. Where an environmental claim is made that relies on a certification mark or scheme which ceases to exist through no fault of the advertiser, what, if any, allowance should be made in the Environmental Claims Code for such a scenario?

If a certification ceases to exist, marketers should not be permitted to use that certification as the basis for their environmental claims. Marketers should take steps to remove the claims from any packaging as soon as possible, and no longer use it in any future advertising.

9. Are any changes required to section 3 or the Practice Notes for section 3? If so, why are changes required and what specific changes are required?

Scientific verification

By their very nature, environmental claims, and determining whether an environmental claim is misleading or deceptive, require Ad Standards to understand, and inform itself of, scientific

[35] Ocean Bound Plastic Certified, What Is Ocean Bound Plastic (OBP)? (obpcert.org).

information in order to test the validity of a claim. This is a significant limitation on the Practice Note to section 3(a) which says that only information provided to Ad Standards by the advertiser or complainant will be used to test the validity of the claim.

This is problematic in two respects: first because an advertiser is likely to select information that it provides to Ad Standards that appears to substantiate its claim to protect its interests; and secondly, because it places a significant burden on a complainant to provide all necessary technical information about a misleading claim in the sustainability or climate area. Given many complainants are members of the public, this is not always possible.

EDO recommends that Ad Standards should have the capacity to undertake its own scientific research and analysis to determine the validity of environmental claims, rather than solely relying on information provided by the advertiser, including using experts to assist in that process. Setting up a panel of expert scientists may significantly assist Ad Standards in its decision making. The EDO itself has an expert register so it can call on scientists and other experts such as economists or heritage/planning experts to help assist with its work. Ad Standards should be able to call on a similar body of independent experts.

For example, it is EDO's view that the plausibility of net zero plans should be assessed against the best available scientific information, which includes the Paris Climate Agreements goal of limiting warming to below 1.5°C compared to pre-industrial levels.

The Shell case study offers useful insight in this regard. Shell claimed, in material on its website, that it is aiming to reach net-zero by 2050, and separately that it supports the goal to limit temperatures to 1.5°C. However, the IPCC estimates that emissions generated from *existing* fossil fuel installations are likely to exceed the emissions limit that is acceptable in pathways that limit warming to 1.5°C. As a result, the IPCC recommends decommissioning and reduced utilisation of current infrastructure, and the cancellation of future installations, to align emissions with these pathways. Despite this, Shell continues to invest in further fossil fuel infrastructure and has not made any suggestion they wish to decommission or reduce the use of any existing installations.[35] In response to the complaint, Shell provided figures from their net zero plans which aligned with its claims. However, Shell did not provide any evidence of how these plans were going to be achieved and made no suggestion that it planned to reduce production of oil and gas in a way that was consistent with the IPCC's findings.

When assessing the validity of a claim, it is highly likely that the justification offered by each party will differ as, by its very nature, allegations of potential misleading or deceptive conduct requires disagreement between the complainant and the advertiser. At present, such a complaint is likely to be dismissed on the basis that the conflicting material provided by each party would render the "science" unclear. Independent scientific analysis would allow such claims from either party to undergo the required scrutiny.

Substantiation of claims

While the Practice Note to section 3(a) refers to the practice of using broad terms, it is important to note that broad terms should not be used as headline claims without the corresponding

qualifications or substantiation being included as prominently in the advertisement. EDO recommends that this should be added to the Practice Note.

At present there appears to be an onus on consumers to search websites, brochures, labels etc for substantiation information, or to make written requests for further information. It should not be necessary for consumers to undertake significant research to verify claims. This is of particular concern where the advertisement is in digital form because of its transient nature: consumers simply do not have time to read substantiation information when the advertisement is visible for a very short time.

Under the ACL, there is case law that requires advertisers to provide information up front so that a consumer can make an informed decision before proceeding to other parts of the website that provide for booking or the purchase of a good. Courts have found conduct to be misleading where a price is advertised on the home page of a website and there is no disclosure of additional fees which increase the price until the consumer has been drawn into the website and commenced the booking process. The belated disclosure of information cannot negate or correct the effect of the otherwise misleading price representation on the home page.[36]

10. In this case (Pinnacle International Wholesalers Pty Ltd), the Jury found the Plastic Free certification mark did not qualify the very broad "plastic free-claims" made by the advertiser and that consumers were entitled to expect that the products did not contain plastic in any form. The jury noted that the certification standard did not replace or modify the standards for truth in advertising under the Code of Ethics and the Australian Consumer Law. Are there any learnings from this case in relation to certification or substantiation that should be incorporated into the Environmental Claims Code?

The EDO agrees that standards do not replace the need for advertisers to comply with the ACL.

In the Pinnacle International Wholesalers case, the "Plastic Free Certification Mark" on which the broad "Plastic Free Claims" were based was not sufficient to substantiate the claim and had not been qualified in any way, and independent testing found the product contained plastic.

Of note also is that the Jury found that a disclaimer to one of the headline claims "Our truly Eco cups are the first plastic-free cups in Australia that can be recycled" did sufficiently qualify the headline claim because "This disclaimer is flagged by an asterisk included as part of the headline claim which links to the qualifying statement" which the Jury said was clearly worded and prominently displayed in close proximity to the headline claim. Whilst EDO agrees that qualifying statements should be clear and prominent, it is our view that an asterisk may not be sufficient and we recommend that advertisers should be required to publish qualification statements on the same page as the headline.

[36] *ACCC v Jetstar Airways Pty Ltd* [2015] FCA 1263.

11. In this case (Pinnacle International Wholesalers Pty Ltd), the Jury decided that if a product is represented in absolute terms as being a fully recyclable product or 100% recyclable, it should be capable of being recycled through standard kerbside recycling facilities in Australia. Is this a principle that should be incorporated into the Environmental Claims Code or Practice Notes?

Claims in relation to recyclability must be based on a practical ability to recycle. In particular, rates of recycling even with kerbside services are relatively low in Australia. Just 9.4% of plastics were recycled.[37] Products that are not able to be recycled through kerbside services are even less likely to be repurposed into useful products. Therefore, claims of recyclability should require re-use through existing kerbside services in the Environmental Claims Code and Practice Notes.

12. Are there any other learnings from this decision which should be incorporated into the Environmental Claims Code rules?

No further comments.

13. In the event of any inconsistency, should the Environmental Claims Code aim for global best-practice on environmental claims standards or consistency with the Australian Consumer Law?

It is important that the Environmental Claims Code is as consistent with the Australian Consumer Law as far as possible, and with the significant body of decisions on misleading or deceptive conduct.

However, where the law has not kept apace with international best practice, it is important that Ad Standards develops its practice. The Ad Standards' counterparts in the UK and the Netherlands have developed the law on environmental and net zero/climate claims in a number of important cases.

However, to date, Ad Standards has not referred to those benchmarks in applying the Code. For example, Ad Standards' decision regarding Glencore's advertisement exemplifies the difference in approach between the Ad Standards and the UK ASA which found similar claims by HSBC Bank to be misleading.

14. Should the Environmental Claims Code adopt international benchmarks or standards for measuring the environmental impact of a product or company? If yes, please provide details of which international standards or benchmarks should be adopted. If no, please explain why

[37] The state of Australia's recycling - how did we get into this mess? (wwf.org.au).

international standards or benchmarks should not be adopted in Australia.

The European Commission's work on environmental footprints could be of considerable assistance to Australia[38]. In particular, work on sectors such as cosmetics and superannuation could assist. However, it is important that there is some consideration of the application of EC standards to the Australian jurisdiction as there are differences in approach/impacts.

15. Should the Environmental Claims Code include a list of specific marketing practices which would automatically be deemed to be misleading and in breach of the Code, similar to that being proposed by the EC?

Yes. The EDO supports the use of prohibited marketing practices. In particular, the use of generic terms such as “green”, “clean”, “eco”, “carbon neutral”, “biodegradable” and the like should not be used lightly without robust substantiation. For example, the EDO is currently involved in a Federal Court case (ACCR v Santos Ltd) that alleges the term “clean” is misleading in the context of gas production in Australia. It is not possible to describe a fossil fuel, that when burned leads to significant greenhouse gas emissions, as “clean”.

16. Should the Environmental Claims Code contain more guidance around product characteristics or future environmental performance or products, similar to that guidance in the EC proposed amendment to Article 6 & 7 of the UCPD?

The EC Guidance in articles 6 and 7 of the UCPD is a useful starting point. As mentioned earlier, the EDO supports clear and specific guidance as to when a product can legitimately claim to be “net zero” or “carbon neutral”. The EDO similarly supports guidance as to the use of offsets to verify such a claim. Further guidance that is adapted for the Australian market would be useful.

17. Unlike the UK Code, the AANA Environmental Claims Code does not include a rule that omitting significant information in relation to general environmental claims could amount to misleading advertising. Should this be included in the new Environmental Claims Code or Practice notes?

As previously noted at question 4, the EDO recommends that silence should be deemed misleading or deceptive in accordance with the case law under the Australian Consumer Law.

Much of the greenwashing at present is from companies seeking to demonstrate to consumers their climate credentials, when their business plans have yet to embrace a full transition to a low

[38] European Platform on Life Cycle Assessment (ec.europa.eu).

carbon footprint for their products. The HSBC Bank decision of the UK ASA is particularly important in this context, and the principle that omissions are capable of misleading should be incorporated into the Code.

18. Should the AANA Environmental Claims Code include a rule that environmental claims must be based on the full life cycle of the advertised product or service?

Yes, it is important that environmental claims consider the full life cycle of a product. As explained at question 2, this is consistent with the ACCC Green Claims Guide and the real impact of a product, and the ASA Code.

The full life cycle issue is particularly important in relation to climate claims. Claims that do not consider the whole of life cycle and particularly scope 3 emissions are misleading, especially in the context of the main environmental impacts of fossil fuels. This is because the vast majority of greenhouse gases are emitted when they are used or combusted for energy rather than during their mining or production. Climate claims can be misleading where scope 3 emissions are not disclosed because this is where the real impact on the environment occurs. All emissions need to be reduced to address climate impacts and keep the world on track to prevent warming above 1.5C degrees.

19. Are there any other rules in the UK Code which should be incorporated into the Environmental Claims Code?

Yes, the UK Code rules in relation to 9.2 - 9.5, which detail that claims must be clear, substantiated and based on full cycle analysis, are particularly helpful and should be incorporated within the Code.

20. Should the Environmental Claims Code align with the updated ICC Framework and additional guidance on emerging environmental claims?

No, the ICC is not an independent and science-based body. Therefore, many of its conclusions are not consistent with the latest information from both the UN/IPCC around climate science. For example, it allows the use of carbon offsets and general claims around carbon neutrality that are not consistent with the science. Industry bodies are not necessarily the best organisations to set such standards. In our view updating the ACCC Green Claims Guide in a way that incorporates the most recent science would be preferable.

21. In the case of general advertising claims, should the Environmental Claims Code require substantiation based on the full lifecycle of the product or business? How can this be proven by advertisers and verified by consumers? Where possible, please provide examples.

Full life cycle substantiation of a product should be the only basis on which such claims could be made. The EDO recommends that AANA consult with scientific experts on how such claims could be verified and made.

22. Are there any other issues, rules or standards that should be included in the Environmental Claims Code? If so, please give details.

No.

23. Do you have any additional suggestions or comments on the Review of the Environmental Claims Code

No.