

GUIDELINES FOR CARBON CLAIMS

FAIR TRADING ACT 1986

PURPOSE OF THESE GUIDELINES

These guidelines will help inform businesses about their obligations under the Fair Trading Act 1986 (the Act). They examine 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 carbon offsets and those that promote their green credentials using purchased carbon offsets. The guidelines aim to improve the accuracy of information provided to consumers about carbon-related claims. This guide is not legislation. Neither does it attempt to give a technical explanation of the often complex area of carbon trading.

Environmental claims that raise concerns may be examined by the Commerce Commission on a case by case basis pursuant to the Fair Trading Act 1986. These guidelines will be used as a reference for evaluating those claims.

While one of the Commerce Commission's functions is to educate through the dissemination of information, the Commission does not provide legal advice about specific representations or specific promotions.

Ultimately only a court can decide whether a representation contravenes the Act.

INTRODUCTION

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

Consumers are becoming aware of their carbon footprint and as they start to look for ways to reduce their impact on the planet, a new generation of environmental claims around reducing and offsetting carbon emissions is emerging. Subsequently an entire new market of carbon offset trading has appeared.

Many businesses use carbon reduction or offsetting to differentiate themselves and their products or services 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 choose to purchase carbon offsets for their activities as well as a wide variety of carbon neutral products. Consumers can also offset their air travel and even attend 'carbon neutral' events.

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

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

To enable consumers to make informed decisions it is essential that consumers are provided with accurate and full information about carbon reduction and offset claims associated with products or services. Providing consumers with the full picture is essential to ensure they are not misled.

CARBON CLAIMS AND THE FAIR TRADING ACT

The development of a credible and transparent carbon offset market and straightforward carbon offset marketing will assist New Zealand to reach its climate change goals.

However, false or misleading claims damage consumer perception of carbon offsetting, thereby damaging the emerging industry.

Carbon claims should clearly inform consumers about exactly what is being offset and how it is being offset. If accurate, transparent and easily understood, carbon claims demonstrating a business's approach to environmental issues and carbon offsetting will assist consumers in their purchasing decisions.

Vague, unsubstantiated, confusing or misleading information will reduce consumer confidence in carbon claims thereby disadvantaging ethical traders. The Commission aims to prevent unscrupulous traders 'green washing' their advertising and exploiting consumers' willingness to pay a premium for goods or services that reduce the impact on the environment.

The Act applies to all forms of marketing, including claims on packaging, labelling and in advertising and promotion across all mediums (print, TV, radio and internet).

Consumers are entitled to rely on any carbon claims you make and expect these claims to be truthful. You should ensure that any claims you make are accurate and can be appropriately substantiated.

WHAT DOES THE LAW SAY?

There are several provisions of the Act affecting the carbon claims you make. Breaching these prohibitions can result in serious penalties under the Act.¹

MISLEADING AND DECEPTIVE CONDUCT

The Act prohibits conduct that is misleading and deceptive, likely to mislead or deceive or is liable to mislead the public. For example, in the context of carbon claims, the Act makes it an offence to engage in conduct that is liable to mislead the public about the nature, the manufacturing process or the characteristics of goods or services.²

The conduct only needs to be likely or liable to mislead. 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.

The most important consideration in determining whether conduct may be misleading is the overall impression formed in the consumer's mind, not your intentions when crafting your advertising message.

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.

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 prohibits representations that are false or misleading about the goods or services being provided.

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

1. Refer PENALTIES AND REMEDIES FOR BREACHING THE ACT further on in guide.

2. Sections 10 and 11 of the Act.

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.

Also, the Act requires that, when making a representation about future matters, you must have reasonable grounds for making this representation. 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.

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 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.

At present, there are no mandated standards regarding carbon offsets and carbon neutrality in New Zealand. However, there are various recognised international standards³ and an emerging consensus of best

practice in the area that may help consumers and businesses assess claims.

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 unverified offsets may leave you at risk of having unsubstantiated carbon offset claims and therefore 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, comparison between offsets can be difficult. These projects all attempt to reduce CO₂ emissions but do so with varying quality. Judging which are of good quality or value can also be complicated.

ADDITIONALITY

A basic requirement for a legitimate carbon offset is ‘additionality’ – the idea that benefits of 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.

Additionality is important in evaluating if an offset 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 offset becomes problematic when making an offset claim.

3. There are numerous international standards for measuring and reporting in this area. There are also companies in New Zealand who offer certification in this area. The Commerce Commission does not endorse the use of any particular standard or company.

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 producing 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 product does not 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' or 'cancelled' and two or more businesses claim the same emissions reduction.

To offset an emission, the offset credit must be retired or cancelled. Simply purchasing an offset but not retiring or cancelling it in a registry does not offset your specific emission. A registry to retire or cancel the offset will ensure that it can not be reused.

Offsets can be purchased in two types of markets.

The voluntary carbon market enables those in unregulated sectors, or countries that have not ratified the Kyoto Protocol, such as the US, to offset their emissions.

The compliance market, also known as the mandatory, Kyoto or regulatory market, refers to the markets that exist to enable those with emission

caps imposed on them by governments or other regulatory bodies to buy or sell carbon credits in order to meet their obligations.

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.

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.

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 may be an important aspect of an offset's environmental credentials, they should not be used to compensate for essentially poor quality offsets.

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 and the calculation of carbon neutrality, and many sources of accreditation and verification of 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 not been given accreditation, you risk breaching the Act.

Be aware that images can also 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.

It is good practice to provide the opportunity for consumers to easily find further information on the scheme identified with the logo to alleviate potential confusion.

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.

One definition of carbon neutral is:

“Carbon neutral means that – through a transparent process of **measuring** emissions, **reducing** those emissions and **offsetting** residual emissions – net calculated carbon emissions equal zero.”⁴

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.

4. Department of Energy and Climate Change, UK: http://www.decc.gov.uk/en/content/cms/consultations/open/carbon_neutrality/carbon_neutrality.aspx Proposed Definition for consultation.

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 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.

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 not as potentially misleading than making a claim that the motorcycle is carbon neutral.

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 to be low in emissions, or so low in emissions that it is virtually carbon-free.

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 not be beneficial to the environment.

SCOPES

The concept behind the term ‘scope’ comes from the Greenhouse Gas Protocol (GHG Protocol)⁵, a widely used international account 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.

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 products and services you utilise.

EXAMPLE

If you operated a taxi service your scope 1 emissions would 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.

A 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. In the previous example, if you decided to only offset your scope 1 emissions, advertising that you have offset the emissions from the fuel used by your cars rather than advertising your company as carbon neutral could avoid misleading consumers.

CARBON FOOTPRINT CALCULATORS

Carbon 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.

When using such a tool from a website or elsewhere you should be clear about what is and is not included in your calculations.

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.

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 the inspirational 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.

5. The Greenhouse Gas Protocol Initiative: <http://www.ghgprotocol.org/>

PENALTIES AND REMEDIES FOR BREACHING THE ACT

The Commission, or any other person, may take criminal or civil action under the Fair Trading Act.

Civil action is taken in relation to declaratory orders and other relief for contraventions of the Act and may include the Commission seeking interim injunctions during the course of an investigation to prevent or stop unlawful activity. The Commission may seek permanent injunctions at the conclusion of an investigation. Under sections 9 (which covers misleading and deceptive conduct generally), 14(2) and 23 of the Act only civil proceedings are possible. For contravention of any other provision, the Commission may take both civil and criminal proceedings.

Such civil proceedings cannot result in fines, but may result in injunctions, orders to refund money and other remedies. Civil proceedings under the Act can take place in the High Court, the District Court, the Disputes Tribunal or the Motor Vehicles Disputes Tribunal, depending on the type of order sought and the amount of the claim.

Criminal action is taken in relation to offences under the Act. Criminal proceedings are taken in the District Court. Criminal court action may result in fines of up to \$60,000 per offence for an individual and \$200,000 per offence for a company. Both a company and the individuals involved in a breach can be prosecuted by the Commission.

The Commission also has the right to apply to the courts for corrective advertising orders. Where it is satisfied that a business has contravened the Act, the court may order the business to:

- disclose information to the public generally, or to an affected section of the public;
- publish corrective statements. The business has to bear the costs of this remedial action.

The court may grant a number of other remedial orders, including orders that:

- a contract be altered or made void;
- money be refunded;
- payment of the amount of any loss or damage;
- goods be repaired or services supplied.

An application can be made to the court for these orders up to three years after a contravention was discovered or ought reasonably to have been discovered. The court may order that money be refunded to a consumer even if that consumer is not party to the proceedings before the court.

AVOIDING A BREACH OF THE LAW

A compliance programme is an in-house checking system designed to ensure that businesses and their staff do not breach the Fair Trading Act. The Fair Trading Act applies to both accidental and deliberate conduct, so a compliance programme can pick up mistakes and oversights which could breach the Act. Remember also that a business is responsible for the actions of its staff and agents.

The existence of an effective compliance programme may in some circumstances also assist a business in establishing a legal defence to any prosecution under the Act. The court may also view favourably the existence of a compliance programme when imposing penalties for breaches of the Act which occurred despite the diligent supervision of the business.

There are other good reasons for a business to have a compliance programme including:

- improved customer service from better informed staff; and
- better customer relations as the company will be identified by customers as a good business.

Dealing with complaints appropriately can also provide valuable information that will help management identify problems and deal with them before they become big issues. In deciding what action to take against a possible breach, the Commission will take into account whether the breach was an isolated event and whether the company has a compliance programme that effectively eliminates systemic breaches of the Act.

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. This may include how an offset has been sourced and how its validity will be maintained.
- 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.
- 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.

MAKING A COMPLAINT

To contact the Commerce Commission about potential breaches of the Fair Trading Act:

Telephone our Contact Centre during office hours on:

0800 94 3600,

Write to us at:

Contact Centre,
Commerce Commission

PO Box 2351

Wellington,

or

email us at:

contact@comcom.govt.nz

FURTHER INFORMATION SOURCES:

Ministry for the Environment

www.mfe.govt.nz

Ministry of Economic Development

www.med.govt.nz

Environmental Choice New Zealand

www.enviro-choice.org.nz