

Eight Commandments For Environmental And Sustainability Claims To Avoid ACCC'S Greenwashing And Breaches

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IN BRIEF

The Australian Competition and Consumer Commission (ACCC) has just issued its long anticipated [guidance](#) on the making of environmental and sustainability claims. The ACCC has set out eight principles which, in its view, businesses should follow when making such claims to comply with the Australian Consumer Law (ACL).

The guidance follows the ACCC's '[Greenwashing by Businesses in Australia](#)' Report in March 2023, where internet sweeps revealed that 57% of websites and businesses that were reviewed made 'concerning' claims about their environmental practices.

The principles set out by the ACCC are in essence a restatement of the ACCC's long-held views and therefore contain no 'surprises.' **The focus of the principles is very much on ensuring:**

- The **accuracy and specificity** of any claims, including:
 - Avoiding broad or unqualified claims or terms or images giving an incorrect impression; and
 - Setting out the conditions and qualifications relevant to the claims;
- **IMPORTANTLY**, that you have evidence to **substantiate** and support the claims that you are making, and that evidence is reflective of the accepted position, studies, or science relevant to the claim; and
- That claims about your **energy** and **sustainability transition** are clear and supported by management decisions and operational steps that you are actually taking.

What may amount to a 'surprise' are some of the positions taken by the ACCC in the examples that it provides to flesh out its eight principles - we refer to some of these below.

While these examples are the ACCC's views and may not necessarily reflect the position that a Court would take, they are very instructive of the approach that the ACCC would take in response to a complaint and as part of an investigation into any claims.

This is highly relevant given that environmental and sustainability claims are key 2023-2024 Compliance and Enforcement Priorities of the ACCC and the very significant monetary penalties that may be imposed for breaches of the ACL.

The ACCC's guidance is similar to the compliance and enforcement approach of ASIC in respect of similar claims, detailed below.

The ACCC's guidance is in 'draft' and it is accepting submissions on the guidance until 15 September 2023.

PRINCIPLES FOR MAKING ENVIRONMENTAL CLAIMS

Increasingly, consumer decisions are influenced by environmental and sustainability claims.

In its guidance, the ACCC sets out common sense meanings of terms as follows:

Environmental Claim

An environmental claim is any representation made by a business in relation to its environmental impact, including claims that give the impression that the business's products or services:

- Have a neutral or positive impact on the environment;
- Are less harmful for the environment than alternatives; and
- Have specific environmental benefits.

They can appear on product packaging or labelling, point-of-sale materials, and in a variety of marketing or advertising materials, including online and social media advertisements - and importantly, in corporate reporting materials.

The ACCC also highlights that products and services often have a range of environmental impacts at different stages of their lifecycle. **The ACCC refers to the environmental impacts associated with:**

- The sourcing of raw materials, manufacturing, transport, and logistics;
- The consumption or use of a product or service; and
- What occurs following the consumer using a product - its reuse or recyclability, or whether it will contribute to landfill waste and greenhouse gas emissions when it breaks down or is incinerated.

The ACCC also notes that some environmental claims are aspirational, for example, where a business sets future goals for improving their environmental performance or reducing their greenhouse gas emissions.

Greenwashing

Greenwashing describes environmental claims that are false or misleading. The ACCC considers that

a business will be engaging in greenwashing where they use any claim that makes a product, service, or business seem better or less harmful for the environment than it really is.

Key Principles and Takeaways

The ACCC then provides additional detail about its eight key principles, highlighting certain tenets within each principle and providing certain examples, a number of which are likely to be of particular interest or relevance. **These are set out below.**

Principle	Key Takeaways and Good Practice
<p data-bbox="102 537 606 573">Make Accurate and Truthful Claims</p>	<p data-bbox="813 537 1490 730">The ACCC's example states that a statement "made from recycled materials" is likely to be misleading or deceptive in breach of the ACL if, for example, the product contains only 20% recycled material.</p> <p data-bbox="813 779 1490 851">The ACCC instead recommends the statement "<i>made from 20% recycled material.</i>"</p> <p data-bbox="813 900 1490 1012">Without making an express statement to this effect, the ACCC's example is seeking to ensure specificity in claims.</p> <p data-bbox="813 1061 1490 1133">The additional tenets and related examples of relevance are as follows:</p> <p data-bbox="813 1182 1347 1209">Do Not Overstate the Level of Scientific Acceptance</p> <p data-bbox="813 1245 1490 1438">Principle 2 requires evidence to substantiate a claim. The overlap here is that where the basis of a scientific supporting claim is disputed or inconclusive, it is important to not overstate the level of scientific acceptance.</p> <p data-bbox="813 1487 1490 1599">The example here is to have regard to 'laboratory' conditions versus whether the claim is sustainable in real-world conditions.</p> <p data-bbox="813 1648 1244 1675">Do Not Exaggerate Environmental Benefit</p> <p data-bbox="813 1711 1490 2024">Claims should not exaggerate environmental benefit or understate environmental harm. Again, specificity is important: the ACCC is stating that a claim on plastic bottle packaging that "this product does not harm the environment" is misleading if only the bottle is made from recyclable material, but the cap, external packaging and its contents are not.</p>

Principle

Key Takeaways and Good Practice

Instead, the ACCC suggests an alternative claim that the product "*reduces harm to the environment*" which discloses which parts of the product are made from recycled material.

Only Make Meaningful Claims

Claims must only be made about genuine environmental benefits.

Here, the ACCC states that a business must not claim that a product has a specific environmental benefit when all similar products have the same feature.

Make Sure Comparisons Are Transparent and Fair

An ordinary and reasonable consumer may be misled by comparisons that are not transparent or fair. Comparisons should be like-for-like, up to date, easy to understand and include further information where necessary.

For instance, claims that a product is 'made with less plastic' may be false and misleading where the point of comparison is not specified and it is unclear how much plastic is being used.

Representations About the Future

This is closely related to Principle 8. As required more generally by the ACL, there must be reasonable grounds for making such representations about the future at the time the representations are made.

In addition, businesses should have regard to the overall impression created by the claim.

Have Evidence to Back Up Your Claims

The ACCC states that "*it is good practice to be able to substantiate any environmental claims you make.*"

However, the ACCC makes stronger statements in speeches, noting that it will seek substantiation or issue businesses with Substantiation Notices if it is concerned with any environmental claims.

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The ACCC states that ideally, this evidence should be scientific and independent.

Using Third-Party Certifications as Evidence

Third-party certifications are reputable ways of substantiating environmental claims. However, certifications should be chosen with caution, and ongoing compliance with the rules of the certification scheme must be maintained to avoid making misleading claims.

Do Not Hide Important Information

Small Print Shouldn't Hide the Truth

The headline claim must not give the wrong impression or must be appropriately qualified. Small print should provide supporting information, not conflict with the overall message of the claim.

Consider the Full Lifecycle of Your Product or Service

The full lifecycle of products and services must be considered in making environmental claims, including the raw materials sourced, the packaging used and end-of-life options. Where an environmental claim applies only to one stage of the lifecycle, this should be specified or the overall impression may be misleading.

The ACCC's example is of a manufacturer of electric vehicles which claims that it "*creates zero emission electric vehicles.*" Such a claim may be misleading as it only considers the emissions produced while driving the vehicle but not during the manufacturing process, charging, or end-of-life.

Instead, a more specific claim may be "*zero exhaust emissions while driving.*"

Explain Any Conditions or Qualifications on Your Claims

Explanations may be necessary where environmental claims are only true under certain conditions.

For instance, a claim that a product is 'recyclable' may depend on the consumer's actions, the location where the product is sold, and the availability of certain technology or

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infrastructure.

Environmental claims should consider the product or service's *normal use* by consumers, conditions in which it is sold, and normal access to infrastructure and resources required for the environmental benefit to be realised.

Avoid Broad and Unqualified Claims

Broad and unqualified environmental claims may be misleading, especially as most products and services carry some environmental harm. Common claims include:

'Green,' 'Go Green,' 'Choose Green'

Claims that a product or service is 'green' are vague but suggest that there is less damage to the environment than like products and services.

'Environmentally Friendly' or 'Eco-Friendly'

These claims give the impression that no environmental harm is caused in the overall lifecycle of a product or service.

'Sustainable'

These claims give the impression that resources are used at a rate that does not contribute to environmental harm.

Claims that provide only partial information should be qualified or reworded. Common claims include:

'Recyclable'

This suggests that a product can be recycled in an ordinary local recycling facility, and hence may be misleading where the product cannot be recycled through a household or local council waste collection program.

'Recycled'

This gives the impression that a product has been through a previous life cycle or has been recycled by a third party.

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'Renewable Energy'

These claims should be supported by information about how renewable energy use has been calculated.

'Free'

This gives the impression that the product is 100% free from an ingredient, component or characteristic.

Emissions Related Claims

- The ACCC states that "*businesses should exercise particular caution when making representations... about the greenhouse emissions associated with their products.*"
- The ACCC's view is that consumers are unlikely to readily understand claims such as 'Carbon Neutral,' 'Climate Neutral' or 'Net Zero.' It states that where claims about emissions are made, it is good practice:
 - To make an emissions baseline assessment using established and recognised methodologies;
 - To clearly communicate the actions that underpin your claim, such as emissions reduction versus reliance on purchasing offsets; and
 - To disclose how you have accounted for emissions, including accounting for all types of greenhouse gas emissions.

Environmental Claims in Highly Polluting Industries

Consumers should not be misled by understating the environmental impacts of a business that operates in a highly polluting industry, where overall environmental detriments can eclipse any benefits.

Use Clear and Easy to Understand Language

Avoid Technical or Scientific Language

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Environmental claims must be understandable by ordinary and reasonable consumers.

Use Words to Convey Their Common Meaning

Avoid using language where the technical definition is different from the ordinary meaning, and avoid using language that has multiple potential interpretations.

Where various interpretations arise, claims should be explained or qualified.

Visual Elements Should Not Give the Wrong Impression

Visual elements can create a misleading impression or give rise to various interpretations and broad claims.

Symbols

Where potentially misleading symbols are used, a clear and prominent explanation of the symbol may be necessary.

As an example, the recycling 'mobius loop' may represent that a product is made from recycled materials or that a product is recyclable. Further explanation may be required where this is not the case, or where only one interpretation applies.

Trust Marks

Self-designed symbols that resemble trust marks used by third-party certifiers may be misleading if the symbol has not been certified or verified by a third party.

Third-Party Labels and Certifications

Certification logos from third-party schemes may create an impression that differs from the actual environmental benefits of a product, service, or business, and it may be necessary to provide consumers with further information.

Be Direct and Open About Your Sustainability Transition

Businesses should be transparent about their environmental goals and initiatives and must not misrepresent their progress or environmental performance.

Principle	Key Takeaways and Good Practice
	<p>In ensuring that environmental claims are not misleading throughout the business's sustainability transition, businesses should:</p> <ul style="list-style-type: none"> • Be realistic about achievable changes; • Understand and use appropriate terminology that consumers are likely to understand; • Disclose details about their initiatives; and • Provide regular updates about progress.

THE ACCC'S COMPLIANCE AND ENFORCEMENT FOCUS

The guidance reinforces earlier statements that environmental and sustainability claims are a compliance and enforcement focus of the ACCC. It reinforces the ACCC's investigative armoury, the scope of remedies, and in particular, the severe penalties that a court may impose in the event of greenwashing and claims breach of the ACL. **In brief, they are as follows:**

Substantiation Notices	<p>The ACCC may formally require persons to give information and produce documents to substantiate an environmental claim by way of substantiation notices.</p> <p>Individuals are not required to provide information or documents that may incriminate them or expose them to a penalty.</p>	
Section 155 Notices	<p>Section 155 of the Competition and Consumer Act 2010 gives the ACCC information gathering powers to investigate potential contraventions of the ACL. Failure to comply with a section 155 notice can attract penalties or jail time.</p>	
Infringement Notices	<p>An infringement notice may be issued where the ACCC has reasonable grounds to believe that a person has contravened particular ACL provisions, for instance, by making false or misleading representations. The person will be liable to pay a penalty amount under the infringement notice.</p>	
Penalties	<p>For Corporations</p> <p>Per breach, the greater of:</p> <p>AU\$50 million;</p> <p>30% of annual turnover during</p>	<p>For Individuals</p> <p>AU\$2.5 million per civil breach.</p> <p>Criminal liability for offences under the ACL may apply.</p>

	the breach period; or Three times the gain.	
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This Insight focuses on the ACCC's guidance. The ACCC's views are very similar to those in [ASIC's guidance](#) which relates to claims in the context of the supply of financial services, financial products and sustainability-related investments. By way of example, please see ASIC's statements [here](#).

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