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A NATIONAL JOURNAL OF ENVIRONMENTAL LAW

Consumer Protection

Australian Network of Environmental Defender's Offices Inc

www.edo.org.au

Issue 90, December 2010

Carbon Offsets and Consumer Protection

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Introduction

In recent years consumer interest in reducing carbon emissions has increased rapidly and a new market for the purchase of carbon offsets has appeared.[1] This emerging market carries with it both opportunities and risks. While there is potential for genuine environmental outcomes, the market moves rapidly and has been left largely unregulated.[2] There is a risk that, without regulation, consumers will be exploited by unscrupulous operators overstating the environmental benefits of their products.

This is compounded by varied levels of consumer understanding of carbon offsets, the varied meanings attached to relevant terms, such as 'carbon neutral', and the wide range of carbon offset standards and logos that seek to verify carbon offset claims.[3] One US study found that only 17% of people could even describe carbon offsets adequately in their own words.[4] This lack of regulation and consumer awareness has sparked concerns over what consumers are actually buying when they purchase carbon offsets.[5]

The Australian Competition and Consumer Commission ('ACCC') has taken an active role in protecting consumers from the risks associated with this emerging market. This short paper provides an overview of the ACCC's regulation of the voluntary carbon market ('VCM') to date, with a focus on recent cases brought by the ACCC, and discusses the limitations on the ACCC's ability to adequately protect consumers in the VCM.

This paper concludes that while the ACCC has an important role to play in protecting consumers, it is limited by its mandate and can only be a last line of defence. In particular, the ACCC has struggled to address the issue of low quality offsets, as this ultimately lies beyond its powers. In order to ensure consumers are fully protected, and that the environmental outcomes desired from a VCM come to fruition, a widening of the ACCC's mandate or the implementation of a mandatory standard for carbon offsets is advocated. Without these changes, consumers risk being misled and sold ineffective offsets.

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The VCM in Australia

The size of the VCM is difficult to estimate. Estimates of the size of the market worldwide vary wildly, from 3 to 50 million tonnes of CO2.[6] Australia hosts 7% of offset projects worldwide,[7] while Australia and New Zealand jointly account for 8% of demand.[8]

The Australian Government has said that Australia accounts for 7% of offset sales, calling the VCM "relatively small", as this is only 0.5% of Australia's emissions.[9] However, it is submitted that the apparently small figure of 0.5% is actually quite high,

given that these offsets are purchased voluntarily and absent the compliance market that results from a mandatory emissions trading scheme.[10] Regardless of size, it is clear that the VCM is growing quickly,[11] "fuelled by rapidly rising community concern about climate change threats".[12] As the market grows, so too does the threat to consumer protection.

Carbon offsets and the *Trade Practices Act 1974* (Cth)

The role of the ACCC is to "ensure that individuals and businesses comply with the Commonwealth's competition, fair trading and consumer protection laws".[13] The primary measure in this regard is the Commonwealth *Trade Practices Act 1974* ('TPA'), which sets out the framework for consumer protection in Australia.

While other jurisdictions, such as the UK,[14] have specific provisions regarding environmental claims, the TPA does not. However, environmental claims can be brought under the auspices of a number of TPA provisions. For example, the TPA provides that a corporation shall not engage in misleading or deceptive conduct,[15] thus a company cannot make claims about a carbon reduction that does not actually take place. Section 53 sets out a list of false claims that are prohibited, such as representing that a product is of a particular standard[16] or that it has certain sponsorships or affiliations,[17] which could be relevant where a company claims its offsets have been accredited to a standard when they have not.

The ACCC's role in the VCM

The ACCC states that its mandate in relation to carbon offsets is to "ensure compliance with the [TPA] through education, compliance activities and, where necessary, enforcement and litigation".[18] The ACCC has pursued each of these activities to some extent, including the production of carbon claims guidance, negotiation with industry to ensure compliance, and bringing cases in the courts.

Guidance for offset claims

In January 2008, the ACCC released an issues paper and invited submissions regarding how it should deal with carbon claims.[19] Over 100 submissions were received.[20] The ACCC also liaised with a wide range of stakeholders, including business and industry representatives and environmental groups.[21] The resulting guide to carbon claims helps businesses to comply with the TPA by ensuring they know how to formulate their advertising claims and are not misleading consumers. The guide advises offset providers on issues of additionality, timing of offsets, double counting and permanence.

Pre-emptive measures

The ACCC has also taken some action to pre-empt issues with carbon claims. For example, following discussions with the ACCC, GreenPower, the Federal accreditation program for renewable energy, issued a notice to electricity companies suggesting that they "soften their language" in relation to GreenPower claims, so as not to mislead consumers.[22] In response, at least one retailer, Energy Australia, conducted an audit to ensure that its marketing practices complied with the TPA.[23]

Given that many companies are genuine about providing environmental benefits, it may be that these pre-emptive measures will be highly effective in ensuring their compliance with the TPA, and thus consumer protection. On the other hand, where companies are not genuine, the ACCC has compliance and enforcement measures at its disposal.

Compliance measures

The ACCC seeks compliance from companies by informing them when breaches of the TPA are actual or imminent.

The *Australian Consumer Law*[24] ('ACL') empowers the ACCC to issue substantiations notices, requiring a company to provide further information to verify claims made.[25] While this is a general provision, it may be particularly relevant to carbon offset claims. For example, if a company states that a certain level of greenhouse gases will be removed from the atmosphere by its offsets, the ACCC could issue a notice requiring an explanation of the methodology used to make the claim.

Enforcement action

The ACCC has stated its intention to "ramp-up its green compliance activities with... targeted enforcement action"[26] and "vigorously pursue" companies making misleading carbon offset claims.[27] So far, this has resulted in a small handful of cases against businesses that are considered to be making misleading claims about their carbon offsets. Such cases are likely to become more frequent given the increased involvement of non-government organisations in identifying misleading and deceptive green claims. For example, in the Holden case below, the NSW Greens played a part in identifying the claim.[28] Alongside this increased level of enforcement action is the new power, given to the ACCC under the ACL, to seek a fine of $1.1 million. The ACCC has indicated that it may use these powers in cases where a company makes misleading environmental claims.[29]

In the Global Green Plan ('GGP') case,[30] GGP entered into agreements with customers to purchase and surrender 11,300 Renewable Energy Certificates ('RECs') under the Government's GreenPower program, but only actually purchased 7,163. GGP was deregistered from the program, but continued to trade for 3 months. The ACCC considered that GGP contravened the TPA by making misleading representations as to the future purchase of RECs,[31] representing that there were environmental benefits that did not exist[32] and that GGP had an affiliation that it did not have.[33] GGP made a legally binding undertaking to the ACCC,[34] to purchase RECs to cover the 4,137 shortfall and inform all customers of the proceedings. It also agreed that if it again operated as a GreenPower retailer it would ensure that it possessed sufficient RECs before entering into an agreement with a customer. The directors undertook to attend trade practices compliance training.

In the Prime Carbon case,[35] Prime Carbon claimed that it had an affiliation or association with the National Stock Exchange. It also claimed that it had a relationship with the National Environment Registry ('NER'), which it said is regulated by the Australian Government and is the registry for all approved carbon credits in Australia. Prime Carbon claimed that the NER had an agreement with the Chicago Environment Registry, which would facilitate the trading of Australian credits internationally. The ACCC found these assertions to be false. Prime Carbon admitted these contraventions and court orders were made by consent, restraining Prime Carbon from making such assertions for three years and requiring it to seek written legal advice before making such claims in the future. The sole director was also required to attend trade practices compliance training and inform customers of the proceedings, both by letter and website announcement.

In the Holden case,[36] Holden placed advertisements in a number of newspapers stating that its cars were "Grrrrrreen", suggesting that it had taken measures to ensure the carbon neutrality of its vehicles, and that it would plant 17 native trees within one year of purchase of a vehicle from its Saab range, which would offset the carbon emissions from the car over the life of the vehicle. In fact, the carbon emissions would not be neutral over the life of the car, and 17 trees would not provide an offset for more than a single year of operation of any of the cars in the Saab range. Following contact from the ACCC, Holden planted 12,500 native trees to offset the emissions of those cars sold during the period of the misleading advertisement. Holden also undertook to provide training to all marketing staff and to review their Trade Practices Compliance Program.

These cases are a welcome development and may have a significant impact on consumer protection in the VCM by deterring companies from making unsubstantiated claims and increasing the utilisation of compliance and training programs.

Deterrence

Deterrence operates on three levels. Firstly, companies will have to make good on their claim, thus negating any benefit sought in making misleading statements. Secondly, there is the high financial penalty the ACCC can seek under the ACL. Thirdly, and probably most importantly, companies are likely to fear the reputational damage that can occur as a result of misleading customers. In this regard, the Total Environment Centre advises

businesses that the "biggest risk of greenwash is damaging your company's reputation".[37] Recall that in all three cases discussed the companies had to write to customers and explain how they had been misled. This undoubtedly stimulates word-of-mouth publicity about the claims, in addition to the numerous news stories written about the cases, which may linger for some time.[38]

The fear of reputational damage can be seen at work in the Prime Carbon case, where Prime Carbon felt it necessary to make a press release informing customers that its program had maintained its integrity,[39] even though that was not at issue in the proceedings. It seems clear that Prime Carbon feared that the mere fact that it had been the subject of ACCC proceedings would lead consumers to believe that its offsets lacked credibility and that its reputation would be damaged. A similar move was made by Holden, who very quickly responded to a posting on a website entitled 'PR Disasters' with a statement attempting to counter bad publicity.[40]

Under the ACL, the ACCC will no longer need to make a complaint to a company or take them to court as it can issue a public warning notice.[41] These public warning notices can be issued by the ACCC when it reasonably suspects that a company is making false or misleading claims and where it is in the public interest to disclose its suspicion. As well as having a deterrent effect, these notices directly protect consumers, by ensuring that they are aware of misleading claims being made by offset providers.

Increased compliance and training programs

In all three cases the companies in question agreed to provide or undergo training, or review their compliance program, to ensure compliance with the TPA when making carbon claims. Given the risk of prosecution that these cases evidence, it seems likely that one impact of the cases will be to encourage companies to provide training and develop compliance programs of their own accord to ensure compliance. This is not uncommon in other sectors. For example, companies generally maintain an occupational health and safety program so as to ensure compliance with the relevant legislation, and the ACCC already provides a number of compliance program templates for companies to use.[42] Holden expanded their compliance program subsequent to the ACCC proceedings.

This increase in training and compliance programs is even more likely given that the "verifiable presence of a compliance culture, as demonstrated by a substantial and successfully implemented compliance program" can be taken into account by the courts should the ACCC bring a claim.[43]

The limit to ACCC regulation of the VCM: Offset quality

One issue that has particularly concerned the ACCC is how to approach cases where it appears that a company overstates the efficacy of the offsets themselves, or where a company claims to be carbon neutral, but uses poor quality offsets to do so. In the Prime Carbon and GGP cases, neither company was challenged as to the quality of the offsets provided, while in the Holden case, the ACCC did question the offsets, *inter alia*, contending that 17 trees would not offset the emissions of a vehicle over its lifetime. However, as Holden agreed to orders by consent, the issue of how the ACCC would have measured offset quality and argued its case was not explored.[44] Thus it remains to be seen how the ACCC will approach a case where it believes the offsets are of poor quality and needs to establish this as fact.

In the guide to carbon claims, the ACCC deflects calls to adopt a standard for offsets[45] by focusing on consumers and their perceptions of a carbon claim.[46] It suggests that companies must "provide accurate and complete information" to customers and spell out "exactly what is included" in the claim, because, absent a universal standard, consumer understanding of terms such as 'carbon neutral' is varied.[47] However, the ACCC also states that provision of poor quality offsets may itself amount to misleading consumers, but does not provide a reference standard for this quality, instead merely suggesting that businesses consider the "certainty, longevity and timeliness" of the offsets.[48]

While the ACCC is "not a policy agency", and so is not able to create and enact minimum standards for offsets or adopt one of the many existing voluntary standards as a benchmark,[49] it did support the

introduction of a national standard, and passed its concerns regarding the difficulty it faces in assessing offset quality on to the Department of Climate Change and Energy Efficiency.[50] The resulting National Carbon Offset Standard ('NCOS')[51] may go some way to assisting the ACCC, but only if an offset provider has been certified. If a company's offsets fail to meet the NCOS criteria, the ACCC has a clear standard to apply. Unfortunately, the NCOS is voluntary and therefore, until it gains widespread acceptance and use, or the ACCC adopts it as its standard,[52] the ACCC will only have this standard to refer to when a company has chosen to be accredited. Indeed, companies may even wish to avoid accreditation so they can continue to make vague claims and avoid the need to adhere to a rigorous standard that is easily susceptible to the ACCC's scrutiny.

The ACCC notes, "the lack of a standard definition disadvantages businesses that use the term only after a rigorous carbon accounting and auditing process or follow one of the internationally recognised voluntary standards" because other companies may be less rigorous and so place genuine traders at a competitive disadvantage.[53] Furthermore, it has been argued that the absence of a standard damages consumer perception of the VCM, as the lack of quality of some offsets encourages scepticism and damages the legitimate claims of businesses genuinely striving to make an environmental impact.[54]

This difficulty has by no means been unique to Australia. The US Bureau of Consumer Protection ('BCP') has also grappled with the question of whether it should regulate offset quality. In consulting for proposed changes to its green claims guide, it received submissions both urging the adoption of a mandatory offset standard and submissions to the contrary.[55] Ultimately, like the ACCC, the BCP noted, "the Commission has authority to combat deceptive and unfair practices. It does not have authority to develop environmental policies or regulations".[56] The UK Advertising Standards Agency ('ASA') has faced this problem more directly because, unlike the ACCC and BCP, the ASA itself adjudicates on whether claims are misleading, and so has had to decide how to determine whether offsets are genuine. The ASA has called on expert advice to determine what the "generally accepted" standard for the industry was at the time, and whether the calculation methodologies used were "sound and used by reputable experts in the field".[57] This illustrates how the consumer protection agencies may deal with issues of offset quality absent a mandatory standard for offsets: the use of an expert to determine the current accepted standard may be a useful tool in an area where the science and consensus moves quickly.[58]

Conclusion

Overall, while the ACCC clearly has an important role in protecting consumers, educating businesses, negotiating compliance and initiating legal action, its role as a regulator of the VCM reaches its limit at the point of regulating the quality of carbon offsets. Without a mandatory standard, or the ability to set one, the ACCC has had to make do with the vague notion that 'low quality' offsets may mislead customers and, as yet, there is little indication of how the ACCC would assess this. Until there is a mandatory offset standard, consumers, who may know little about the technical details of offsets, are not fully protected from being sold poor quality carbon offsets that do little to reduce carbon emissions.

1 ACCC, 2008, 'Carbon claims and the Trade Practices Act' p. 1.

2 Ribón and Scott, 2007, *Carbon Offset Providers in Australia 2007* (report) (RMIT University).

3 Australian Government, 2008, *National Carbon Offset Standard Discussion Paper*, p.4; ACCC, 2008, 'Carbon claims and the Trade Practices Act'.

4 BCP, 'Proposed Revisions to the Green Guides' available at: www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf (accessed 13 November 2010). See also ACCC, 2008, 'Carbon claims and the Trade Practices Act'.

5 ACCC, 2008, 'Carbon claims and the Trade Practices Act'.

6 Harris, 2007, *The voluntary carbon offsets market: An analysis of market characteristics and opportunities for sustainable development*, International Institute for Environment and Development, London (report) 12.

7 Hamilton et al. 2008, *Forging a Frontier: State of the Voluntary Carbon Markets 2008*, Ecosystem Marketplace & New Carbon Finance, (report) 4.

8 Hamilton et al. 2008, *Forging a Frontier: State of the Voluntary Carbon Markets 2008*, Ecosystem Marketplace & New Carbon Finance, (report) 67.

9 National Carbon Offset Standard Discussion Paper, 2008, Australian Government, 4; ACCC, 2008, 'Carbon claims and the Trade Practices Act', 3.

10 Ribón and Scott, 2007, *Carbon Offset Providers in Australia 2007* (report) (RMIT University), 4.

11 Hamilton et al. 2008, *Forging a Frontier: State of the Voluntary Carbon Markets 2008*, Ecosystem Marketplace & New Carbon Finance, (report), 43; Brazzale, President of the Voluntary Carbon Markets Association, presentation to Carbon Expo Australasia 2010. Available at: www.vcma.org.au/resources/voluntary-carbon-market-could-triple-size-2015 (Accessed 12 November 2010).

12 Hogarth, 2010, *Crunch Time for Offsets: Where to now for the voluntary carbon market?* Total Environment Centre, Sydney.

13 ACCC website, 'What We Do', available at: www.accc.gov.au/content/index.phtml/itemId/54137#h2_25 (Accessed 13 November 2010).

14 See Committee of Advertising Practice, 2010, 'Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing' (12th ed) s. 3.

15 *Trade Practices Act 1974* (Cth), s.52(1).

16 *Trade Practices Act 1974* (Cth), s. 53(a).

17 *Trade Practices Act 1974* (Cth), s. 53(c).

18 *Trade Practices Act 1974*ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper, p. 6.

19 ACCC, 2008, 'Issues paper: The Trade Practices Act and carbon offset claims'.

20 ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper, p. 6.

21 ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper, p. 6.

22 *The Age*, 'Tone down renewable claims: GreenPower' (August 5 2009). Available at: http://news.theage.com.au/breaking-news-national/tone-down-renewable-claims-greenpower-20090805-e8y7.html (accessed 10 November 2010).

23 *The Age*, 'Tone down renewable claims: GreenPower' (August 5 2009). Available at: http://news.theage.com.au/breaking-news-national/tone-down-renewable-claims-greenpower-20090805-e8y7.html (accessed 10 November 2010).

24 *Trade Practices Amendment (Australian Consumer Law) Act (No. 2)* 2010, Schedule 2, s. 224(3).

25 *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*, Schedule 2, s. 219.

26 *ABC News*, 'ACCC targets green claims' (October 29 2007). Available at: http://www.abc.net.au/news/stories/2007/10/29/2073330.htm (accessed 13 November 2010).

27 ACCC, 2008, 'Carbon claims and the Trade Practices Act' p. 2.

28 *Sydney Morning Herald*, 'Green claims attacked' (2 August 2007). Available at: http://www.smh.com.au/news/national/green-claims-attacked/2007/08/01/1185647979249.html (accessed 9 November 2010).

29 ACCC website, 'What are carbon claims?', available at: http://www.accc.gov.au/content/index.phtml/itemId/833200 (accessed 9 November 2010).

30 Global Green Plan, *Undertaking to the Australian Competition and Consumer Commission for the Purposes of Section 87B* (2009) Doc: DID/681.

31 *Trade Practices Act 1974* (Cth), s. 52.

32 *Trade Practices Act 1974* (Cth), s. 53(c).

33 *Trade Practices Act 1974* (Cth), s. 53(d) due to trading after it had been deregistered from the GP program.

34 Provided for by the *Trade Practices Act 1974* (Cth), s. 87B.

35 *ACCC v Prime Carbon Pty Ltd* (2010) FCA No: (P)QUD305/2009.

36 *Australian Competition and Consumer Commission v GM Holden Ltd* [2008] FCA 1428.

37 Total Environment Centre, 'Green Marketing: Snapshot on how to avoid greenwash', available at: http://greencapital.org.au/index.php?option=com_docman&task=doc_download&gid=135&Itemid=166 (accessed 13 November 2010).

38 For example, as of 10 November 2010, half of the links on the first page of a Google search for 'Prime Carbon' relate to the ACCC's action against the company.

39 Prime Carbon, 'Media Release: Prime Carbon program maintains integrity', 11 March 2010. Available at: http://primecarbon.com.au/what/docs/Prime_Carbon_Media_Release_110310.pdf (accessed 9 November 2010).

40 McCusker, 2010, 'Saab's 'green' Ads mislead buyers says ACCC', *PR Disasters*, available at: http://prdisasters.com/saabs-green-ads-dented-by-accc-legal-action/ (accessed 12 November 2010).

41 *Trade Practices Amendment (Australian Consumer Law) Act (No. 2)* 2010, s. 233.

42 ACCC website, 'Trade practices compliance program templates', available at: www.accc.gov.au/content/index.phtml/itemId/716224 (accessed 12 November 2010).

43 ACCC website, 'Trade practices compliance programs', available at: http://www.accc.gov.au/content/index.phtml/itemId/54418 (accessed 12 November 2010).

44 In any case, it seems patently obvious that 17 trees would not offset the lifetime emissions of a motor vehicle, so it is unlikely that the ACCC did any calculation or investigation into this, beyond merely pointing out the apparent falsity of the claim.

45 ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper,13.

46 ACCC, 2008, 'Carbon claims and the Trade Practices Act'.

47 ACCC, 2008, 'Carbon claims and the Trade Practices Act', p. 17.

48 ACCC, 2008, 'Carbon claims and the Trade Practices Act', p.10.

49 ACCC, 2008, 'Carbon claims and the Trade Practices Act', p. 9.

50 ACCC, 2008, 'Carbon claims and the Trade Practices Act', p. 14.

51 National Carbon Offset Standard, available at: http://www.climatechange.gov.au/government/initiatives/~/media/publications/carbon-accounting/revised-NCOS-standard-pdf.ashx (accessed 11 November 2010).

52 Watson et al., 2010, 'Introduction of a new national standard for the voluntary carbon trading market' *Lexology*. Available at http://www.lexology.com/library/detail.aspx?g=fc186d96-c49a-409c-8486-5b19cad4b02b (accessed 4 November 2010). "It remains to be seen whether the ACCC will also refer to the methodologies and standards deemed acceptable under NCOS to determine if other voluntary carbon products and carbon claims have made false, misleading or deceptive claims".

53 ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper, p. 8.

54 ACCC, 2008, 'Carbon offset claims: trade practices issues and other key concerns'. Concerns identified in submissions to the ACCC's issues paper, p. 8.

55 BCP, 'Proposed Revisions to the Green Guides' available at http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf (accessed 13 November 2010).

56 BCP, 'Proposed Revisions to the Green Guides' available at http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf (accessed 13 November 2010).

57 ASA Adjudication on Eurostar Group Ltd. Available at http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2008/6/Eurostar-Group-Ltd/TF_ADJ_44493.aspx (accessed 1 November 2010).

58 ACCC, 2008, 'Carbon claims and the Trade Practices Act'.