

White paper: Facilitating emissions reduction through fossil fuel advertising restrictions

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1. Introduction

- 1.1 Comms Declare has commissioned Marque Lawyers to consider law reform options in the context of fossil fuel advertising, which have the potential to support the Australian government's objective to move towards a net-zero economy.
- 1.2 Australia has committed to a legislated target of 43% emissions reduction by 2030 under the *Climate Change Act 2022* and committed to net zero emissions by 2050 under the *Powering Australia* policy¹. In line with this, there has been a steady introduction of policy that targets emissions reduction and aims to provide clearer communication of energy consumption; Energy Ministers have agreed to fast track the implementation of an emissions reduction objective into the national energy laws² and introduce amendments to extend relevant energy laws to hydrogen and other renewable gases³, which will play a vital role in delivering net zero emissions for Australia.
- 1.3 The first Annual Climate Change Statement to Parliament released last year as required by the *Climate Change Act 2022* further solidifies the Federal government's intention to implement climate policies that will assist in the transition to net zero⁴. The government has committed to developing a net zero plan that considers the advice given by the Climate Change Authority, with a specific focus on decarbonisation and reducing emissions by replacing fossil fuel energy with renewable sources, improving energy efficiency, and investing in new technologies⁵.
- 1.4 The Federal government is paying close attention to climate change mitigation strategies as a matter of priority. One example is the environment minister, Tanya Plibersek, has agreed to reconsider 18 proposed oil and gas projects from major companies including Woodside,

¹ <https://www.pm.gov.au/media/australia-legislates-emissions-reduction-targets#:~:text=The%20Albanese%20Government's%20landmark%20Climate,will%20be%20enshrined%20in%20legislation.>

² ESOM OOS Nov 22 ATT B(a) - Consultation paper - incorporating an emissions reduction objective in the national energy objectives.pdf.

³ Energy Ministers Meeting Communique - 28 October 2022.docx (live.com).

⁴ Annual Climate Change Statement 2022 (dcceew.gov.au).

⁵ Annual Climate Change Statement 2022 (dcceew.gov.au), pages 29-31.

Whitehaven and Glencore to assess their climate change impact⁶. The projects were approved by previous ministers as far back as 2011.

- 1.5 Australia's economy has historically been shaped by the extraction and use of fossil fuels⁷. This historical reliance on coal, oil and gas, as sources of energy and export earnings has placed Australia as one of the world's largest emitters of greenhouse gases per capita⁸. It follows that laws which target a reduction in fossil fuel production and consumption will assist in abatement of Australia's carbon emissions.
- 1.6 Additional regulation of advertising in specific industries can support greenhouse gas reduction. This paper identifies the rationale for, and implementation of, a range of laws designed for this purpose. This can be done by introducing new legislation or through using existing legislative regimes to regulate advertising in a way that facilitates emissions reduction. The obvious benefit of mobilising existing regimes, including ACL mandatory information standards and the GEMS Act, is that laws may be introduced quickly and efficiently without the need to go through Parliament.
- 1.7 We consider two categories of emissions-producing entities.
 - (a) Fossil fuel production companies, which own or invest in fossil fuel reserves, fossil fuel infrastructure, or are involved in the mining, extraction, or burning of fossil fuels.
 - (b) High-consumption industries / products, which use fossil fuels to operate and are the sectors that make the largest contributions to Australia's greenhouse gas emissions, including energy and power, transport such as aviation and vehicles, and agriculture⁹.
- 1.8 The Intergovernmental Panel on Climate Change (**IPCC**) reports that "fossil fuel industries have unique access to mainstream media via advertisements, shaping narratives of media reports, and exerting political influence in countries like Australia"¹⁰. Examples of fossil fuel advertising include the following.
 - (a) *Sponsorships*. There are many examples of sports, health, education and arts organisations that maintain fossil fuel company sponsorships¹¹. For example, natural gas exporter Woodside sponsors at least 56 organisations including AFL team, Fremantle

⁶ www.theguardian.com/environment/2022/nov/04/tanya-plibersek-to-reassess-18-proposed-oil-and-gas-projects-to-consider-their-climate-change-impact.

⁷ <https://www.sciencedirect.com/science/article/abs/pii/S0301421516302634>.

⁸ https://www.sciencedirect.com/science/article/pii/S2214629621001870?casa_token=NqvKReVAtbgAAAAA:uBhjuTmeP1aXs8U066h7R3hPnLXgJX2QKPAKqVVe6oLrRnPuj6V8CY67Yy3KqJOvyBx0m9fiAA4.

⁹ <https://www.csiro.au/en/research/environmental-impacts/climate-change/climate-change-qa/sources-of-ghg-gases>.

¹⁰ Sixth Assessment Report, 4 April 2022, Chapter 13, page 35:
https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter_13.pdf.

¹¹ <https://www.theguardian.com/environment/2022/dec/27/fossil-fuel-interests-revealed-to-have-signed-more-than-500-sponsorship-deals-with-australian-bodies>.

Dockers, the Woodside Australian Science Project, and the West Australian Nippers program.

- (b) *Carbon neutral and net zero claims by fossil fuel production companies*
 - (i) Petroleum producer Ampol is advertising a carbon neutral petrol and diesel option where business customers can opt to have the emissions associated with Ampol's fuel products offset through the purchase of a portfolio of carbon credits¹².
 - (ii) Oil and gas producer Santos made representations of 'clean energy' and a 'net zero' plan, which are now the subject of litigation¹³. The claim alleges Santos misrepresented that hydrogen produced from natural gas with CCS (blue hydrogen) is 'clean' or 'zero emissions'. However, the blue hydrogen production is alleged to increase Santos' greenhouse gas emissions. Its net zero plan also does not account for expected production and/or emissions growth from oil and gas exploration opportunities beyond 2025.
- (c) *Carbon neutral claims by companies in high-emitting industries*. Tlou Energy 'carbon neutral' claims¹⁴: Tlou Energy made two ASX announcements representing that it would produce carbon neutral electricity and that its gas-to-power project would be 'low emissions'. ASIC was concerned that Tlou either did not have a reasonable basis to make the representations, or that the representations were factually incorrect and issued infringement notices on that basis.

1.9 Research in the UK identifies the potential for consumer behaviour changes to drive substantial carbon abatement, particularly reducing the demand for fossil fuel products and shifting to lower-carbon goods¹⁵. Examples include switching towards healthier and lower-carbon diets, reducing growth in aviation demand, and choosing products that last longer and therefore improve resource efficiency¹⁶.

1.10 Regulation in fossil fuel advertising can accelerate the much-needed shift in two distinct ways.

- (a) First, it presents the opportunity to reduce the visibility of fossil fuel production and consumption and change the social norm of reliance on fossil fuels in Australia.

¹² <https://www.ampol.com.au/about-ampol/news-and-media/carbon-neutral-fuel>.

¹³ <https://www.edo.org.au/2021/08/26/world-first-federal-court-case-over-santos-clean-energy-net-zero-claims/> ; <https://www.edo.org.au/2022/08/25/australasian-centre-for-corporate-responsibility-expands-landmark-federal-court-case-against-santos/>.

¹⁴ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-294mr-asic-acts-against-greenwashing-by-energy-company/>.

¹⁵ <https://committees.parliament.uk/publications/30146/documents/174873/default/> (see [18] – [29] re carbon abatement).

¹⁶ <https://committees.parliament.uk/publications/30146/documents/174873/default> (paragraph 18).

- (b) Second, it can introduce a level of transparency and consistency across high-emitting industries and products to promote greater choice and better inform consumers of the impact of purchasing decisions. This has the potential to reduce demand for fossil fuel related products and, in turn, the extraction, production and supply of fossil fuels, to support Australia's emissions reduction targets.

1.11 Consistent with these concepts, the IPCC further reports as follows.

- (a) Two-thirds of greenhouse gas emissions are directly or indirectly linked to household consumption. It goes on to identify advertising regulation as one option for reducing such carbon consumption¹⁷.
- (b) The provision of targeted information, social advertisements and influence of trusted in-group members and admired role models can be used to create better climate change knowledge and awareness and assist in the reduction of demand for fossil fuel related products¹⁸.
- (c) As a key enabler to drive changes in consumption behaviour, novel narratives created in a variety of ways, including by advertising, can help to break away from the established values and discourses of the status quo. For example, advertisements that frame comfortable public transport services to avoid stress from driving cars on busy, congested roads help avoid car driving as a status quo and can create a new social norm to shift to public transport¹⁹.
- (d) Corporate advertisement and brand building strategies also attempt to deflect corporate responsibility to individuals, and/or to appropriate climate care sentiments in their own brand building; climate change mitigation is uniquely framed through choice of products and consumption²⁰.

1.12 The purpose of this paper is to identify potential law reforms and regulatory levers which may drive changes in consumer behaviour. These are designed to support the government's plans for emissions reduction and net zero emissions. Implementation of the reform options discussed may support the government's commitment to climate change mitigation and deliver the outcomes of reducing high-emissions consumption, including fossil fuel production for transport, energy and consumer goods.

¹⁷ Sixth Assessment Report, 4 April 2022, Chapter 15, page 31:
https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter_15.pdf.

¹⁸ Sixth Assessment Report, 4 April 2022, Chapter 5, page 69:
https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter_05.pdf.

¹⁹ Sixth Assessment Report, 4 April 2022, Chapter 5, page 107:
https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter_05.pdf.

²⁰ Sixth Assessment Report, 4 April 2022, Chapter 5, page 6:
https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter_05.pdf.

2. Current legal framework

- 2.1 Fossil fuel advertising and emissions reduction claims are not presently subject to specific regulation. They will however be subject to laws prohibiting misleading or deceptive conduct generally.
- 2.2 The *Australian Consumer Law (ACL)* addresses misleading or deceptive conduct at a principles-based level.
- (a) The regulator is the Australian Competition and Consumer Commission (**ACCC**) which has the power to investigate, issues penalties and commence legal action for breaches of the ACL. The Australian Securities and Investments Commission has similar powers in respect of the financial services industry and representations to the ASX.
 - (b) Section 18 of the ACL prohibits misleading or deceptive conduct or conduct which is likely to mislead or deceive²¹.
 - (c) Section 29 of the ACL provides that it is unlawful for a business to make certain types of false representations in relation to the supply of goods or services²². Relevantly, a business must not make false or misleading claims about the performance characteristics, uses or benefits of goods and services. Examples of environmental claims that may be misleading include:
 - (i) overstating the water / energy / fuel efficiency of goods and services;
 - (ii) claims that a product is made from or uses renewable or green energy, but only a proportion of energy is obtained from renewable sources;
 - (iii) greenhouse gas emissions claims that don't specify if they relate to emissions from the production of the good, emissions from the product's use, or both;
 - (iv) carbon offset claims that don't disclose the negative impacts of offset projects (if any);
 - (v) carbon neutrality claims which don't specify if it relates to the whole life cycle of the product e.g., manufacture, use and disposal, or only one part; and
 - (vi) vague 'green' claims with enough suggestion of environmental benefits but limited explanation of how it intends to make a positive impact²³.

²¹ *Australian Consumer Law* section 18.

²² *Australian Consumer Law* section 29.

²³ ASIC identifies such claims as potentially misleading in its Information Sheet 271 issued in June 2022: <https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>.

- 2.3 The ACL does not provide prescriptive rules around what is misleading or deceptive, or what comprises a false representation. The courts will look at whether the ‘overall impression’ created by the advertisement is false or inaccurate²⁴, taking account of all relevant circumstances. The test is whether the conduct was objectively misleading or deceptive (or likely to be) and uses the reasonable person test. Silence can also be misleading where additional information that was not disclosed would have significantly changed a customer’s purchasing decision. For example, in 2019 Volkswagen was ordered to pay \$125 million in penalties for false representations about compliance with diesel emissions standards²⁵. More recently, Mitsubishi was found liable for misleading labelling of a vehicle’s fuel consumption²⁶.
- 2.4 Contraventions of these provisions can result in ACCC prosecution. The ACCC can seek penalties including declarations, injunctions, corrective advertising and compliance programs. For section 29 contraventions it can also seek pecuniary penalties, with the maximum starting from \$50M per contravention.
- 2.5 The benefits of the misleading or deceptive conduct principles are that they are flexible in their application and can cover a wide range of misconduct. However, the role of the court is to give judgment on the case before it. A finding provides a level of guidance and deterrence in the wider industry. Yet there remains a degree of uncertainty around what is permissible because there are no universally accepted definitions of common terminology i.e., ‘carbon neutral’ or ‘carbon offsets’.
- 2.6 The existing regime is not nimble. The requisite investigation and enforcement processes mean that regulators like the ACCC cannot respond quickly enough to the specific problem of misleading environmental claims that are becoming more prominent in advertising with the rise of the conscious consumer.

3. Reform options

- 3.1 Against that background, in the remainder of this paper we examine potential means of supplementing existing laws with additional rules designed to deliver greater clarity on carbon claims, supporting the national transition towards a lower emission economy.
- 3.2 The IPCC recognises the importance of regulatory instruments in achieving mitigation outcomes against climate change.²⁷ They can be applied by governments to cause the adoption of desired processes, technologies, products (including energy products) or outcomes (including emission

²⁴ *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54.

²⁵ *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166.

²⁶ *Mitsubishi Motors Australia Pty Ltd Northpark Berwick Investments Pty Ltd v Begovic* [2022] VSCA 155; 403 ALR 558.

²⁷ Sixth Assessment Report, 4 April 2022, Chapter 13, page 7:
https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter_13.pdf.

levels).²⁸ They are most effective when failure to comply incurs financial penalties and/or legal sanctions.

- 3.3 Further, the IPCC has identified that information programmes, including energy efficiency labels, energy audits, certification, carbon labelling and information disclosure, can play a significant role in reducing greenhouse gas emissions by promoting voluntary technology choices and behavioural changes by firms and households²⁹.
- 3.4 The United Nations has also provided recommendations for regulation around voluntary efforts by non-state entities that also wish to support a transition to net zero³⁰. The primary recommendations include regulators developing standards in areas including net zero claims, pledges, transition plans and disclosure, starting with high-impact corporate emitters, including private and state-owned enterprises and financial institutions.
- 3.5 The proposals put forward by the IPCC and the UN inform the options for reform discussed below. Each of the reforms below is capable of concurrent implementation; they are not mutually exclusive.
- 3.6 Further, there is a clear rationale for introducing specific, up-front (ex ante) obligations to complement existing misleading conduct laws. Enforcement action under misleading conduct laws is retrospective, and any decision is fact-specific and addresses harm after it has occurred. This limits the law's impact on future conduct, which is a particular detriment in the context of the fast-paced advertising environment and given the urgency of the need to reduce emissions. Ex ante regulation can establish explicit rules applicable to certain types of environmental claims, and thereby have greater potential to address problems before harm occurs. The ACCC recently proposed a similar, and in our view analogous, rationale for recommending ex ante regulation of digital platforms³¹.

4. Fossil fuel advertising ban

- 4.1 One approach would be an outright tobacco-style ban on advertising of fossil fuels. This aim of kind of prohibition would be to reduce the exposure to fossil fuel production and decrease positive public image. It may also fall within the scope of behaviour change towards renewable energies and less carbon intensive goods and services by virtue of it communicating a change in a social norm, as Australia has historically relied on fossil fuel extraction for economic growth.

4.2 *Rationale for a ban*

²⁸ Sixth Assessment Report, 4 April 2022, Chapter 13, page 37: IPCC_AR6_WGIII_Chapter13.pdf.

²⁹ Sixth Assessment Report, 4 April 2022, Chapter 13, page 37: IPCC_AR6_WGIII_Chapter13.pdf.

³⁰ Report from the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, November 2022, page 33: <https://www.un.org/sites/un2.un.org/files/high-level-expert-group-update7.pdf>.

³¹ Digital Platform Services Inquiry, Interim Report No. 5 – Regulatory Reform, September 2022, at [2.1].

- 4.3 The IPCC has emphasised that behavioural interventions like communicating changes in social norms can accelerate a positive behaviour change³². Research has shown that social-norm communication can be used to influence people's choice, and it has been long established that repeated exposure to advertising leads to a stronger preference for a product³³. For instance, social norms have been proposed an effective way to nudge certain pro-environmental behaviours by conveying information regarding what others do or think, in turn influencing people's environmental attitudes and behaviours³⁴.
- 4.4 The proposal is to prohibit advertising related to fossil fuels, such as coal, oil, and gas extraction, projects or supply etc. The idea is to reduce the public's exposure to fossil fuels and assist with phasing them out in parallel with scaling up visibility of renewables and access to renewable energy finance, which the UN reports will provide a lasting solution to today's energy crisis while cutting emissions³⁵. This kind of restriction may support a cultural shift and accelerate the transition towards a lower-emission economy.
- 4.5 France recently adopted a similar ban on fossil fuel advertising under the Climate and Resilience Law³⁶. The French government introduced legislation prohibiting the marketing or promotion of energy products related to fossil fuels. The ban, which is being phased in, prohibits advertising for all petroleum energy products related to fossil fuels, such as gasoline, energy from the combustion of coal mining, and hydrogen-containing carbons³⁷. There are some carve outs however, for example, the new law still permits sponsorship, institutional communication, and financial advertising of fossil fuel products.
- 4.6 The notion of restricting fossil fuel advertising is already gaining traction in Australia; the ACT and more than ten local councils have already introduced, or voted to introduce, some form of a ban on fossil fuel marketing. These measures evidence existing support for bans on fossil fuel advertising at certain levels of government. For example:
- (a) the City of Sydney has moved to investigate ways of implementing restrictions on advertising for fossil fuels for any Council controlled signage or property, as well as a ban on accepting sponsorships from companies whose main business is the extraction, production or sale of coal, petroleum and gas³⁸;

³² Sixth Assessment Report, 4 April 2022, Chapter 5, page 69:
https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter_05.pdf.

³³ <https://www.sciencedirect.com/science/article/pii/S2352154615000558>;
<https://psycnet.apa.org/doiLanding?doi=10.1037%2Fh0026247>.

³⁴ <https://www.sciencedirect.com/science/article/pii/S2214804322001276>.

³⁵ Report from the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, November 2022, page 23: <https://www.un.org/sites/un2.un.org/files/high-level-expert-group-update7.pdf>.

³⁶ <https://www.legifrance.gouv.fr/loda/id/LEGISCTA000043957631>.

³⁷ <https://www.theplanetarypress.com/2022/08/france-bans-fossil-fuel-advertisements/>.

³⁸ <https://meetings.cityofsydney.nsw.gov.au/ieDecisionDetails.aspx?AllId=13628>.

- (b) the ACT has banned advertisements on Canberra buses and light rail trams that represent, portray, or promote fossil fuel products³⁹; and
 - (c) Wingecarribee Shire Council has adopted a policy where it will not seek or accept financial assistance from mining companies whose main business is the extraction or sale of coal, oil or gas⁴⁰, Glen Eira Council has adopted a policy that excludes any partnerships with the fossil fuel industry⁴¹ and Byron Shire Council are looking to prohibit sponsorships from fossil fuel companies⁴². The policies from these councils target fossil fuel *companies*; a variation on the concept proposed in this paper which is to censor advertising of fossil fuel *products*.
- 4.7 In September 2022, Sue Higgsinon, a member of parliament for the Greens party, introduced the *Public Health and Safety (Fossil Fuel Advertising) Bill 2022* to the Parliament of New South Wales. The text is not presently available; however, the legislation reportedly aims to prohibit advertising by fossil fuel companies for the purposes of protecting human health⁴³.
- 4.8 *Implementation of a ban*
- 4.9 The steps in introducing this kind of ban on fossil fuel advertising may involve:
- (a) Articulating the ban, including defining ‘advertising’, and defining the kind of advertising which is prohibited.
 - (i) ‘Advertising’ should be defined to include all communications which directly or indirectly promote defined concepts of fossil fuels. There are existing legislative definitions of ‘advertising’ or ‘advertisement’ which may be useful to adopt or adapt⁴⁴.
 - (ii) The ban might be framed to apply to advertising that directly or indirectly promotes the production or supply of coal, petroleum and / or gas.
 - (b) The ban should apply to all corporations operating in trade or commerce. This would create a basis for legislation at a federal level, under the corporations power in section 51(xx) of the Constitution.
- 4.10 There are several reasons for framing the ban on advertising around fossil fuel products rather than on advertising by fossil fuel companies. Addressing products most directly targets the

³⁹ www.transport.act.gov.au/contact-us/advertise-with-us.

⁴⁰ www.wsc.nsw.gov.au/Council/Codes-and-Policies/Grants-Donations-and-Sponsorships-Policy.

⁴¹ philanthropic-partnership-policy.pdf (gleneira.vic.gov.au).

⁴² https://byron.infocouncil.biz/Open/2022/12/OC_15122022_MIN_1481.PDF.

⁴³ <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=4014>.

⁴⁴ *Tobacco Advertising Prohibition Act 1992* (Cth), section 9; *Therapeutic Goods (Therapeutic Goods Advertising Code) Instrument 2021* (Cth), section 4.

policy outcome of emissions reduction and will assist in de-normalising reliance on these high emitting sources of energy. Banning the promotion of fossil fuel products eliminates the difficulties around defining a ‘fossil fuel company’ and how these kinds of companies may have other business areas and/or change the nature of their business over time and no longer be captured by the definition. Framing the prohibition in this way also has the advantage of not penalising companies that wish to promote their transition plans or investments and research into renewable energies, which is a vital element of the shift towards a lower-carbon economy. Transparency and accuracy of those kinds of promotional claims would be addressed under the further reform options discussed below.

5. Mandatory information standards

- 5.1 Another reform option may involve introducing specific, targeted information standards, designed to support consumer choice towards lower carbon intensity products and services. There is an existing regime to mandate information standards through the ACL.
- 5.2 *Rationale for information standards*
- 5.3 The IPCC has emphasised that information measures, including the way choices are presented to consumers and alternative ways of redesigning and motivating decisions, can provide positive contributions to reduce energy consumption and greenhouse gas emissions and support the changing of social norms about consumption choices⁴⁵. There is evidence that choice architecture (interventions that shape choice context and how choices are presented) can shape energy decisions by engaging a consumer’s desire to contribute to the social good, facilitating accurate assessment of risks, costs, and benefits, and making complex information more accessible⁴⁶. For example, consumers who are shown energy efficiency labels on average buy more energy efficient appliances than those who are not⁴⁷.
- 5.4 The UN further recommends that increasing transparency of voluntary net zero pledges from firms can assist in accountability and overcoming barriers to faster progress, as capacity constraints or lack of access to finance can be identified more quickly and addressed⁴⁸. The UN’s primary recommendation in this area is that firms should publicly disclose and report on the progress towards net zero targets and plans, cover all scope emissions and all operations along the value chain in all jurisdictions (with any omission requiring disclosure) and verification by a credible, independent third party⁴⁹.

⁴⁵ Sixth Assessment Report, 4 April 2022, Chapter 5, page 5: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter_05.pdf.

⁴⁶ Sixth Assessment Report, 4 April 2022, Chapter 5, page 72: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter_05.pdf.

⁴⁷ Sixth Assessment Report, 4 April 2022, Chapter 13, page 37: [IPCC_AR6_WGIII_Chapter13.pdf](https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter13.pdf).

⁴⁸ Report from the United Nations’ High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, November 2022, page 28: <https://www.un.org/sites/un2.un.org/files/high-level-expert-group-update7.pdf>.

⁴⁹ <https://www.un.org/sites/un2.un.org/files/high-level-expert-group-update7.pdf>, page 16.

- 5.5 The ACL empowers the Commonwealth Minister (Dr Jim Chalmers the Treasurer or Dr Andrew Leigh the Assistant Minister for Competition, Charities and Treasury) to introduce mandatory information standards⁵⁰. A supplier of a good or service may be guilty of an offence for failing to comply with an information standard and may face high pecuniary penalties⁵¹. Information standards for goods or services of a particular kind may⁵²:
- (a) make provision in relation to the content of information; or
 - (b) require the provision of specified information; or
 - (c) provide for the manner or form in which such information is to be provided; or
 - (d) provide that such information is not to be provided in a specified manner or form;
 - (e) provide that information of a specified kind is not to be provided; or
 - (f) assign a meaning to specified information about goods or services.
- 5.6 The scope of information standards as contemplated in the ACL is broad, looking at the above list. Further, the framework is not limited to consumer goods. The legislation would permit information standards designed to support emissions reduction, including by facilitating consumer choice towards lower-emission products.
- 5.7 In this sense, the information standards provisions create the opportunity to enhance disclosure of information about high emissions products. Coupled with that, there is precedent for imposing disclosure and reporting obligations around emissions. The *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER**) and the Safeguard Mechanism apply to facilities with scope 1 covered emissions over a baseline threshold set by the Clean Energy Regulator and captures large fossil fuel production companies such as Santos, Chevron, Rio Tinto, and Woodside. The facilities must report on their total emissions each financial year, the purpose being to deliver emissions reduction.
- 5.8 Presently, there is little consistency between different business's 'renewable', 'green energy', 'carbon neutral' or 'net zero' claims. This makes it difficult for consumers to understand the scope of those claims and any relevant limitations. It also makes it difficult for consumers to compare emissions claims by competing businesses, thereby limiting their ability to make fully informed purchase choices.
- 5.9 There is a particular risk with 'carbon neutral' and 'net zero' claims which rely on carbon offsetting, which may be mitigated via information standards. A European consumer law paper

⁵⁰ See *Australian Consumer Law* sections 134 and 135.

⁵¹ *Australian Consumer Law* sections 135 and 136.

⁵² *Australian Consumer Law* section 134.

has examined this issue in detail⁵³. A 'carbon neutral' claim based on offsets assumes an equivalence between emissions generated and emissions offset. However, there is substantial evidence which suggests that this assumption is unsupported. The practical capacity of offsets to neutralise the harm of emissions is uncertain and measurement imprecise. Following are just two examples of the kinds of uncertainties which exist.

- (a) Offsets based on emissions avoided are calculated against a hypothetical baseline scenario. The quantity of emissions avoided will depend largely on the assumptions which underpin the baseline. Really, emissions are being modelled rather than calculated. And the assumptions used may be subject to manipulation, producing a wide range of offset claims from the same activity.
 - (b) Market factors also contribute to uncertainties with offsetting. One example may be offsets based on avoided deforestation. One operator may claim emissions reduction by protecting a forest from logging. This does not remove the underlying logging demand. The logging may simply have been displaced and conducted in another location.
- 5.10 Information standards may be used to mitigate some of the uncertainties involved in carbon neutral or offsetting claims. At a conceptual level, providing additional detail and potentially warning consumers as to the inherent uncertainties in such claims, would allow them to make better-informed choices about the extent to which they rely on those claims.
- 5.11 Mandating additional information to be included with particular claims or with information for particular goods or services may deliver the kind of outcomes proposed by the IPCC and already pursued by existing government policies, facilitating consumer choice of less emission-intensive products and reducing overall emissions.
- 5.12 Following are possible examples of this kind of information regulation.
- (a) Regulate emissions or 'carbon neutral' claims by requiring them to include information specifying the basis on which the claim is made i.e., the method of calculation, any applicable certification, the scopes addressed (scope 1, 2, 3 emissions), disclosure of a company's total annual emissions, whether carbon offsets are being used, and whether the claim applies to the whole or part of the business/product/service advertised. Given the high potential for a carbon neutral claim to mislead consumers (as discussed above at 5.9), there would also be justification for including:
 - (i) a prescribed warning as to the inherent uncertainties with offsetting claims; and
 - (ii) an obligation to publish further details about carbon calculations, offset calculations and assumptions, and the nature of offsets used, and to link to that in all

⁵³ Kaupa, Clemens, Peddling False Solutions to Worried Consumers the Promotion of Greenhouse Gas 'Offsetting' as a Misleading Commercial Practice (July 8, 2022). Journal of European Consumer and Market Law, 2022, Available at SSRN: <https://ssrn.com/abstract=4157810> or <http://dx.doi.org/10.2139/ssrn.4157810>.

advertising (along the lines of the requirements for Product Disclosures Statements in the financial services industry).

- (b) Regulate 'net zero' claims by requiring them to specify or link to the date at which net zero will be achieved, disclosure of the plans for and progress towards meeting those targets, demonstrate progress with reports that are verified by credible, independent third parties, explain whether achieving 'net zero' is consistent with modelled pathways that limit warming to 1.5°C with no or limited overshoot, and to disclose the extent to which the net zero claim relies on offsets.
 - (c) Alternatively to a fossil fuel advertisement ban, mandate that any advertisement directly or indirectly promoting the production or supply of coal, oil and / or gas must include certain warning language. For example, this might require disclosure of the total carbon emissions of the company making the advertisement, whether it has a net zero plan in place (with details included), and/or a general statement to remind people about the connection between fossil fuels, carbon emissions and climate change. This would assist to educate the audience about the amount of emissions that fossil fuel production companies contribute.
- 5.13 Separately, to address high-emitting products, additional information standards could be mandated which require the disclosure of emissions produced on a standardised basis. For example, vehicles consuming more than 4L/100m and/or emitting more than a specified amount of Co2 per kilometre may be required to have mandatory, consistent emissions labelling. A similar idea has been introduced in France; mandatory environmental labelling of goods and services with a focus on high-polluting sectors such as the textile industry, which aims to set up a 'carbon score' that informs consumers of the environmental footprint of their purchases⁵⁴.
- 5.14 There is already precedent in Australia for reporting and disclosure of carbon emissions by new vehicle models up to 3.5 tonnes under the *Vehicle Standard (Australian Design Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008 (Cth)*⁵⁵. The standard prescribes the requirements for the measurement of vehicle fuel consumption, carbon dioxide emissions and energy consumption, and the design of the mandatory Fuel Consumption Label attached to the windscreen of vehicles. Manufacturers must report the tailpipe carbon emissions of each model of vehicle to the government, which is then ranked on the Green Vehicle Guide website⁵⁶. Where the testing and reporting of carbon dioxide emissions produced by new vehicles is already enforced, published online, and required to be displayed on the windscreen label of the vehicle at the point of sale⁵⁷, it would be straightforward to mandate that produced carbon emissions are also to be communicated to the public in advertisements.

⁵⁴ <https://www.euronews.com/green/2021/07/20/france-s-new-climate-law-has-just-been-approved-so-why-are-activists-so-unimpressed>.

⁵⁵ www.legislation.gov.au/Details/F2022C00213.

⁵⁶ www.greenvehicleguide.gov.au.

⁵⁷ www.legislation.gov.au/Details/F2022C00213/Html/Volume_2.

- 5.15 As with 'carbon neutral' and 'net zero' claims, the benefits of this proposal are to facilitate comparison of consumer goods by setting effective 'green' defaults and simplify access to lower carbon energy choices by communicating the relevant information in an overt way. This type of regulation would be most effective in industries such as:
- (a) high-emission vehicles – to assist in the transition to alternative transport options like electric vehicles and reduce demand for traditional fossil fuel powered vehicles;
 - (b) flights – to encourage competition between airlines to implement more ambitious carbon abatement strategies and reduce consumer demand for high-emissions producing flights;
 - (c) agriculture and meat products – to encourage a shift towards lower-carbon diets; and/or
 - (d) textiles – to promote less carbon intensive practices and fabrics.
- 5.16 *Implementation of mandatory information standards*
- 5.17 Introducing mandatory standards would be a simpler process than an outright advertising ban; it would not require parliamentary involvement or the introduction of new legislation. Rather, it requires action by the Commonwealth Minister⁵⁸. There are no specific triggers in the legislation that are required to be satisfied before the implementation of information standards, meaning they are discretionary,
- 5.18 The benefit of this reform is that certain rules on making emissions or clean energy claims, and the addition of mandatory emissions labelling on high-emitting products, can be implemented almost immediately under existing powers in the ACL. The wide discretion in application of the information standards means they can be specifically designed to change behaviours and support emissions reduction. It will encourage greater transparency by high-emitting businesses and inform consumers about the impact of their purchasing decisions.

6. Determination under GEMS Act

- 6.1 The *Greenhouse and Energy Minimum Standards Act 2012* (Cth) (**GEMS Act**) allows the Federal government to set nationally-consistent labelling requirements for designated products. It can be used as a means to provide consumers with clear information about the emissions that are produced from the products they are purchasing. It is framed in such a way that a labelling requirement can extend to both labelling on products and advertising⁵⁹.
- 6.2 *Rationale for further GEMS Act determinations*
- 6.3 The Behavioural Economics Team (**BETA**) of the Australian government reported that in 2015, Australian households contributed to 11.1% of Australia's carbon emissions, with about 45% of

⁵⁸ *Australian Consumer Law* s 134.

⁵⁹ GEMS Act s 26(1).

those emissions accounted for by household appliances and equipment⁶⁰. In the Annual Climate Change Statement 2022, the Federal government recognised that improving energy efficiency is critical for emissions reduction, and that standards and regulations need to be implemented to support industry, businesses, and households to make improvements to their energy use⁶¹.

- 6.4 The GEMS Act has been the vehicle for regulating energy efficiency labelling on appliances and white goods in Australia for many years, applying to most household appliances and some commercial appliances, including refrigeration and electric motors. The purpose of the GEMS Act is to help Australians save energy and thereby reduce energy bills and greenhouse gas emissions⁶².
- 6.5 The GEMS Act could be used to introduce labelling requirements in respect of emissions, which are similar to the reform proposals made around mandatory information standards. GEMS determinations are made by the Minister under the GEMS Act, meaning they are enforceable, and penalties apply for failure to comply. A GEMS determination for a specified product class may:
- (a) provide level requirements for a product class, including the amount of energy used by operating products in that product class and the amount of greenhouse gases resulting from operating products⁶³;
 - (b) mandate labelling requirements, including the information that must be communicated in connection with supplying or offering to supply products in that product class, for the purpose of ensuring that products can be compared with other products⁶⁴. These requirements may relate, for example, to the labels displayed on packaging for products or in advertising of the product; and/or
 - (c) specify requirements relating to the impact of products in that product class on the environment or the health of human beings⁶⁵.
- 6.6 The GEMS Act provides a means to introduce labelling requirements on packaging and advertisements that disclose the amount of greenhouse gas emissions produced. Further, the definition of a GEMS product is broad; it includes any product that uses energy or affects the amount of energy used by another product⁶⁶. There may be potential to expand the program

⁶⁰https://behaviouraleconomics.pmc.gov.au/sites/default/files/projects/beta_report_energy_labels_that_make_cents.pdf, page 4.

⁶¹ Annual Climate Change Statement 2022 (dceew.gov.au), page 37.

⁶² https://www.energy.gov.au/sites/default/files/gems_review_-_final_report-accessible.pdf.

⁶³ GEMS Act s 25(a)(ii).

⁶⁴ GEMS Act s 26.

⁶⁵ GEMS Act s 27(1)(c).

⁶⁶ GEMS Act s 11(1)(a).

and introduce determinations on other high-emissions products with greater diversity, for example, transport and industrial goods.

- 6.7 The GEMS Act also contemplates imposing level requirements on the amount of greenhouse gas emissions that are permitted to be produced by operating products. This could also be used to support the government's objective to reduce overall emissions, however that is beyond the scope of this paper.
- 6.8 *Implementation of GEMS Act determinations*
- 6.9 The Minister (Chris Bowen for Climate Change and Energy) is afforded the power to make a GEMS determination under the GEMS Act, subject to the consent of a certain number of participating states and territories to the making or replacement of GEMS determinations⁶⁷. As this reform can be implemented under existing legislation, it does not need to go through parliament. Though there is the potential for pushback from state governments.
- 6.10 Appliances and equipment can play a role in assisting Australia to rapidly progress towards a zero-carbon economy. A consultant for the Australian Alliance for Energy Productivity identified that, while appliances typically have much shorter lives than, for example, buildings, each investment in an inefficient appliance locks-in significant emissions⁶⁸. Further, the tendency for consumers to replace like-with-like equipment means the lock-in of high emissions can extend beyond the life of an individual appliance⁶⁹.
- 6.11 BETA conducted a controlled trial to test the impact of energy labels on decisions made by Australian consumers and found that they had a positive effect compared to no labels⁷⁰. The opportunity here is that the requirement for emissions labelling on product packaging and/or in advertisements of white goods and appliances will enable a simpler comparison and basis for consumer choice towards lower emission products, and will likely encourage production of more energy efficient appliances. It also has the potential to extend to other high-emissions products beyond consumer and household appliances, such as vehicles and flights.

7. Industry codes

- 7.1 Industry codes provide a set of rules or minimum standards for an industry, including the relationship between industry participants and their customers. There are two types of industry codes.

⁶⁷ GEMS Act s 33.

⁶⁸ https://www.energy.gov.au/sites/default/files/gems_act_review_-_discussion_paper_submission_-_pears.pdf.

⁶⁹ https://www.energy.gov.au/sites/default/files/gems_act_review_-_discussion_paper_submission_-_pears.pdf.

⁷⁰ https://behaviouraleconomics.pmc.gov.au/sites/default/files/projects/beta_report_energy_labels_that_make_cents.pdf, pages 4-5.

- (a) Mandatory codes – prescribed as regulations under the *Competition and Consumer Act 2010* (Cth) and are enforced by the ACCC⁷¹.
 - (b) Voluntary codes – a form of self-regulation between participants in an industry. They may be created and administered by industry participants that commit to achieving agreed goals. Voluntary codes only apply to those who sign up and are not enforceable under legislation or by any government body.
- 7.2 The IPCC recognises the role of voluntary programs in climate change mitigation⁷². This is because they are often implemented in conjunction with economic or regulatory instruments, and sometimes are used to gain insights ahead of implementation of regulatory standards. When used as part of a broader policy framework, voluntary programs can enhance the cost effectiveness of individual firms in attaining emissions reductions while pricing or regulations drive participation in the agreement.
- 7.3 Under a voluntary code, members of an industry may agree minimum standards in relation to emissions, advertising, and other environmental claims. e.g., automotive, aviation, agriculture. Targeting these traditionally high-emitting industries like these can assist with accelerating consumer behaviour change towards lower-carbon lifestyles. This might include the following kinds of requirements.
- (a) Labelling for high-emissions products and requiring labels on advertisements/promotions of the product, such as emissions-intensive vehicles. This idea follows the same logic as the proposed mandatory information standards, but provides the option to be introduced voluntarily by industry on their own terms. This could be achieved by adding to the existing Voluntary Code of Practice for Motor Vehicle Advertising⁷³, overseen by the Federal Chamber of Automotive Industries.
 - (b) Agreeing not to use environmental imagery on high-emission products, a practice known as ‘nature rinsing’⁷⁴. This would also benefit industry by portraying a high sense of social responsibility to consumers. This has worked in other contexts e.g., the Children’s Advertising Code was adopted by the Australian Association of National Advertisers (AANA) as a self-regulatory tool to address ethical considerations around marketing to children⁷⁵.
 - (c) Sporting leagues, community services, arts and educational institutions agreeing not to accept sponsorship from fossil fuel companies, potentially via direct collaboration or

⁷¹ See *Competition and Consumer Act 2010* (Cth) s 51AE.

⁷² Sixth Assessment Report, 4 April 2022, Chapter 13, page 56:
https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter_13.pdf.

⁷³ <https://www.fcai.com.au/news/codes-of-practice/view/publication/161>.

⁷⁴ <https://www.greenpeace.org/static/planet4-netherlands-stateless/2022/09/0ded952d-threeshadesofgreenwashing.pdf>.

⁷⁵ Children’s Advertising Code – AANA: <https://aana.com.au/self-regulation/codes-guidelines/aana-code-for-advertising-marketing-communications-to-children/>.

through governing bodies where applicable. An alternative could be agreeing to only accept sponsorship from those fossil fuel companies with effective transition strategies, although this would be difficult to ascertain and enforce.

- (d) Voluntary positive behaviour campaigns by industry. For example, the Australian Food and Grocery Council promoting meat-free options or the Digital Industry Group (DiGi) agreeing to donate advertising space to promote low-carbon transport.
 - (e) Advertising and public relations firms agreeing not to advertise large emissions consumption drivers such as airline frequent flyer programs or prices for flights.
 - (f) Encouraging positive eco messaging on existing advertisements. Industry associations could promote taglines that influence consumer behaviour e.g., Australian Fashion Council encouraging “consider upcycled or second-hand garments” in clothing and textile advertisements. The Climate Change Authority has identified that promoting the transition into a circular economy can also present opportunities for significant emissions reductions in the waste sector⁷⁶. This kind of proposal has had success in influencing consumer behaviour and increasing choice architecture. For example, the Australian-made campaign enables consumers to easily identify domestically made products and support Australian businesses.
- 7.4 The attractiveness of this type of action is that it is industry-led and more flexible than legislation, and can be implemented quickly. Industry participants developing the code and having a choice to opt in may create a greater sense of ownership and a stronger commitment to compliance. There is opportunity to tailor the code to specific outcomes or change the rules in response to industry or consumer needs, and the potential to request that the code be mandated to add legislative force and ACCC oversight.
- 7.5 Depending on the nature of rules in any voluntary code, it may be necessary to obtain ACCC authorisation for the code to avoid liability for potential contraventions of the *Competition and Consumer Act 2010* (Cth). Industry collaboration of this nature might plausibly produce public benefits such as emissions reduction and climate change mitigation, which may support an application for authorisation.
- 7.6 In addition to assisting with overall emissions reduction, there would be benefits in developing industry codes in the environmental claims context, including greater transparency within the industry and greater stakeholder or consumer trust in the industry.

8. Conclusion

- 8.1 The emissions reductions challenge does not end with Australia's 2030 target, and the Government will need to continue adjusting its policies and measures to meet future, more

⁷⁶ <https://www.climatechangeauthority.gov.au/sites/default/files/2020-09/Prospering%20in%20a%20low-emissions%20world.pdf>, page 137.

ambitious emission reductions targets and respond to changing environmental and economic circumstances.

- 8.2 An outright ban on fossil fuel promotions would send an unequivocal signal to industry and the public that Australia is moving towards a clean energy economy. As outlined in this paper, there are also a range of additional measures that can be implemented concurrently and almost immediately under existing legal frameworks which would support emissions reduction targets and climate change mitigation without the need to introduce new legislation or go through Parliament. The introduction of mandatory information standards, extension of the GEMS Act, and lobbying for robust industry codes would all have a positive impact on improving transparency and consistency across environmental claims advertising for the purposes of empowering consumers to make less-carbon intensive choices.
- 8.3 There are many examples of questionable marketing practices and environmental claims made by high-polluting firms displaying the scale of the problem. The IPCC and UN reports, along with this paper, speaks to the opportunity to regulate such advertisements and the great potential to shift consumer behaviours towards a lower-carbon future.

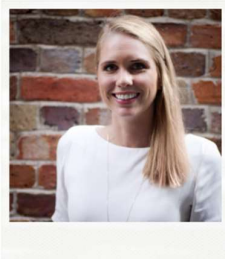
About Marque Lawyers

Marque Lawyers is a for-profit commercial B Corp law firm led by the purpose of using the law as a tool for social good. We have extensive experience advising on the Competition and Consumer Act and Australian Consumer Law, advertising, climate advocacy and political and electoral law. We also regularly participate in law reform consultation processes, including in respect of the ACCC's Digital Platforms Inquiry, the formulation of the News Media Bargaining Code, and the review of defamation laws.



[Hannah Marshall](#), Partner

Having literally consumed the Competition and Consumer Act, Hannah can tell you without blinking whether your advertising claims for the health benefits of cage-free, organically grown charcoal tea leaves will pass muster or leave you with a major regulatory headache. She also knows why they call it "third line forcing" and how to make the ACCC roll over like a playful puppy.



[Kiera Peacock](#), Partner

Kiera is both a commercial litigator and public lawyer. Being across both areas, she is well versed in the intersection of strategic litigation and government regulation. She's worked on disputes with subject matter as diverse as traffic forecasting, electoral signage and Nigerian banknotes (sadly, not together).



Cassandra Barberis-Leon, Lawyer

A member of our competition and regulatory team, Cassandra is a straight-shooter with a sharp eye for misleading advertising claims. Her strength is in her ability to help businesses develop effective marketing content that won't set off a warning alert to regulators or competitors.