



Ms Gina Cass-Gottlieb  
Chairperson of the Australian Competition and Consumer Commission  
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By email: [EnforcementCoordination@accc.gov.au](mailto:EnforcementCoordination@accc.gov.au)

Dear Ms. Cass-Gottlieb

Thank you for the opportunity to provide feedback to inform the recently released *Environmental and sustainability claims – draft guidance for business* (draft guidance). The NSW Small Business Commissioner (the Commission) welcomes the opportunity for ongoing engagement with the ACCC on this and other matters.

As you may be aware, the Commission is an independent statutory office of the NSW Government. It provides strategic advice, advocacy, and affordable dispute resolution services across NSW.

The Commission's role includes:

- Encouraging government agencies and larger businesses to enter productive working relationships with small businesses.
- Facilitating and encouraging the fair treatment of small businesses
- Promoting a fair operating environment in which small businesses can flourish.

Understanding the needs and challenges of operating a small business is crucial to governments delivering guidance that is effective and appropriately targeted. Many small business operators in NSW are time-poor and may come from culturally, and linguistically diverse (CALD) backgrounds. It is important to communicate and engage effectively with different small business groups to help them understand their legal obligations.

### **General feedback**

While the Commission supports the eight principles in the draft guidance as appropriate and reasonable, we welcome the opportunity to contribute feedback to ensure the guidance is effective and appropriate.

The Commission supports the intent of the draft guidance which is to assist businesses to have greater confidence that their claims are likely to be compliant with their obligations. However, it is important for the final guidance to reflect substantive obligations set out in the ACL and to refrain from offering advice that is likely to exceed what might reasonably be required to comply with the ACL (or any other relevant obligations).

Small businesses often lack resources, prompting them to rely on government-issued guidance to support their decision-making processes in lieu of obtaining legal advice. Because these businesses often lean on guidance as their primary reference, it is essential for it to be clear and straightforward, without suggesting requirements that exceed legal mandates. While guidance may offer further information and examples to encourage best practices or recommend additional precautions, they must specify where these are not compelled by law. Failing to make such distinctions could inadvertently lead businesses to incur unnecessary costs under the presumption of legal obligations.

The Commission encourages further clarification to prominently make clear that the guidance does not establish any new requirements but has instead been prepared to support businesses to operate within the boundaries of the current law. The Commission recognises the purpose of the guidance is partially established in the 'Using this guidance' section, however some small businesses are likely to focus on the list of eight principles summarised towards the beginning of the draft guidance. This clarification could be more prominently presented and explained throughout the document and in shorter-form summaries of the principle, such as the content presented on pages 5 and 6.

The Commission notes aspects of the guidance appear to be written from the perspective of benefits to the consumer, focussing on consumer choice, trust, and fair pricing. As this guidance is intended for businesses, the Commission recommends framing the guidance around why it is beneficial for businesses to adopt the principles, including because of their value in supporting businesses to meet their legal obligations and the potential consequences if they fail to comply.

A further aspect the guidance may wish to consider is the limit of business responsibility for the claims made by their suppliers (such as a café using disposable coffee cups which are labelled as environmentally friendly). In these circumstances it can be difficult for businesses to be confident about the claims made by their suppliers as they do not possess direct visibility over the production process or may be unable to request changes to representations made on the products they use or sell. Page 10 commits to due consideration of 'the scope and extent of due diligence undertaken' in relation to 'the size of the business', which could be noted earlier and elaborated on. It is still unclear to what extent businesses will be held responsible for claims made in their supply chains.

Page 16 of the guidance recognises that 'small businesses generally will not have access to the same resources as larger businesses' and commits to taking this 'into account' when assessing steps taken to verify environmental claims, yet this could be included earlier in Principle 2. Including this caveat nearly halfway into the guidance may leave room for misunderstanding when it could be included earlier to alleviate small businesses' concerns.

While the guidance refers to a responsibility to review supply chains, there can be considerable ambiguity which can be costly to investigate. If small businesses rely on the claims made by their suppliers, which they may take at face value, it should be clear where they stand in relation to their legal obligations.

## **Specific feedback on the eight principles**

### *Principle 2*

This principle recommends that businesses have evidence to substantiate environmental and sustainability claims. The Commission notes that some small businesses may be unclear as to the extent of their obligations to substantiate their claims with evidence.

The presentation of Principle 2 may lead some small businesses to feel compelled to undertake activities that go beyond the scope of their requirements under the ACL. While the ACL requires environmental claims to be truthful, it does not require businesses to retain or publish evidence per se, although such evidence may assist them in defending their claims. As a result of misunderstanding their obligations, some small businesses may incur unnecessary costs or engage in burdensome recordkeeping or evidence-gathering.

Page 16 outlines that it is 'good practice to be able to substantiate any environmental claim' but not necessarily a legal requirement. This could be referenced earlier to make the distinction between good practice and legal requirement clear. While it should be apparent that having evidence can be useful to

defend claims, the Commission recommends that the focus of Principle 2 be on encouraging businesses to have sufficient confidence and a reasonable evidential basis for the claims they make.

### *Principle 3*

This principle discourages omitting 'important information' from environmental and sustainability claims. However, the term 'important information' is arguably not sufficiently defined or explained. The phrase could be interpreted as information important to inform consumer decisions whereas the Commission presumes it is limited to information that may be required to comply with the ACL. The directive 'Don't leave out or hide' at the start of Principle 3 suggests a substantive obligation. Small businesses might misunderstand its scope.

The Commission proposes that instead, the principle could emphasise that an act of omission has the potential to mislead consumers and by hiding or making relevant information unavailable, small businesses could fail to comply with ACL obligations.

### *Principle 6*

This principle advocates for clear and comprehensible language. However, this might seem somewhat contradictory to Principles 3, 4, and 5. If businesses interpret this as a recommendation to simplify or employ non-specific language, small business suppliers may risk making claims which are ambiguous or misleading.

While the Commission supports the assumed intent of Principle 6; to ensure the meaning of claims is accurately understood; we suggest reframing this Principle to make its meaning clearer for small businesses. This might include a focus on improving clarity and discouraging oversimplification where it increases ambiguity.

### *Principle 7*

The guidance is designed to support businesses which 'choose to make environmental claims', and it is arguable whether using green or blue coloured packaging is tantamount to making an environmental claim. This principle appears to be overly prescriptive in suggesting that green or blue coloured packaging and other visual attributes may be misleading to consumers without providing greater context as to the circumstances where this may be the case.

In the extended explanation of Principle 7 on page 29, 'images of plants, animals, the earth' as well as 'colours such as green and blue' on packaging are claimed to be potentially misleading. While the Commission accepts that visual elements of packaging are relevant to the impression made on consumers, a blanket recommendation against green or blue coloured packaging may be overly arbitrary.

### *Principle 8*

This principle encourages caution when making aspirational claims about businesses' plans to become more sustainable. While the Commission acknowledges claims made by an organisation can inform consumer decisions, some elements of this principle appear to exceed the scope and obligations for businesses under the ACL (though other legislation may apply). The guidance should provide a stronger link explaining how contravention of this Principle may result in a contravention under the ACL or other legislation.

Thank you for the opportunity to make a submission. If you require further information, please contact Megan Bennett, at either [megan.bennett@smallbusiness.nsw.gov.au](mailto:megan.bennett@smallbusiness.nsw.gov.au) or (02) 9372 8767.

Yours sincerely

Chris Lamont  
**Commissioner**  
**NSW Small Business Commission**

Date: 21/08/23