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By Hugh Riddiford member (834 words)

"*Director's potential liability for offsetting claims made by a company.*"

It has been known for some time that "offsetting" as a green strategy is flawed. Offsetting means an emitter can buy voluntary carbon credits and claim that it is relieved of an obligation to reduce emissions by the amount of the credits purchased.

Even before the world's largest certifier of such credits, Verra, was brutally exposed by the Guardian newspaper of England in February for peddling credits that had no environmental impact (90+% of its certifications), emitters like Easyjet of Europe were moving away from their use. That trend has only continued. Regulators now have their sights on offsetting. The EU Commission will require proof of claims within 10 days and the UK Advertising Standards Authority has in effect banned them.

Offsetting is difficult to defend because to meet IPCC/Paris Agreement goals it will be necessary for countries to *both* reduce emissions *and* remove emissions that are already in the atmosphere (*i.e.,* not do one as an excuse for not doing the other). And of course, even if we planted tree in every place on earth where they would successfully grow past 2100 (the IPCC end date) there would never be enough to offset our emissions.

One yet to be fully explored consequence where an emitter makes green claims, such as it is "offsetting", is whether directors of a company are being exposed to potential liability under New Zealand laws for misleading claims that a company makes.

Looking at what is misleading or deceptive under domestic legislation such as the Fair Trading Act and Financial Markets Conduct Act, what is important is what the person to whom claims are made would believe was expressly or impliedly being conveyed.

Green claims around offsetting may be taken to convey that not only have offset credits been purchased but they are high integrity credits: that is to say, they will have a proven beneficial impact on the planet and will not consist of forestry credits from forests that can be cut down and their sequestration reversed anytime soon. So, there are two hurdles to surmount; proving claimed credits are not dodgy and proving that offsetting can help the planet even if high integrity credits are purchased.

PFS Certification Ltd, which I am director of, commission an independent random public poll to ascertain exactly what the public (consumers) believed green claims conveyed to them. This not only included offsetting claims but also others like "carbon neutral". This article focusses on the former.

It turned out that consumers were much more knowledgeable about such claims than assumed and they had strong views on what should not be claimed. A particular concern was that forestry credits should be reasonably permanent and provably so. Of course, emitters could add a qualifier to their claims that they could not prove what they implied (it's not hard to guess why they do not). Failure to do may well be tendered as proof of lack of belief in what is implied. The results of the survey can be accessed at https://www.pfs-carbonstandard.com/wp-content/uploads/2023/07/PFS-General-Public-Survey.pdf.

Armed with the results of that poll PFS then approached Peter Watts KC for an opinion on directors' liability if an emitter makes green claims that they cannot prove. Mr Watts opined that directors can be liable under the Fair Trading Act if they engaged in trade. An example might be directing or authorising company management to buy offsets and/or advertise the fact of doing so. Mr Watts concludes the same risks apply under the Financial Markets Conduct Act, particularly in relation to statements made to shareholders and bankers.

Mr Watts also notes that in relation to the new climate disclosure reporting, it "is obvious that, by mandating climate-change reporting, the FMCA is exposing entities, and indirectly their directors, to liability for inaccuracies in that reporting." Silence on climate-change matters that fall within the disclosure obligations is no longer an option for entities caught by Part 7A.

Mr Watt's opinion is accessible at https://www.pfs-carbonstandard.com/wp-content/uploads/2023/07/PF-Sequestration-Watts-Opinion.pdf. Please note it is for interest only and cannot be relied upon other than by the person to whom it is addressed.

Where does this leave emitters and their directors who do not want to be accused of greenwashing or subject to litigation or regulatory review, and suffer the brand reputational damage associated with any of these? I make four suggestions.

(a) "Offsetting" is no longer a saleable or even acceptable message, both because it almost always relies on low integrity credits and because as a concept it cannot be defended.

(b) Emitters need to shift public perception away from offsetting before it indelibly sticks to their brand.

(c) Emitters may need to do three things to disassociate their brand with offsetting:

- Stop referring to it.
- Use high integrity credits (there some on the market for as little as NZ$20tCO2e).
- Send a different message to the public "we are trying our best to reduce our GHG emissions but when we have unavoidable emissions, we have ensured we have permanently captured CO2 in the atmosphere at least equal to them."