Kluwer Competition Law Blog

Australia Greenwashing: Half-Yearly Review of ASIC and ACCC Prosecutions ? and ACCC Position on Environmental Collaborations

Ayman Guirguis, Jessica Mandla, James Gray, Tess Kane, Jenna Yim (K&L Gates) · Wednesday, October 30th, 2024

In Brief

The Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investments Commission (ASIC) continue to be vigilant and seek significant penalties for alleged "greenwashing" (misleading environmental or sustainability claims).

The ACCC has been vocal that greenwashing is an enforcement priority for some time and, in December 2023, issued guidance for businesses in making environmental claims. It has also taken court action against Clorox Australia Pty Limited (Clorox) regarding "recycled" claims on its kitchen tidy and garbage bags.

ASIC has been even more adversarial in the greenwashing space:

- In September 2024, ASIC achieved its largest penalty to date for greenwashing in court action against Vanguard Investments Australia (Vanguard) in the Federal Court in relation to claims regarding the environmental, social and governance (ESG) credentials of one of its funds.

This follows earlier court actions:

- In August 2024, Mercer Superannuation (Australia) Limited (Mercer) admitted to having made misleading sustainability claims, resulting in the Federal Court ordering a penalty of AU$11.3 million; and
- In June 2024, the Federal Court found that a trustee of Active Super had made misleading representations regarding its ESG credentials.

These enforcement actions make clear that the regulators are closely monitoring environmental and sustainability claims and highlight the need for businesses to ensure the accuracy of any environmental claims they are making.

More positively, the ACCC recognises that collaborations to achieve sustainability may result in significant benefits for Australia. To that end, it has released draft guidance regarding sustainability collaborations and how these may be impacted by Australia's competition laws or otherwise managed through the ACCC's authorisation process.

This Insight expands on these developments and sets out our key takeaways for businesses.

ASIC Prosecutions

ASIC Wins its First Civil Penalty Greenwashing Proceedings v Vanguard: AU$12.9 Million Penalty

In March 2024, ASIC succeeded in its first civil penalty greenwashing proceedings, with the Federal Court finding that investment company Vanguard had breached the ASIC Act through its representations regarding the ESG characteristics of one of its funds.

On 25 September 2024, the Federal Court ordered that Vanguard pay a penalty of AU$12.9 million and publish an adverse notice on the Vanguard website in respect of these representations.

ASIC alleged that from August 2018 to February 2021, Vanguard had made representations to investors on a variety of platforms (including product disclosure statements, a media release, its website and interviews) regarding its Vanguard Ethically Conscious Global Aggregate Bond Index Fund (the Fund).

These representations included that the Fund offered an ethically conscious investment opportunity and that it was comprised of securities that had been researched and screened against applicable ESG criteria (with any securities issued by companies in breach of applicable ESG criteria being removed from the Fund).

ASIC alleged that, contrary to these representations:

- There were a number of limitations in the research and screening for the Fund (such as that only publicly listed entities were properly screened, and that the "fossil fuel" screen did not exclude customers that derived revenue from the transportation or exploration of thermal coal).
- A large proportion of securities in the Fund were issued by companies that had not been researched or screened against applicable ESG criteria.
- The Fund included issuers that violated applicable ESG criteria.

Vanguard admitted the majority of these allegations.

The Federal Court found that, through making these representations, Vanguard contravened the ASIC Act by engaging in conduct that was liable to mislead the public as to the nature, characteristics and suitability of the Fund, and by making false or misleading representations that the Fund was of a particular standard, quality or grade.

Notably, the court agreed with Vanguard's proposed 20% penalty discount for corporations, noting that the discounted penalty of AU$12.9 million struck an *"appropriate balance between deterrence and oppressive severity"*.

Our key takeaways from this case are that:

- Businesses must scrutinise their environmental claims to ensure that they are accurate and verifiable.
- Businesses should ensure that they regularly review their representations to ensure that they

remain true.

- Where environmental or sustainability claims are dependent on certain processes, such as investment screens, businesses should put in place safeguards to ensure that these mechanisms are precise, applied appropriately, clearly communicated to prospective investors and are regularly reviewed for any inadvertent failures.

ASIC Prosecution of Mercer: AU$11.3 Million Penalty

ASIC commenced court action in February 2023 alleging Mercer had contravened the ASIC Act by making statements that were liable to mislead the public regarding multiple Sustainable Plus investment options. Mercer later admitted to this conduct.

On 2 August 2024, the Federal Court approved joint submissions as to penalties and the publication of a notice on the Mercer website totalling AU$11.3 million to be paid by Mercer.

During four periods between 12 November 2021 and 1 March 2023, Mercer made statements in a video and via multiple publications on Mercer's website claiming that Sustainable Plus options excluded certain investments.

The video statement claimed *"Our Sustainable Plus options go further than the other options in their commitment to sustainable investment. First they exclude investments in certain sectors deemed not to be sustainable. These options will not invest in alcohol, gambling and carbon intensive fossil fuels like thermal coal."*

Five different statements were published on the Mercer website in this period making claims regarding the Sustainable Plus investment options, such as:

- *"These are investment options that have a higher proportion of sustainability-themed assets and exclude companies involved in alcohol production, carbon intensive fossil fuels, gambling and pornography. The list of exclusions will vary for each option."*
- *"These options have a higher proportion of sustainability-themed assets and exclude companies involved in alcohol production, carbon intensive fossil fuels, gambling and pornography. The list of exclusions varies for each investment option."*
- *"…go beyond the standard approach to sustainable investing. They are invested according to a wider set of ethical criteria and have a greater exposure to sustainability-themed investments. They have a broader exclusion approach, for example, excluding companies involved in production of alcohol, carbon intensive fossil fuels like thermal coal, gambling and adult entertainment. The list of companies excluded varies for each investment option."*

Six of the seven Sustainable Plus superannuation investment options were found to have invested in up to 19 companies involved in gambling, 15 companies connected to the production of alcohol and 15 companies concerned with the extraction or sale of carbon-intensive fossil fuels.

Some key takeaways of this case include:

- Where companies make ESG claims, especially those made in absolute terms, the representation of services must be accurate as well as monitored to enforce any corresponding exclusions.
- Companies must have in place systems or processes to ensure ESG compliance, as corrective

action that is limited in its scope is considered inadequate.

ASIC v Active Super: Federal Court Finds Trustee Made Misleading ESG Claims

In June 2024, the Federal Court found that LGSS Pty Limited, a trustee of Active Super, made various misleading representations concerning its ESG credentials.

ASIC's case concerned representations made by Active Super that it had eliminated investments considered harmful to the environment and the community, such as gambling, coal mining, oil tar sands and Russian investments (following the invasion of Ukraine).

ASIC alleged that, in fact, Active Super had invested either directly or indirectly in various securities which it claimed were either eliminated or restricted through investment screens.

The court held in favour of ASIC.

In particular, the court noted that the critical language in certain representations was unequivocal, e.g. that there was "No way" Active Super would invest in certain funds, and that Active Super would "not invest" or "eliminate" these harmful investments.

Importantly, the court's view was that in the face of such unequivocal language, and in the absence of any obvious disclaimers (such as footnotes or asterisks), a reasonable consumer would not "search around" for an obscure investment policy which qualifies such statements.

In relation to Active Super's arguments that it did not hold investments in Russian entities because they were held through a pooled fund, the court maintained that these representations were misleading on the basis that an ordinary consumer would not distinguish between direct investments (i.e. holding shares in a company) and indirect exposure to these investments through pooled funds.

Our key takeaway is that any main promotional statements must be accurate and verifiable.

To the extent that these promotional statements must be qualified, any such disclaimers must be transparent and prominent. This means that they should be easily accessible to a reasonable consumer and should not require the consumer to expend significant effort to understand the "true" position.

Practically, these disclaimers could be "linked to" via footnotes or asterisks, which are proximate to, and appear in the same size and font as, the main promotional statement. To the extent that promotional statements are qualified in extraneous documents, such as investment policy documents, consumers should be able to easily access these documents, e.g. via a hyperlink.

Ultimately, companies should consider their promotional representations from the perspective of a reasonable consumer. If the impression given to such a consumer is not reflective of the facts, the main promotional representations should be reconsidered or qualified.

ASIC has issued guidance containing other practical tips as to how companies can avoid greenwashing when offering or promoting sustainability-related products.

It has been made clear that such misrepresentations may undermine the confidence consumers have in the claims made by providers of financial products and services, which detriments both consumers and the financial services industry more widely.

ACCC Prosecutions

ACCC v Clorox

While the ACCC has taken a number of actions against greenwashing, this is its first court action in some period of time.

The ACCC alleges that Clorox, the manufacturer of GLAD-branded kitchen and garbage bags, misled consumers by describing various kitchen tidy and garbage bags as comprising 50% recycled "ocean plastic".

The ACCC contends that Clorox exaggerated the environmental qualities of the bags (and their manufacturing process) in order to appeal to increasingly environmentally conscious consumers. The representations made by Clorox in relation to the products included the following:

- *"Glad to be GREEN"*, with the words *"to be GREEN"* appearing upon a green coloured background;
- *"50% ocean plastic recycled bags";*
- *"Made using 50% Ocean Plastic*"* appearing atop a graphic of a blue-tinted garbage bag; and
- *"These bags are made from 50% ocean recycled plastic, and have the trusted strength of Glad to hold household waste on its way to landfill. Recycling ocean bound plastic reduces plastic pollution before it enters the ocean, helping to reduce pollution in waterways, save marine life and put an end to irresponsible waste."*

Despite this disclaimer, the ACCC alleges that these representations were false or misleading as the products were instead partially made up of a recycled plastic that had been taken from locations up to 50 kilometres from the ocean (as opposed to being collected from the ocean itself).

Whilst a disclaimer appeared in small font on the back of the bags (which stated *"*Made using 50% ocean bound plastic that is collected from communities with no formal waste management system within 50 km of the shore line"*), it is clear that this has not affected the ACCC's allegations that the dominant representations were misleading.

While the court's judgment is not expected for some time, our key takeaways from the case brought by the ACCC include that:

- The use of disclaimers may not be sufficient to overcome a misleading impression created by a dominant promotional message.
- Recycled "ocean plastic" or "ocean bound plastic" claims appear to be in the ACCC's crosshairs (it previously investigated and obtained an undertaking from MOO Premium Foods Pty Ltd in relation to its "100% ocean plastic" claims) and appear to be at material risk of contravening the Australian Consumer Law given the nebulous definition of this term.
- Despite this case representing the only proceedings the ACCC has brought in this space to date, the regulator can be expected to take further enforcement action in this area, with ACCC Chair

Gina Cass-Gottlieb stating in her speech announcing the ACCC's Compliance and Enforcement Priorities for 2024 – 25 that the ACCC has *"a number of in-depth greenwashing investigations"* already on foot.

Private Actions

In addition to actions taken by the regulators, there have recently been a number of developments in relation to private actions or complaints against businesses regarding alleged misleading environmental claims.

- UniSuper accused of greenwashing by member
- A member of UniSuper has lodged a complaint with ASIC, alleging that the superannuation fund has made misleading sustainability claims in relation to its investment products.
- The complaint, lodged by UniSuper member Dr Christopher Standen, contends that UniSuper marketed two of its funds as "sustainable" despite them having considerable investments in a major global toll road operator, Transurban Group.
- Dr Standen stated that *"Transurban Group's business model relies on increasing road traffic, which increases climate and other pollution"*, and argued that UniSuper should not market products that include such investments as sustainable.
- Dr Standen has asked ASIC to investigate whether UniSuper has made misleading and deceptive statements regarding the funds.
- APCA v EnergyAustralia
- In August 2023, Australian Parents for Climate Action (APCA) commenced proceedings in the Federal Court against EnergyAustralia, alleging that EnergyAustralia's "Go Neutral" campaign for its energy and gas products was misleading.
- EnergyAustralia claims that home energy use from its gas and electricity products is "carbon neutral" and results in positive environmental impacts, because EnergyAustralia purchases carbon offsets equivalent to the emissions from household energy use.
- On the other hand, APCA contends that EnergyAustralia's representations convey a misleading impression to consumers that their emissions have been "cancelled out" by carbon offsets.
- APCA argues that, in reality, the burning of fossil fuels to create energy generates emissions which contribute to climate change, and which cannot be undone, regardless of the purchase of carbon offsets.
- This matter is scheduled to go to trial in May 2025.

ACCC Consultation on Sustainability Collaborations

The ACCC has published a draft guide on sustainability collaborations and their interaction with Australian competition law (the Competition and Consumer Act (CCA)) (the Guide).

In the Guide, the ACCC recognises the clear need for urgent action on environmental sustainability, as well as the steps that many businesses are taking to address their environmental impacts.

The ACCC notes that in certain circumstances, businesses may be incentivised, or need, to collaborate with others (including competitors) to achieve better environmental outcomes – for

example, where taking action on an individual basis would be uneconomical, inefficient or would result in a competitive disadvantage, such as competitors free-riding or a "first mover" disadvantage.

Collaborative arrangements with competitors are at risk of contravening the CCA – specifically, cartel conduct (which is automatically prohibited) or other anti-competitive practices which are prohibited if they have the purpose, or likely effect, of substantially lessening competition in Australia.

In the Guide, the ACCC has provided high-level examples of conduct likely to involve risks under the CCA (such as agreements between competitors to only acquire a certain input from suppliers that meet a specific sustainability criteria), as well as lower risk collaborative arrangements (such as jointly funded research into reducing environmental impacts, the establishment of industry-wide emissions targets and making independent decisions about using sustainable inputs).

The Guide notes that conduct which is at risk of breaching the CCA may be permitted through the ACCC's authorisation process, under which the ACCC will permit (and issue statutory immunity in respect of) conduct which is likely to result in a net public benefit.

Some key takeaways from the Guide are:

- *Seek legal advice as to whether your proposed collaborations are at risk of breaching competition laws:* Do not proceed to give effect to any sustainability-related collaborations with competitors without first assessing whether these arrangements are likely to be in breach of competition laws.

The penalties for engaging in cartel conduct (or otherwise prohibited anti-competitive conduct) are very significant.

In addition to having regard to the factors set out in the Guide, if you consider that your proposed collaborations may result in competition law risk, seek legal advice. This will enable you to make an informed decision about whether you should seek to obtain authorisation from the ACCC for the proposed conduct.

- *Consider, quantify and document the sustainability benefits arising from your proposed collaborations:* In the event that you seek authorisation for your collaborations, the ACCC will be required to assess whether the likely public benefits of the arrangements will outweigh the likely public detriments. Applicants for authorisation must substantiate their public benefit claims and how these benefits are likely to arise from the proposed conduct. They must also set out why collaboration is necessary to achieve these public benefits (as opposed to being able to attain them individually).

The public benefits that the ACCC may consider arising from a sustainability collaboration are broad. The ACCC has already accepted that reducing greenhouse gas emissions is a public benefit of considerable weight. Provided they can be attributed to the relevant conduct, other public benefits may include reduced plastic use, increased biodiversity conservation, and "circularity" (being the process of using, recycling and regenerating materials and products). Public benefits can apply to society generally, as opposed to only the consumers impacted by a sustainability collaboration.

- *Expedited authorisation options are possible:* Authorisation is often a lengthy process – the ACCC is required to make a determination within six months of an application being lodged and must issue a draft determination and undertake a public consultation process before doing so.

However, parties are also entitled to apply for "interim authorisation", which permits them to engage in their proposed conduct while the ACCC assesses their substantive application. Interim authorisation is assessed on a case-by-case basis, having regard to factors such as urgency and possible harm to applicants if interim authorisation is denied.

The Guide also notes that the ACCC may streamline the authorisation process in certain circumstances by issuing a draft determination without engaging in the "standard" initial public consultation process prior to doing so. The ACCC is most likely to do so where there does not appear to be any significant detriments associated with the conduct, or where the ACCC had previously concluded that there were net public benefits likely to arise from similar arrangements in the same industry or subject matter. Applicants who wish to be subject to this streamlined process should seek to explain in their application how these features are present.

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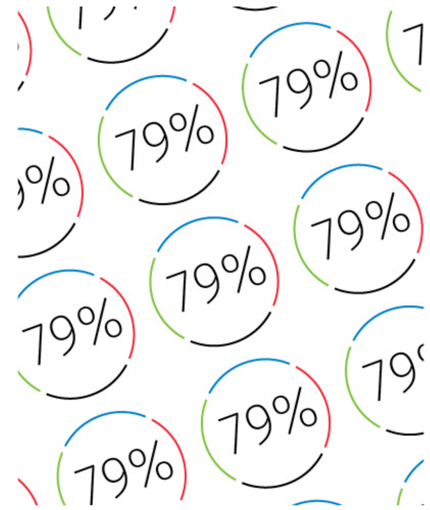

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