



Environmental  
Defenders Office

# Misleading or Deceptive Conduct Handbook

**A Legal Guide to Greenwashing**





# About EDO

Environmental Defenders Office Ltd (EDO) is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

**Successful environmental outcomes using the law.** With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

**Broad environmental expertise.** EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

**Independent and accessible services.** As a nongovernment and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

[www.edo.org.au](http://www.edo.org.au)

## **About the Safe Climate (Corporate) team.**

The Safe Climate (Corporate) team uses the law to hold companies to account for corporate greenwashing and to influence change in corporate behaviour. Our lawyers work with clients to ensure that claims by companies about their climate credentials are properly supported and to investigate potential greenwashing. The Corporate team also runs groundbreaking litigation to hold Australia's biggest emitters to account for potentially misleading investors.

## **Acknowledgment of Country**

EDO recognises and pays respect to the First Nations Peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations' cultural heritage through both First and Western laws. We recognise that First Nations' Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

Companies are increasingly trying to position themselves as part of the solution to the climate crisis and to convince investors they will remain financially viable during the energy transition. While many corporate efforts to reduce climate impacts are well-intentioned and commendable, the prevalence of ‘greenwashing’ has skyrocketed.

This is a guide for EDO clients concerned about potential greenwashing. It covers the basic legal principles of misleading or deceptive conduct under the *Australian Consumer Law (ACL)*, the *Corporations Act 2001 (Cth) (Corporations Act)* and the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)*, concrete examples of conduct that may be misleading or deceptive, and what you can do about potential greenwashing.

The information provided in this handbook is general information only and not legal advice. Please contact the EDO’s Safe Climate (Corporate) team if you require advice on particular conduct of concern and/or with preparing complaints to regulators.



# What is misleading or deceptive conduct?

Section 18 of ACL provides that:

*A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

Section 1041H of Corporations Act provides that:

*A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.*

Section 12DA of ASIC Act 2001 similarly states:

*A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.*

All of the provisions relate to conduct that is likely to **mislead** or **deceive**. This is an objective test requiring consideration of how the behaviour affects the target audience's impression of a good or service. Considering who is the target audience is therefore important.

Conduct is misleading or deceptive or likely to mislead or deceive if “the impugned conduct viewed as a whole has a tendency to lead a person into error”.<sup>1</sup> This means all relevant circumstances will be taken into consideration, including the entire context of the relevant advertisement/statement/report. Fine print, contradictory statements, and images that alter written statements are all taken into account when considering whether the conduct was misleading or deceptive.

Sometimes advertisements or websites contain bold headline statements that may mislead a consumer or investor. The question of whether the headline representation is misleading or deceptive depends on whether any qualifications to the headline representation have been sufficiently drawn to the attention of the relevant consumers and whether that

information is sufficiently instructive to nullify the risk that the headline claim might mislead or deceive.<sup>2</sup> For example, qualifications to a statement that are in fine print at the end of a document, or on another page of a website are usually insufficient.

It is also necessary to consider the use of any disclaimers that qualify information. Courts have found that disclaimers do not necessarily prevent conduct being misleading or deceptive. For example, disclaimers have been found to be misleading where they are in such small print as to insufficiently qualify a headline statement.<sup>3</sup>

Silence can also constitute misleading or deceptive conduct. For example, failing to disclose important qualifications or assumptions about a company's plan to achieve net zero emissions may be misleading. Silence can also breach disclosure requirements in the Corporations Act. For example, failing to disclose the impacts that climate change may have on a coal mine's operations may mislead investors and/or consumers. Similarly, silence in relation to expected changes to coal demand/markets as countries transition from coal fired power may be misleading.

When making a complaint alleging misleading or deceptive conduct, you should include information that refutes the claim that the company has made. For example, if the statement is that “gas is clean energy”, you should ensure that you have clear information from reliable sources to refute that claim. The information may be the company's own reporting on greenhouse gas emissions and other environmental impacts and/or reports by the UN Intergovernmental Panel on Climate Change, the International Energy Agency, or the CSIRO. If there is a contrary argument that supports the statement – such as a standard that has been used to verify or certify the claim, or contrary scientific literature – then it may be harder to argue that it is misleading.



It is also necessary to establish that the conduct:

- is by a person, which includes a company;
- the person engaged in the conduct; and
- is either in trade or commerce (s 18 of the ACL and s 12DA of the ASIC Act) or in relation to a financial product or service (s 1041H of the Corporations and s 12DA of the ASIC Act).

The final requirement is considered in more detail below.

### **Future representations**

If a representation concerns a “future matter”, there is a presumption that the representation is misleading if the representor does not have reasonable grounds for making the representation. This means that, if the company fails to produce evidence that its claim was based on reasonable grounds, the representation<sup>4</sup> is taken to be misleading.<sup>5</sup>

A representation will concern a future matter if it is a promise, forecast, prediction, or other statement about something that will only transpire in the future.<sup>6</sup> Many environmental representations relate to future matters, for example, “net zero by 2050” or statements about future fossil fuel demand. However, claims that a product is “biodegradable” or “compostable” are not future matters, as they can be ascertained at the time the representation was made.<sup>7</sup>

### **What type of representations may be misleading or deceptive?**

Whether a representation is likely to mislead or deceive will depend on the entire circumstances of the representation, so it is difficult to determine what representations may be misleading or deceptive in the abstract. However, based on existing court and tribunal decisions and net zero standards, the following representations may be misleading or deceptive:

- Net zero plans that involve one or more of the following:
  - the expansion of fossil fuel production;
  - the exclusion of Scope 3 emissions;
  - the use of offsets for anything other than residual emissions;
  - the reliance on unproven technology, if the uncertainties associated with that technology are not adequately disclosed;
  - the failure to adequately disclose material assumptions, qualifications or contingencies.
- Fossil fuels are “clean”
- Fossil fuels, including fossil gas, are “low carbon” (as opposed to lower carbon)
- Fossil fuels have “net negative emissions”
- Increasing LNG exports will reduce global emissions by replacing coal
- New fossil fuel projects, including fossil gas projects, will help meet the Paris Agreement’s temperature goals or are essential to an energy transition aligned with the Paris Agreement
- New fossil fuel projects, or expansion of existing projects, are compatible with net zero goals
- Hydrogen is “renewable” or “zero emissions” (if not specific to the type of hydrogen, or if it concerns hydrogen other than green hydrogen)
- Hydrogen blended gas is renewable
- The use of outdated demand forecasts for fossil fuels, or the cherry-picking of demand forecasts more favourable to a company
- Products complying with emission standards when they do not<sup>8</sup>
- Claims to offset emissions from products or services by planting trees<sup>9</sup>



## Black Mountain Energy – ‘net zero carbon emissions’ natural gas project

In December 2022, the Australian Securities and Investments Commission (**ASIC**) issued infringement notices to Black Mountain Energy Limited concerning statements made in ASX announcements that its Project Valhalla natural gas project would be ‘net zero carbon emissions’. ASIC said Black Mountain did not have a reasonable basis for making this representation because:

- Black Mountain had not progressed any specific works related to its net zero aim, including any emissions modelling or a detailed plan; and
- the net zero target would only apply if Black Mountain progressed to production and was not intended to apply in relation to any exploratory or development activities.

Black Mountain paid \$39,960 on a no admissions basis.



## HSBC advertising campaign – Green financing

In October 2022, the UK Advertising Standards Authority ruled that two advertisements by HSBC were misleading.

Published in the lead up to COP26, the first poster depicted an image of crashing waves with the headline “Climate change doesn’t do borders” and the accompanying text, “Neither do rising sea levels. That’s why HSBC is aiming to provide up to \$1 trillion in financing and investment globally to help our clients transition to net zero.”

The second poster depicted tree growth rings with the headline “Climate change doesn’t do borders” and the accompanying text “So in the UK, we’re helping to plant 2 million trees which will lock in 1.25 million tonnes of carbon over their lifetime.”

The ASA found that consumers would understand the claims to mean that HSBC was making a positive overall environmental contribution when in fact HSBC was continuing to finance businesses and industries that emitted carbon dioxide and other greenhouse gases.

The ASA also said that consumers would not expect that HSBC would make such unqualified claims about the environment whilst simultaneously financing greenhouse gas emitting businesses and industries.





## Shell – “sustainable oil” advertising

In 2008, the UK Advertising Standards Authority found that an advertisement by Shell representing that a Canadian tar sands oil project was “sustainable” was misleading.

The advertisement was published in the Financial Times alongside Shell’s financial results. It claimed that Shell was harnessing its technical expertise “to unlock the potential of the vast Canadian oil sands deposit” and that “continued investment in technology” is one of the key ways to “secure a profitable and sustainable future”.

The ASA found that green claims must not be vague or ambiguous by the use of terms such as “sustainable”, “green” and “non-polluting”, and that, because “sustainable” lacks a universal definition, it was likely to be unclear to consumers. The ASA also found that Shell had not provided any data showing how it was effectively managing its carbon emissions from its oil sands projects.



## Ryanair – “lowest emissions airline”

In 2019, the UK Advertising Standards Authority found that advertisements by Ryanair relating to its CO2 emissions were misleading.

Ryanair ran a series of press, TV and radio advertisements variously claiming to be “Europe’s lowest emissions airline” and that Ryanair is a “low CO2 emissions airline” compared to 27 other European airlines.

The ASA found that the average consumer would take the claims to mean that, by flying with Ryanair, they would be contributing lower CO2 emissions than if they had chosen another European airline and that consumers would need significant information to understand the basis of that claim. The ASA found that the information was not clear in the advertisements, and that the evidence provided by Ryanair to the ASA in response to the complaint was not sufficient to substantiate Ryanair’s claims.

**It will be more difficult to prove a representation is misleading if it uses ambiguous or vague language, such as “help”, “support” or “aim”, or if there are conflicting scientific views on the subject matter of the representation. Such representations may nonetheless be misleading if they fail to adequately disclose significant assumptions, qualifications or contingencies.**

# When is the conduct ‘in trade or commerce’?

To contravene s 18 of the ACL and/or s 12DA of the ASIC Act, misleading conduct must be ‘in trade or commerce’.

Conduct in trade or commerce is not restricted to activities for the making of a profit.<sup>10</sup> It can be for the purposes of promoting the business of some other person or corporation.<sup>11</sup> The conduct must be carried out “in” trade or commerce and not any other activities in which corporations may engage during, or for the purpose of, carrying on some overall trading or commercial business.<sup>12</sup> This includes conduct of a corporation towards persons, whether or not they are consumers, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, are of a trading or commercial character. Promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, whether they are identified persons or merely an unidentifiable section of the public fall within the scope.<sup>13</sup>

Conduct by an industry body representing or promoting a good or service to actual or potential consumers, including an unidentifiable section of the public, can be considered as “in trade or commerce” where:

- Material is published extensively, nation-wide.
- Directed to the public at large.
- The material is prominent and eye-catching and describes itself as an advertisement.
- Even a cursory reading is sufficient to convey to an ordinary reader a message favourable to the consumption of the good or service as an article of commerce.
- It uses a persuasive tone rather than instructional language.
- It seeks to allay fears or manage commercial risk of public opposition.
- The industry body has authorised the advertisement.
- It is not intended as a learned contribution to a scientific debate.
- It was not published in a learned scientific journal.<sup>14</sup>
- Used to address public criticism of an industry.
- Used to protect commercial interest of members of an association<sup>15</sup>

The test is whether the representation has the requisite commercial or trading character.<sup>16</sup> Generally, activities or transactions will only have the requisite ‘trading or commercial character’ if they are directed at persons that have an actual or potential trading or commercial relationship with the representor.<sup>17</sup>





## When is conduct not “in trade or commerce”?

When representations are made, or content is published in the context of a public debate and is not promotional material designed to persuade consumers to use the service, it is not considered to be in trade or commerce. Rather, it can be characterised as political and designed to influence public opinion or achieve a particular regulatory outcome.<sup>18</sup>

## What can you do?

When determining whether conduct is “in trade or commerce,” it is necessary to consider why each representation was made, and the purpose it intended to achieve.<sup>19</sup> Therefore, if you are concerned about representations made by a company or body and are considering legal action, we recommend that you seek legal advice to closely consider the circumstances of each representation.



## When is conduct ‘in relation to a financial product or service’?

In order to contravene s 1041H of the Corporations Act or s 12DA of the ASIC Act, the alleged conduct must be ‘in relation to’ a ‘financial product’ or ‘financial service’. Section 18 of the ACL does not contain this requirement.<sup>20</sup>

Securities such as shares, notes or bonds constitute financial products.<sup>21</sup> For conduct to be “in relation to” a company’s securities, there must be a relationship between the conduct and the securities, but an indirect or less than substantial connection is sufficient.<sup>22</sup> Statements made in materials published by a company on the ASX will usually satisfy this requirement.<sup>23</sup> In certain circumstances, it is also possible for statements made on a company’s website or in press conferences to be “in relation to” a company’s shares.<sup>24</sup>

If a company holds an Australian Financial Services Licence, then statements concerning the services or products provided under that licence will also likely be in relation to a financial service.



## Which Act applies?

If conduct is “in relation to a financial product or a financial service”, s 1041H of the Corporations Act and/or s 12DA of the ASIC Act may apply to the exclusion of s 18 of the ACL.<sup>25</sup>

Practically, it is usually worth referring to all of the relevant legislative provisions in any complaint to regulators.

## Other useful provisions

Some conduct that contravenes s 18 of the ACL may also contravene s 29(1) of ACL, which states:

*A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:*

- (a) make a false or misleading representation that goods are of a particular standard, quality, grade, composition, style or model or have had a particular history or particular previous use;*
- (b) make a false or misleading representation that services are of a particular standard, quality, value or grade; ...*
- (g) make a false or misleading representation that good or services have sponsorship, approval, performance characteristics, accessories, uses or benefits...*

It is important to consider whether s 29(1) applies to the potentially misleading statement because the ACCC cannot seek penalties for contraventions of s 18 of the ACL, but it can for contraventions of s 29(1) of the ACL.

Section 1041E of the Corporations Act creates an offence in relation to false or misleading statements made recklessly or knowingly. It is harder to establish a contravention of s 1041E than s 1041H because the former requires proof of a company's knowledge and/or intention in making the relevant representations.

Section 1041E of Corporations Act states:

*A person must not make a statement or disseminate information if*

- (a) The statement or information is false in a material particular or is materially misleading;*
- (b) The statement or information is likely:
  - (i) to induce persons in this jurisdiction to apply for financial products, or*
  - (ii) induce persons in this jurisdiction to dispose or acquire financial products*
  - (iii) have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and**
- (c) When the person makes the statement or disseminates the information;
  - (i) the person does not care whether the statement or information is true or false; or*
  - (ii) the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.**



# What can you do about misleading or deceptive conduct?

Depending on the seriousness of the conduct, you can take the following actions:

- Write a letter of enquiry or demand to the relevant entity, asking for clarification or rectification of the conduct.
- Make a complaint to the relevant regulator or Ad Standards.
- Seek legal advice on commencing legal proceedings against the relevant entity.

The EDO's Safe Climate (Corporate) team can help you determine which avenue is most appropriate if you are unsure. We can assist with drafting letters of enquiry or demand to companies, complaints to regulators, and, if appropriate, the commencement of legal proceedings.

## What to include in a letter of demand or complaint?

Any letter of demand to a company or complaint to a regulator should include the following:

- Details of the statements you say are false/misleading or deceptive, including links to any online documents containing the statements. Screenshots of any websites/advertisements may also be of assistance to the regulators.
- Relevant legislative or code provisions that you say the conduct may breach
- Why those statements are misleading, including any scientific or other reports that refute those statements.
- Depending on the legislative provisions you think may have been breached, explain why the conduct is 'in relation to' a financial product or financial service, and/or in trade or commerce.

- Context on why the statements are important and any impacts or harm they may have, for example, on competition/competitors and third parties/investors.
- State what you would like the company or regulator to do. If it's a company, how do you want it to rectify the conduct? If it is a regulator, do you want it to investigate the conduct and/or take enforcement action?
- If it is a complaint to a regulator, include any other issues you would like the regulator to address, including law reform. For example, you may think there is a need for clearer disclosure standards or requirements of environmental claims.

The EDO's Safe Climate (Corporate) team can provide assistance with drafting letters of enquiry or demand to companies, and complaints to regulators.

## Who can you make a complaint to?

There are various regulators who can look at corporate disclosures and misleading or deceptive conduct. While the regulators will take a limited number of cases to court, they have broad investigative and penalty powers. An investigation may result in increased clarity around a company's claims, or more prominent quantifications or disclaimers. Regulators may also seek penalties for conduct they consider to be misleading or deceptive.

Determining which regulator(s) to make a complaint to can be complex. They have different, but at times overlapping, regulatory responsibilities. If you require assistance with identifying the appropriate regulator(s) to make a complaint to, please contact the EDO's Safe Climate (Corporate) team.



## ACCC

The ACCC is responsible for enforcement of the ACL, along with State Fair Trading bodies.

The ACCC's compliance and enforcement priorities for 2022-23 include "Consumer and fair trading issues in relation to environmental claims and sustainability".<sup>26</sup> The new Chair of the ACCC has publicly commented that greenwashing and fabrications about carbon neutrality create unfair advantages for untruthful companies and mislead consumers.<sup>27</sup> She has been quoted as saying "But, also, when businesses that are genuinely investing in recyclable structures, renewable energy and expending the costs for it, if there is a competitor falsely claiming that is it, you also have unfair competition outcomes."

Complaints to the ACCC can be made here.



## GM Holden – "Every Saab is green"

In 2007, the Federal Court of Australia held that GM Holden engaged in misleading or deceptive conduct by making representations about the carbon neutrality of its Saab vehicles in an advertising campaign.

Under the headline "Grrrrrreen", Saab claimed that "Every Saab is green. Carbon emissions are neutral across the entire Saab range". The campaign was based on a promise to plant 17 native trees as a carbon offset in the first year.

The Court agreed with the ACCC's allegation that the advertisements represented to consumers that, by planting 17 native trees, GM Holden would offset the amount of CO<sub>2</sub> emitted by any Saab vehicle over its entire life cycle, when in fact:

- CO<sub>2</sub> emissions from any Saab vehicle would not be neutral over its life cycle; and
- planting 17 native trees would not provide a CO<sub>2</sub> offset for more than one year's operation of any Saab vehicle.

The Court made a declaration that the advertisements contravened s 18 of the ACL (formerly s 52 of the *Trade Practices Act 1974 (Cth)*). GM Holden also gave an undertaking to the ACCC to refrain from re-publishing the advertisement and to train Saab's marketing staff in misleading or deceptive conduct.



### Grrrrrreen.

Every Saab is green. Carbon emissions are neutral across the entire Saab range.

[CLICK HERE TO WANT TO BUY!](#)



## ASIC

ASIC regulates misleading or deceptive conduct relating to financial products and services. That is, conduct that may contravene the Corporations Act and/or the ASIC Act.

Similarly to the ACCC, ASIC's Corporate Plan for 2021-2025 outlines priorities relating to climate disclosure.<sup>28</sup> It states at page 24 of their Plan it will focus on "Climate risk governance and disclosure":

*Through targeted surveillance and external communications, influence Australian companies to adopt sophisticated governance structures that produce more nuanced and reliable climate risk disclosures Engage with peer regulators (e.g. CFR, IOSCO), industry bodies (e.g. the Australian Sustainable Finance Initiative) and the Australian Government to further Australia's regulatory response to climate risks". It also mentions priorities relating to insurance outcomes for consumers affected by natural disasters including regulatory intervention. Complaints to ASIC can be made here.*

In some circumstances it may be possible that a company is both promoting the sale of their product, and investment in their shares as a publicly listed company, so it may be worth complaining to both regulators as they both regularly discuss duplication and who is best placed to investigate such matters.



## Mercer Super – Sustainable super options

In February 2023, ASIC commenced its first court action for alleged greenwashing against Mercer Super. ASIC alleges that Mercer Super's 'Sustainable Plus' investment options were marketed as suitable for members who are 'deeply committed to sustainability' because they exclude companies involved in carbon intensive fossil fuels, alcohol production and gambling. ASIC says these representations were false and misleading because the Sustainable Plus options in fact invest in 15 companies involved in carbon intensive fossil fuels, 15 companies involved in the production of alcohol, and 19 companies involved in gambling.





## Tlou Energy – carbon neutral electricity & low emissions gas

In October 2022, ASIC issued infringement notices to Tlou Energy Ltd relating to a series of statements that Tlou published to the ASX.

ASIC alleged that the statements and images represented that:

- electricity produced by Tlou would be carbon neutral;
- Tlou had the necessary approvals to generate certain quantities of electricity from solar power;
- Tlou's gas-to-power project would be low emissions; and
- Tlou was equally concerned with producing clean energy as it was with developing its gas-to-power project.

ASIC considered that Tlou had no reasonable basis for making these representations because Tlou had not undertaken any modelling of whether achieving carbon neutral electricity was feasible, did not have the necessary approvals to produce electricity from solar, and its primary asset is a fossil fuel project and that its plans to develop clean energy were at an early stage of development. ASIC therefore considered the representations were misleading or likely to mislead. Tlou paid a \$53,280 fine on a no admissions basis.

### **ASX**

The ASX monitors and enforces compliance with the ASX Listing Rules, and ensures that statements made on the ASX do not contravene statutory misleading or deceptive conduct provisions.

Therefore, if a potentially misleading statement is made in an ASX announcement, it may be worth complaining to the regulators and the ASX.

Complaints to the ASX can be made [here](#).

### **APRA**

APRA regulates institutions across banking, insurance and superannuation in particular in relation to their financial stability. Therefore, if you are concerned about conduct by a bank, insurance company or superannuation fund, you should consider making a complaint to APRA.

Complaints to APRA can be made [here](#).

### **Advertising Standards**

Advertising Standards can receive complaints about breaches of the Australian Association of National Advertisers (**AANA**) self-regulatory system. The Environmental Claims Code has been adopted by AANA as part of advertising and marketing self-regulation. The object of the Code is to ensure advertisers maintain rigorous standards when making environmental claims. In particular, cl 1 of the Code requires environmental claims in advertising or marketing communications to not be misleading or deceptive or likely to mislead or deceive, to display disclaimers or important limitations and qualifications prominently and to represent the attributes or extent of environmental benefits or limitations in a way that can be clearly understood by a consumer. Clause 2 also requires environmental claims to be relevant and clearly explain the significance of the claim, not overstate the claim or imply the product is more socially acceptable on the whole. Clause 3 of the Code relates to substantiation and requires environmental claims to be substantiated and verifiable, as well as meeting all applicable standards and contain genuine testimonials.

Complaints under the AANA can be made [here](#).



## Australian Gas Networks – “cleaner” gas advertising

In July 2020, the Australian Advertising Standards Authority ruled that an Australian Gas Networks (AGN) billboard was misleading or deceptive based on its overall impression that cooking with natural gas is cleaner than any other method.

The billboard depicted a man holding a tray of lasagne accompanied with the headline “Greener than anything you’re cooking tonight” and the accompanying text “Love cleaner energy. Love Natural Gas.”

AGN said that the advertisement was promoting gas as a ‘cleaner’ option than electricity provided by the grid, but not necessarily the ‘cleanest’ option. Ad Standards found that this was not clear in the billboard and that many consumers would not consider gas to be greener than all other energy sources, including renewables.



### What remedies are available for misleading or deceptive conduct?

Enforcement actions brought by shareholders or other interested individuals or groups may be able to seek declarations and injunctions. In some circumstances, the conduct can also lead to damages claims/class actions. For example, Volkswagen faced both ACCC proceedings for its misleading statements about its emissions that resulted in civil penalties of \$125 million, and a class action that resulted in payments of around \$120 million to eligible motorists. In the ACCC proceedings, Volkswagen was found to have contravened s 29(1)(a) of the ACL (a provision which attracts penalties).

Regulators can seek additional penalties, including civil penalties.

#### **Declarations**

The ACCC,<sup>29</sup> ASIC,<sup>30</sup> and any interested person<sup>31</sup> can seek a declaration from the Federal Court that a corporation engaged in misleading or deceptive conduct, including identifying how and why the conduct was misleading. For example, the Court could declare that the representation that ‘gas helps to reduce emissions’ is misleading and state how and why that is the case. The purpose of a declaration is to record the Court’s disapproval of the corporation’s conduct, deter others from engaging in similar conduct and to inform consumers about the conduct.

#### **Injunctions**

The ACCC,<sup>32</sup> ASIC,<sup>33</sup> and any interested person<sup>34</sup> can seek an injunction from the Federal Court restraining a corporation from engaging in misleading or deceptive conduct. For example, an injunction may restrain the corporation from repeating its claim that ‘gas helps to reduce emissions’.<sup>35</sup>

## Penalties

The ACCC can seek penalties for misleading or deceptive conduct.<sup>36</sup>

If the conduct is by a corporation, the Federal Court may order the greater of:<sup>37</sup>

- \$50,000,000;
- if the court can determine the value of the benefit that the corporation has obtained as a result of the contravention, 3 times the value of that benefit; or
- 30% of the annual turnover in the preceding 12 months, if the court cannot determine the benefit obtained from the contravention.

For individuals, the penalty must not exceed \$2,500,000.<sup>38</sup>

Neither s 1014H of the Corporations Act or s 12DA of the ASIC Act attract civil penalties. This means that ASIC cannot seek civil penalties for contraventions of those provisions. However, ASIC may seek penalties for contraventions of other provisions relating to false or misleading representations.<sup>39</sup>

In those circumstances, ASIC can seek the greatest of:<sup>37</sup>

- 50,000 penalty units (currently \$15.65 million);
- if the court can determine the value of the benefit that the corporation has obtained as a result of the breach, 3 times that benefit; or
- 10% of the corporation's annual turnover, capped at 2.5 million penalty units (currently \$782.5 million).

In some circumstances, misleading or deceptive conduct by silence or omission may also contravene a company's continuous disclosure obligations under the Corporations Act. If so, ASIC can seek civil penalties.<sup>38</sup> The maximum penalty for companies that breach their continuous disclosure obligations is the greater of:<sup>39</sup>

- 50,000 penalty units (currently \$15.65 million); and
- 3 times the benefit obtained, or the detriment avoided, as a result of the contravention; and
- 10% of the company's annual turnover capped at 2.5 million penalty units (currently \$782.5 million).

For individuals, the maximum penalty is the greater of:<sup>40</sup>

- 5000 penalty units; and
- 3 times the benefit obtained, or the detriment avoided, as a result of the contravention.



# References

- <sup>1</sup> *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 319 [25] (French CJ)
- <sup>2</sup> citing *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2015] FCA 1263; [2016] ATPR 42-523 at [40] (Foster J) and endorsed in *Viagogo AG v ACCC* [2022] FCAFC 87 at [45].
- <sup>3</sup> *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20, which concerned a prominent advertisement about unlimited downloads that was subject to significant limitations only disclosed in fine print.
- <sup>4</sup> ACL s 4(1), Corporations Act s 769C, ASIC Act
- <sup>5</sup> *Unilever Australia Ltd v Beiersdorf Australia Ltd* [2018] FCA 2076, [407].
- <sup>6</sup> *ACCC v Woolworths Group Ltd* [2020] FCAFC 162, [132].
- <sup>7</sup> *ACCC v Woolworths Group Ltd* [2020] FCAFC 162.
- <sup>8</sup> *ACCC v Volkswagen* [2019] FCA 2166, in which the Court awarded a \$125 million penalty for the conduct.
- <sup>9</sup> The ACCC was concerned that carbon absorbed when first planted is small and the offsets are only maximised when fully grown—<https://www.accc.gov.au/media-release/v8-supercars-corrects-carbon-emissions-claims>.
- <sup>10</sup> *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621
- <sup>11</sup> *Murphy v State of Victoria (No 2)* [2014] VSC 404 Morling J citing *Glorie v WA Chip and Pulp Co Pty Ltd* [1981] FCA 244
- <sup>12</sup> *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594
- <sup>13</sup> *Ibid.* at [603]-[604]
- <sup>14</sup> *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 (Tobacco Case).  
See also *Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Limited* [2014] FCA 1412
- <sup>15</sup> *Glorie v WA Chip and Pulp Co. Pty Limited and George W Kelly* [1981] FCA 244
- <sup>16</sup> *Tobacco case* Op cit. 4
- <sup>17</sup> *Street and Others v Luna Park Sydney Pty Limited and Others* (2009) 223 FLR 245, 300-301 [215] citing *Village Building Co Ltd v Canberra International Airport Pty Ltd* (2004) 134 FCR 422, 439 [62].
- <sup>18</sup> *Village Building Co Ltd v Canberra International Airport Pty Ltd* [2004] FCAFC 240; 139 FCR 330; 210 ALR 114
- <sup>19</sup> *Firewatch Australia Pty Ltd v Country Fire Authority* (1999) 93 FCR 520, 543 [62], cited approvingly in *New Cap Reinsurance Corporation Ltd v Daya* (2008) 216 FLR, 136 [49].
- <sup>20</sup> In 2018, the term ‘financial service’ in s 12DA of the ASIC Act was amended to include a ‘financial product’, with the result that s 12DA of the ASIC Act also applies to conduct ‘in relation to’ a ‘financial product’: ASIC Act s 12BAB(1AA); Revised Explanatory Memorandum, *Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018* (Cth) 17.
- <sup>21</sup> Corporations Act s 764A(1); ACL s 2; ASIC Act s 12BAA(7).
- <sup>22</sup> *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211, 213-214 [6]-[9] (Finkelstein J), 223 [76] (Jacobson and Gordon JJ).
- <sup>23</sup> *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211, 215 [12].
- <sup>24</sup> *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201.
- <sup>25</sup> Competition and Consumer Act 2010 (Cth) s 131A(1); *Clifford v Vegas Enterprises Pty Ltd and Others (No 5)* (2010) 272 ALR 198, 209 [53]-[55].
- <sup>26</sup> *Competition and Consumer Act 2010* (Cth) s 131A(1); *Clifford v Vegas Enterprises Pty Ltd and Others (No 5)* (2010) 272 ALR 198, 209 [53]-[55].
- <sup>27</sup> <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>
- <sup>28</sup> “‘Sham’ carbon credits, banks in ACCC’s sights” *Australian Financial Review*, 26 March 2022 found at <https://www.afr.com/policy/energy-and-climate/sham-carbon-credits-banks-in-accc-s-sights-20220324-p5a7k>

29 <https://download.asic.gov.au/media/qzcaljce/asic-corporate-plan-2021-25-focus-2021-22-published-26-august-2021.pdf>

30 Federal Court of Australia Act 1976 (Cth) (FCAA), s 21

31 Corporations Act, s 1101B(1)(a); ASIC Act, s 12GBA.

32 FCAA, s 21

33 ACL, s 232

34 ASIC Act, s 12GD(1)

35 Corporations Act, s 1324

36 ACL, s 232(4); Corporations Act 2006 (Cth), s 1101B(1)(b).

37 Note that s 224 applies to breaches of ss 29 and 33 of the ACL but not s 18. However, because there is significant overlap between the provisions, conduct which amounts to a breach of s 18 may also amount to a breach of ss 29 and/or 33.

38 ACL, s 224(3A)

39 ALC, s 224(3) (Item 1)

40 ASIC Act, s 12DB

41 ASIC Act, s 12GBCA(2)

42 Corporations Act, ss 674 and 1317E.

43 Corporations Act, s 1317G(4)

44 Corporations Act, s 1317G(3).



Environmental  
Defenders Office

Opening Hours: Monday – Friday 9am-5pm

**T** +61 2 9262 6989    **E** [info@edo.org.au](mailto:info@edo.org.au)

**F** +61 2 9264 2414    **W** [edo.org.au](http://edo.org.au)

Suite 8.02, Level 8, 6 O'Connell Street  
Sydney, NSW 2000

ABN: 72002 880 864