



Environmental
Defenders Office

**Submission to the Senate Standing Committees on
Environment and Communications on Greenwashing**

9 June 2023

About EDO

Environmental Defenders Office (**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 non-government 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.

EDO is a legal centre dedicated to protecting the environment.

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EXECUTIVE SUMMARY

EDO welcomes the opportunity to comment on the Senate Standing Committee on Environment and Communications' inquiry into greenwashing.

As part of a national community legal centre specialising in public interest environmental law, the work of the EDO Safe Climate (Corporate and Commercial) lawyers includes examining potential greenwashing and related conduct.

A record number of businesses are making pledges and claims in response to the growing demand for strong climate action from government and industry. With this comes a corresponding boom in companies greenwashing their environmental and sustainability credentials.

In particular, EDO has observed a significant increase in concern about misleading climate claims, as well as other greenwashing claims concerning biodiversity and the environment more broadly. As a result, we have assisted clients in lodging over 9 complaints in relation to greenwashing across several industries to either the Australian Securities and Investments Commission (**ASIC**), the Australian Competition and Consumer Commission (**ACCC**) or Australian Advertising Standards Authority (**Ad Standards**).¹ Further, we are currently representing a client in ongoing litigation in the Federal Court alleging misleading or deceptive conduct related to environmental claims.²

Greenwashing erodes consumer confidence, public trust and distorts competition. Moreover, greenwashing unfairly diverts investment away from products and services that may support a more sustainable future.

In the context of an urgent triple planetary crisis – of climate change, pollution and biodiversity loss as recognised by the United Nations³ – and resonating calls for immediate and drastic action to address this crisis, it is essential that strong efforts are made at institutional and organisational levels to curb greenwashing.

We set out **below** a summary of our key recommendations and detailed responses to the issues identified in the terms of reference (**ToR**).

KEY RECOMMENDATIONS

Recommendation 1: The introduction of legally enforceable standards on environmental and sustainability claims, which:

¹ See Environmental Defenders Office, Corporate greenwashing (Web Page) <<https://www.edo.org.au/corporate-greenwashing/>>.

² *Australasian Centre for Corporate Responsibility v Santos Ltd* (NSD858/2021).

³ See, for example, *United Nations Climate Change*, 'What is the Triple Planetary Crisis?' (13 April 2022) <<https://unfccc.int/blog/what-is-the-triple-planetary-crisis>>; *United Nations Environment Programme*, 'The triple planetary crisis: Forging a new relationship between people and the earth' (Speech, 14 July 2020) <<https://www.unep.org/news-and-stories/speech/triple-planetary-crisis-forging-new-relationship-between-people-and-earth>>.

- (a) set out the substantiation requirements for all environmental and sustainability claims;
- (b) for certain environmental and sustainability claims, set out the specific requirements which apply, reflecting best available scientific and technical information, including relevant international standards, and provide that uses of those claims which are inconsistent with the requirements are misleading or deceptive; and
- (c) set out the further substantiation, communication and verification requirements for the use of environmental and sustainability labels.

Recommendation 2: The adoption of mandatory disclosure requirements, incorporating as a baseline the International Sustainability Standards Board’s (**ISSB**) draft standards for climate-related disclosures, and at a minimum supplemented by:

- (a) the inclusion of “double materiality” as adopted by the European Union in December 2022;
- (a) a requirement that entities disclose their emissions on an equity basis, to improve the consistency and comparability of emissions disclosures; and
- (b) a requirement that entities use climate-related scenario analysis and pathways consistent with limiting warming to 1.5°C and disclose transition plans aligned with the Science Based Target Initiative’s Corporate Net Zero Standard and findings of the UN’s High-Level Expert Working Group on Net Zero Emissions Commitments of Non-State Entities.

Recommendation 3: Urgent review of existing certification trade marks (**CTMs**) to ensure that those CTMs are sound having regard to the principles of competition, unconscionable conduct and consumer protection, and having regard to the best available technical and scientific information.

Recommendation 4: Reforms to the mechanisms for review of certification trade marks (**CTMs**), including enabling ACCC to independently initiate a review of a CTM and to withdraw approval for a CTM or require changes to the CTM rules.

Recommendation 5: The Environmental Claims Code be updated to incorporate the whole of life cycle approach to assessing claims, in similar terms to rule 11.4 of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing. Scientific and expert advice should also be used to assess claims.

Recommendation 6: The Environmental Claims Code Practice Notes be updated to:

- (a) align with the case law on what is misleading or deceptive under the Australian Consumer Law (**ACL**), particularly in relation to the use of headline statements and the overall impression of the advertisement;

- (b) align with the case law under the ACL in relation to use of disclaimers and fine print, which state that prominent claims can still mislead even if used with disclaimers; and
- (c) ensure net zero claims are consistent with the recommendations of the UN High Level Expert Group on Net Zero Emissions Commitments of Non-State Entities report entitled “Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and regions” (**UN Expert Report**)”.

Recommendation 7: ACCC and ASIC be provided with further resources directed at the investigation of greenwashing and taking action to stop its proliferation, and further powers to take immediate action to remove misleading claims or issue warnings in relation to advertising and financial reports.

Recommendation 8: The onus of proof be reversed for applications for protective or maximum costs orders by applicants who bring proceedings in the public interest.

DETAILED RESPONSES TO TERMS OF REFERENCE

ToR (a) the environmental and sustainability claims made by companies in industries including energy, vehicles, household products and appliances, food and drink packaging, cosmetics, clothing and footwear;

In response to ToR (a) we discuss:

- the increasing prevalence of environmental and sustainability claims;
- several categories of environmental and sustainability claims which, based on our experience, are of particular concern; and
- the issue of “greenhushing”, the deliberate removal or under-communication of environmental and sustainability credentials or practices.

1. Prevalence of environmental and sustainability claims

Environmental and sustainability claims are increasingly prevalent across industries,⁴ giving rise to more significant risks of ‘greenwashing’.⁵

In 2022, ACCC undertook an internet sweep of potential greenwashing claims across 8 sectors and found that 57% of the businesses reviewed made concerning claims about their environmental or sustainability credentials.⁶

⁴ See, for example, Consumer Policy Research Centre, *The Consumer Experience of Green Claims in Australia*, December 2022, <https://cprc.org.au/wp-content/uploads/2022/12/CPRC-Green-Claims_Final.pdf>.

⁵ The ACCC has described greenwashing as environmental and sustainability claims which are false, misleading or have no reasonable basis: ACCC, 'Greenwashing by businesses in Australia – findings of ACCC's internet sweep' (Final Report, March 2023) <<https://www.accc.gov.au/about-us/publications/greenwashing-by-businesses-in-australia-findings-of-acccs-internet-sweep>>.

⁶ Ibid.

ASIC Deputy Chair Karen Chester recently stated that the regulator is dealing with an “ever-growing playing field for greenwashing” in relation to financial products and investment strategies.⁷ ASIC research has also shown that more than 400 ASX listed companies used the terms “carbon neutral” or “net zero” in their price sensitive announcements in 2022, compared to less than 50 companies in 2019.⁸

Both ACCC and ASIC have made greenwashing an enforcement priority in recent years.⁹

2. Key areas of concern

We draw attention to the following categories of environmental and sustainability claims which, based on our experience and for the reasons detailed below, we consider to be of particular concern:

- (a) claims that gas is “clean” or “cleaner” energy;
- (b) net zero claims and targets without a reasonable basis;
- (c) claims of carbon neutrality not underpinned by reasonable grounds;
- (d) claims disregarding the whole of life cycle of products or services;
- (e) positive environmental claims based on offsetting schemes;
- (f) vague claims such as “sustainable” or “ethical” which are not warranted, including overstating sustainability investment screens;
- (g) unclear uses of environmental and sustainability labels and trade marks; and
- (h) an ancillary category to environmental and sustainability claims, relating to companies overstating their concern and respect for the interests of First Nations peoples.

We note that the majority of EDO’s work in relation to greenwashing has concerned the fossil fuel industry and, as such, our observations derive primarily from that area. However, our work has also included considering certain claims made by the plastics industry, aviation industry, automotive industry, timber industry, superannuation industry and finance industry, which also inform our observations.

⁷ ASIC Deputy Chair Karen Chester, ‘ASIC and greenwashing antidotes’ (Speech, RI Australia 2023 annual conference, 10 May 2023) <<https://asic.gov.au/about-asic/news-centre/speeches/asic-and-greenwashing-antidotes/>>.

⁸ Ibid.

⁹ ASIC, ‘ASIC Enforcement Priorities 2023’ <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/>>; ACCC, ‘Compliance and enforcement policy and priorities 2023-24’, <<https://www.accc.gov.au/about-us/accc-priorities/compliance-and-enforcement-policy-and-priorities>>.

The introduction of legally enforceable standards on environmental and sustainability claims (**Recommendation 1**), together with changes to the Environmental Claims Code and Practice Notes (**Recommendations 5 and 6**) would assist in ensuring legal clarity for all stakeholders about what companies can and cannot say in environmental and sustainability claims. Together with mandatory disclosure requirements (**Recommendation 2**), companies' claims would be able to be verified and compared.

2.1. Gas is “clean” or “cleaner” claims

We are concerned by the frequency of claims that gas is a “clean” or “cleaner” energy source, that gas produces low or lower greenhouse gases, or similar.

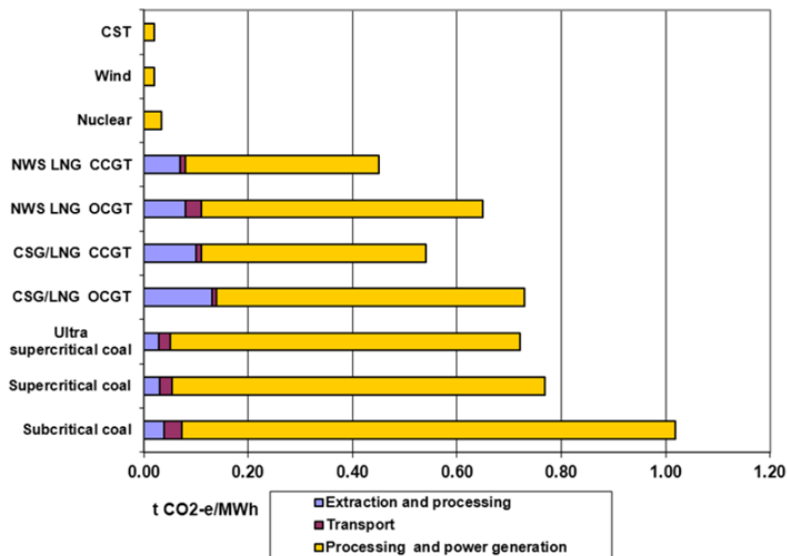
Several examples of such claims are set out at **Annexure A**.

These claims have the capacity to misrepresent the environmental and climate impacts of gas, with concerning cumulative impacts where such claims are made across the gas industry.

“Clean” is an absolute term which may represent that the extraction, production and combustion of natural gas to produce energy does not harm the environment. In fact, gas releases significant quantities of greenhouse gases, including both carbon dioxide and methane, into the atmosphere, contributing to climate change. While “cleaner” is a relative term, without contextualising the energy sources which are being compared it also has the capacity to mislead consumers. For example, gas is unlikely to be “cleaner” in comparison to renewable sources of energy which release very low amounts of greenhouse gases. While it may be arguable that gas is “cleaner” than coal in the sense that in some circumstances gas can release less greenhouse gas emissions than coal when it is combusted, gas still has a significant emissions footprint in its total life cycle. For example, the comparison of the life cycle emissions intensity of Australian LNG as compared to other energy sources is illustrated by the following diagram.¹⁰

¹⁰ Hardisty et al., ‘Life Cycle Greenhouse Gas Emissions from Electricity Generation: A Comparative Analysis of Australian Energy Sources’ (2012) 5 *Energies* 872.

Figure 7. Life cycle GHG emissions intensities for Australian fossil fuel exports, and selected renewables and nuclear, base case.



Advertising standards bodies in both Australia and overseas have made findings that these types of claims are misleading, including in the following instances.

- (a) In January 2023, the Ads Standards found that a flyer published and distributed by ATCO Gas claiming that gas “produce[s] 70% less greenhouse gas” was misleading because there are other energy sources that produce less greenhouse gases than gas.¹¹
- (b) In July 2020, Ads Standards found that an Australian Gas Networks (**AGN**) advertisement with the headline “Greener than anything you’re cooking tonight” and the accompanying text “Love cleaner energy. Love Natural Gas.” was misleading because it created the “overall impression” that “natural gas is cleaner and greener than any alternative method of cooking that [consumers] could use”, when there are other energy sources that would be considered “cleaner and greener” than gas.¹²
- (c) In September 2019, the UK Advertising Standards Authority (**UKASA**) warned Equinor not to use an advertisement with the headline “We’re the low carbon energy just over the horizon” and smaller print that stated “Equinor is Britain’s largest supplier of imported gas – and a key provider of UK wind power too”.¹³ The

¹¹ Ad Standards, *Case Report into ATCO*, (Case Report, 25 January 2023)

<<https://adstandards.com.au/sites/default/files/reports/0292-22.pdf>>.

¹² Ad Standards, *Case Report into Australian Gas Networks* (Case Report, 8 July 2020)

<<https://adstandards.com.au/sites/default/files/reports/0202-20.pdf>>.

¹³ Harry Dempsey, ‘Gas is not a ‘low-carbon fuel, UK watchdog rules’, *Financial Times* (online, 16 September 2019) <<https://www.ft.com/content/788005cc-d3e9-11e9-8367-807ebd53ab77?segmentid=acee4131-99c2-09d3-a635-873e61754ec6>>.

UKASA considered the statement to be misleading because it implied that gas was a “low-carbon energy source”.

- (d) In May 2017, the Dutch Advertising Code Authority (**DACA**) held that the Norwegian oil and gas company Equinor (formerly “Statoil”) breached Dutch advertising standards by describing natural gas as “low-emission” and the “cleanest fossil fuel” and “a relatively clean energy source”.¹⁴ In its defence, Equinor argued that “low emissions” means relative to emissions released by the combustion of other fossil fuels. The DACA considered the statements were misleading because “low emissions” and “cleanest fossil fuel” are absolute statements. It found that the statements would be taken to mean that natural gas does not harm the environment. It further found that the carbon dioxide emissions associated with natural gas cannot “come close” to renewable energy sources which do not release greenhouse gas emissions in the production of energy. In relation to the claim that gas is “a relatively clean energy source”, the DACA found that the qualification provided by the term “relatively” does not make clear it referred only to other fossil fuels, and not renewable energy sources.
- (e) In September 2008, the UKASA found that a television advertisement by ExxonMobil claiming that “natural gas is one of the world’s cleanest fuels” was misleading because it implied that natural gas is one of the cleanest sources of energy when in fact it is major contributor to greenhouse gas emissions.¹⁵

Despite these findings, similar claims continue to be made, including those examples at Annexure A. In its claim against Santos Ltd currently before the Federal Court, the Australasian Centre for Corporate Responsibility (represented by EDO) claims that Santos engaged in misleading or deceptive conduct by stating in its 2020 Annual Report that gas is “clean energy”.¹⁶

Moreover, there is a need for clear and comprehensive guidance which may not be derived from individual cases which are decided on their specific facts. For example, in 2021, Ad Standard rejected a complaint that the claim on the AGN’s website “the future of gas is renewable” was misleading as Ad Standards considered that the statement was vague and aspirational rather than an environmental claim under the Environmental Code.¹⁷

¹⁴ DACA, *Complaint into Statoil* (Complaint, 31 May 2017)

<<https://www.reclamecode.nl/uitspraken/resultaten/nutsvoorzieningen-2017-00283/188597/>>.

¹⁵ Douglas Wood, 'UK's Advertising Standards Authority Issues Green Claims Report, Decisions' (Media Release, Reed Smith, 18 September 2008)

<<https://www.adlawbyrequest.com/2008/09/articles/environmental/uks-advertising-standards-authority-issues-green-claims-report-decisions/>>.

¹⁶ Environmental Defenders Office, 'World-first Federal Court case over Santos' 'clean energy' and net zero claims' (Media Release, 26 August 2021) <<https://www.edo.org.au/2021/08/26/world-first-federal-court-case-over-santos-clean-energy-net-zero-claims/>>.

¹⁷ Ad Standards, *Case Report into Australian Gas Networks* (Case Report, 8 September 2021) <<https://adstandards.com.au/sites/default/files/reports/0248-21.pdf>>.

2.2. Net zero claims and targets

We are concerned by companies' increasingly common claims that they have a net zero commitment or target without providing sufficient details of their plans to achieve net zero.

For example, as at FY2022, 49% of ASX200 companies had net zero emissions targets, a 13% increase from the previous year.¹⁸ However, only 55% of these companies disclosed a reasonable level of detail on a plan to achieve these targets.¹⁹

Where details are provided, we have found that companies' plans are often inconsistent with the current science on net zero commitments.

We summarise below key scientific guidance on net zero commitments and set out examples of net zero claims from the fossil fuel industry, aviation and transport industry, superannuation industry, and banking and finance industry.

2.2.1. Meaning of net zero

The term "net zero" is derived from Article 4.1 of the Paris Agreement.²⁰ It requires "a state by which the greenhouse gases going into the atmosphere are reduced as close to zero as possible and any residual emissions are balanced by permanent removals from the atmosphere by 2050."²¹

The UN Expert Report provides five principles and ten recommendations to create a universal definition for net zero and standardise net zero claims. According to the UN Expert Report, "net zero" targets must:²²

- (a) include interim targets and plans to reach the targets for 2025, 2030 and 2035 which are consistent with the Intergovernmental Panel on Climate Change (IPCC) or International Energy Agency (IEA) greenhouse gas emissions modelled pathways that limit warming to 1.5°C;
- (b) include scope 1, 2 and 3 emissions across the entities' entire value chain;

¹⁸ PWC, *ESG Reporting in Australia* (2022) <<https://www.pwc.com.au/assurance/esg-reporting-in-australia-2022-.pdf>> pages 5, 7.

¹⁹ Ibid.

²⁰ Conference of the Parties, United Nations Framework Convention on Climate Change, Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Twenty-First Session, Dec 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2015) ('Adoption of the Paris Agreement').

²¹ United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions* (Report, November 2022) <https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf>.

²² Ibid.

- (c) include specific targets to end the use of and/or support for fossil fuels in line with the IPCC and IEA net zero modelled pathways that limit warming to 1.5°C, including no new fossil fuel projects or expansion of existing projects;
- (d) prioritise urgent and deep emissions reductions;
- (e) only use carbon offsets for residual emissions, and offsets cannot be counted towards an entity's interim emissions reductions required by its net zero pathway;
- (f) ensure operations and supply chains do not contribute to deforestation and the destruction of ecosystems; and
- (g) align external policy and engagement efforts with the goals of reducing global emissions by 50% by 2030 and reaching net zero by 2050, in other words lobbying for positive climate action and not lobbying against it.

The Science Based Targets Initiative (**SBTi**) has published a corporate net zero standard to provide guidance to companies to set science-based net zero targets.²³ The standard defines corporate net zero as:

- (a) reducing scope 1, 2, and 3 emissions to zero or a residual level consistent with reaching global net-zero emissions or at a sector level in eligible 1.5°C-aligned pathways; and
- (b) permanently neutralizing any residual emissions at the net-zero target year and any GHG emissions released into the atmosphere thereafter.

To contribute to societal net zero goals, companies are encouraged to go further than their science-based abatement targets to mitigate emissions beyond their value chains.

The standard sets out four key elements that make up a corporate net-zero target:

- (a) near-term science-based target: 5-10 year emission reduction targets in line with 1.5°C pathways;
- (b) long-term science-based target: target to reduce emissions to a residual level in line with 1.5°C scenarios by no later than 2050;
- (c) neutralization of any residual emissions: greenhouse gases released into the atmosphere when the company has achieved their long term science based target must be counterbalanced through the permanent removal and storage of carbon from the atmosphere; and
- (d) beyond value chain mitigation action.

²³ Science Based Targets Initiative, *SBTi Corporate Net-Zero Standard* (April 2023) <<https://sciencebasedtargets.org/resources/files/Net-Zero-Standard.pdf>>.

2.2.2. Fossil fuel industry examples

In December 2022, ASIC issued infringement notices to Black Mountain Energy concerning statements made to the ASX that its Project Valhalla gas project would be “net zero carbon emissions”. ASIC found that Black Mountain did not have a reasonable basis for making this claim because it was not supported by a detailed emissions reduction plan and did not include any emissions modelling. Further, Black Mountain’s net zero target would only apply if the business progressed to production, and it was not intended to apply to any exploratory or development activities.²⁴

In April 2023, Lock the Gate Alliance and GetUp submitted a joint complaint to ASIC and ACCC alleging certain claims by Tamboran Resources Ltd were misleading. The basis for these allegations included that Tamboran represented to support the principles of net zero including the Paris Agreement, when in fact its business plan was inconsistent with the Paris Agreement and current science on climate change including because Tamboran had plans to exploit a new gas resource in the Beetaloo Basin; its net zero pledge did not include Scope 3 emissions; it was likely to rely on offsets to achieve net zero emissions; its net zero plan did not refer to the IPCC or IEA pathways, including no interim targets; and its business activities would lead to land clearing in important ecosystems.²⁵

In October 2022, Comms Declare, represented by EDO, submitted a complaint to Ad Standards requesting that it investigate whether statements made by Shell Australia Pty Ltd (and/or Shell Energy Holdings Ltd), that its aim to “become a “net zero business by 2050” were potentially misleading.²⁶ Our client alleged that Shell’s net zero claim was misleading because: Shell was expanding its oil and gas operations and had plans to increase its LNG export capacity; its net zero target did not include all of its emissions, including emissions from its petrochemical operations; and Shell was reliant on offsets to achieve its net zero target. Ad Standards rejected the complaint on the basis that it did not breach the Environmental Claims Code.²⁷

In September 2022, Lock the Gate Alliance and the Plains Clan of the Wonnarua People, represented by EDO, submitted a complaint to ASIC and ACCC requesting it investigate whether claims made by Glencore PLC (via its Australian subsidiary Glencore Holdings Pty Ltd) were misleading or deceptive, including its claim that the company “seeks to achieve net zero total CO₂ emissions by 2050”.²⁸ Our client alleged that Glencore’s net zero claims

²⁴ ASIC, ‘23-001MR ASIC issues infringement notices to energy company for greenwashing’ (Media Release, 5 January 2023) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-001mr-asic-issues-infringement-notices-to-energy-company-for-greenwashing/>>.

²⁵ ‘Complaint regarding misleading representations by Tamboran Resources Ltd’ (5 April 2023) <https://assets.nationbuilder.com/lockthegate/pages/8241/attachments/original/1681252925/20230404_ASIC_and_ACCC_complaint_re_Tamboran_-_Lock_the_Gate_and_GetUp_%281%29.pdf?1681252925>.

²⁶ ‘Complaint about Shell Australia’ (31 October 2022) <<https://www.edo.org.au/wp-content/uploads/2023/02/Ad-Standards-Shell-Complaint-Comms-Declare.pdf>>.

²⁷ Ad Standards, *Case Report into Shell Company of Australia Ltd* (Case Report, 25 January 2023) <https://adstandards.com.au/sites/default/files/reports/0280-22_0.pdf>.

²⁸ ‘ACCC/ASIC Complaint re Glencore’ (2 September 2022) <<https://www.edo.org.au/wp-content/uploads/2023/02/Glencore-complaint-FINAL.pdf>>.

were misleading or deceptive because: Glencore is expanding its coal operations in Australia; the emissions included in its net zero target do not appear to include methane emissions; and its net zero strategy is not aligned with an IPCC or IEA 1.5 degree pathway. We understand ASIC did not investigate the matter on the basis that the Australian subsidiary Glencore Holdings Pty Ltd is not a listed entity.

2.2.3. Aviation and transport industries examples

In March 2023, Flight Free Australia, represented by EDO, submitted a request to ACCC to investigate Etihad Airways PJSC in relation to an advertisement displayed on digital billboards stating “Net zero emissions by 2050” displayed alongside the Etihad logo.²⁹ Our client alleged that Etihad’s net zero claim was potentially misleading because: Etihad intended to increase its absolute CO₂ emissions; its net zero target did not account for non-CO₂ emissions that comprise the majority of the aviation industry’s contribution to global warming; its net zero target did not appear to include Scope 3 emissions; its net zero target was inconsistent with the IPCC and IEA pathways because it intended to increase its number of flights and it did not have a credible plan for how it will achieve its net zero target.

Also in March 2023, Greenpeace Australia Pacific Ltd, represented by EDO, submitted a request to ACCC to investigate whether Toyota Motor Corporation Australia Ltd misled consumers in relation to alleged representations concerning its “net zero” claim, including that its target was not supported by a credible plan and that Toyota was actively lobbying against the introduction of new emissions standards.³⁰ Further, our client alleged that Toyota’s net zero plans were contradicted by its vehicle production plans and that the company was not seeking a rapid transition to electric vehicles.

2.2.4. Superannuation industry examples

Several examples of net zero claims made in the superannuation industry are included in **Annexure B**. Net zero claims in the superannuation industry may relate to the organisations’ own operations and / or the superannuation funds’ portfolios.

In relation to financial institutions, the UN Expert Report requires that net zero targets must include an immediate end to lending, underwriting and investing in companies planning new coal operations and phase-out policies must commit to ending the financing

²⁹ ‘Complaint about potential greenwashing by Etihad Airways PJSC’ (22 March 2023)

<<https://www.edo.org.au/wp-content/uploads/2023/04/230322-Complaint-to-ACCC-Etihad-Airways-climate-advertisements.pdf>>.

³⁰ ‘Complaint about misleading advertising by Toyota Motor Corporation Australia Ltd’ (2 March 2023)

<<https://www.greenpeace.org.au/wp/wp-content/uploads/2023/03/ACCC-Toyota-complaint-FINAL-February-2023- 1.pdf>>.

and investing in support of exploration of new oil and gas, expansion of existing reserves and oil and gas production.³¹

In 2022, EDO wrote to the trustees of HESTA and UniSuper on behalf of their respective members raising concerns that that the funds' commitments to align their portfolios with net zero emissions by 2050, and claims to be "Paris-aligned" were potentially misleading given their continued investment in Santos, and Woodside in the case of HESTA, neither of which included scope 3 emissions in their emissions reductions targets and both of which have plans to expand their fossil fuel operations.³²

Recent reports from Market Forces and ACF³³ have indicated that, as at December 2022, both HESTA and UniSuper continue to invest in fossil fuels, particularly gas.

EDO is concerned that superannuation funds may rely on a meaning of "net zero" which allows some investment in fossil fuels, which is inconsistent with the UN Expert Report and SBTi corporate net zero standard. Moreover, we are concerned that superannuation funds may not be using sufficiently rigorous investment screens to assess the companies they invest in against their own public commitments which are relied on by consumers.

2.2.5. Banking and finance industry examples

Concerns about net zero representations also arise in relation to the banking and finance industry. Banking and finance institutions frequently make public statements in support of the Paris Agreement and net zero commitments, whilst continuing to fund fossil fuel projects.

As noted above, the UN Expert Report includes specific requirements for financial institutions including an immediate end to lending to companies planning new coal operations and phase-out policies for ending financing of oil and gas exploration and expansion.³⁴

³¹ United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions* (Report, November 2022) <https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf> page 24.

³² 'Letter to HESTA Trustees Re: HESTA's Investments in Woodside and Santos may amount to a breach of the law' (4 August 2022) <<https://www.edo.org.au/wp-content/uploads/2023/02/Letter-to-HESTA-Trustees.pdf>>; 'Letter to Unisuper Trustees Re: Unisuper's Investments in Santos may amount to a breach of the law' (29 August 2022) <<https://www.edo.org.au/wp-content/uploads/2023/02/Letter-to-Unisuper-Trustees.pdf>>.

³³ Market Forces, 'The superannuation industry's \$140 billion bet on climate destruction', *The Climate Wreckers Index* (Website, 2023) <<https://www.marketforces.org.au/campaigns/super/climatewreckersindex/>>; Australian Conservation Foundation, *Superfund Disclosure Analysis* (Report, 2023) <https://assets.nationbuilder.com/auscon/pages/21868/attachments/original/1681353200/Superfund_disclosure_analysis.pdf?1681353200>.

³⁴ United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions* (Report, November 2022) <https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf> page 24.

As at 2020, the “big four” banks – ANZ, CommBank, NAB and Westpac – collectively loaned \$8.9 billion to the coal, oil and gas industry, up 18% since 2019, bringing the total amount loaned since 2016 to \$44.4 billion.³⁵

2.3. Carbon neutrality claims

We consider claims about carbon neutrality are also a key area of concern.

ACCC’s ‘Green Marketing and the Australian Consumer Law’ guide (**Green Marketing Guide**) states that claims about carbon neutrality should be factually based and not overstated. Further, the entire life cycle of a product should be considered when making claims about carbon neutrality, and that care should be taken to distinguish between offset activities that have already been undertaken and those that are planned.³⁶

We are concerned that claims about carbon neutrality are frequently made that are inconsistent with this guidance. Some examples are outlined below.

In October 2022, ASIC issued an infringement notice to Tlou Energy Ltd in relation to its statement that all electricity generated at its power station would be carbon neutral through carbon sequestration. ASIC found that this claim was misleading because Tlou had not undertaken the necessary modelling; had not undertaken studies in relation to using carbon sequestration as an offset method; and had not investigated whether it would be possible to obtain offsets or carbon credits for its proposal.³⁷

In September 2022, Comms Declare, represented by EDO, made a complaint to Ad Standards regarding an advertisement by Ampol in relation to “carbon neutral fuel”.³⁸ The complaint alleged that the fuel was not carbon neutral because its “carbon neutrality” relied solely on offsetting emissions rather than reducing emissions associated with the production or use of fuel itself. The Ad Standards panel rejected the complaint on the basis that the advertisement did not breach the Environmental Code.³⁹

In 2007, the Federal Court held that GM Holden engaged in misleading or deceptive conduct by making representations that its Saab vehicles were carbon neutral by planting 17 native trees in the first year of the car’s life.⁴⁰ The Court found that planting 17 trees would not provide a CO₂ offset for more than one year’s operation of any Saab vehicle and

³⁵ Market Forces, *Funding Climate Failure*, (Report, September 2021)

<<https://www.marketforces.org.au/campaigns/banks/bigfourscorecard/>>.

³⁶ ACCC, *Green marketing and the Australian Consumer Law* (Report, 11 March 2011)

<<https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf>>.

³⁷ ASIC, ‘22-294MR ASIC acts against greenwashing by energy company’ (27 October 2022)

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

³⁸ ‘Complaint about Ampol - Powering better journeys, today and tomorrow’ (26 August 2022)

<<https://www.edo.org.au/wp-content/uploads/2023/02/Comms-Declare-Ampol-EV-Complaint.pdf>>.

³⁹ Ad Standards, *Case Report into Ampol*, (Case Report, 14 September 2022)

<<https://adstandards.com.au/sites/default/files/reports/0209-22.pdf>>.

⁴⁰ *ACCC v GM Holden Ltd* (ACN 006 893 232) [2008] FCA 1428 [9].

that CO₂ emissions from any Saab vehicle would not be neutralised over the vehicle's lifetime.

2.4. Claims disregarding whole of life cycle

A further issue is claims made by business which do not reflect the entire life cycle of a product. For example, claims about a product generating zero emissions or being carbon neutral when such claims only consider the emissions associated with the use of the product and not the emissions associated with the production, transport or disposal of the product.

The whole life cycle should be considered in making environmental and sustainability claims, including carbon neutral claims as noted above.

This is reflected in ACCC's Green Marketing Guide which states that when making claims about a particular characteristic or part of a product, the whole product life cycle should be considered including the manufacturing, recycling, destruction and disposal process.⁴¹

Contrary to this approach, many fossil fuel producers only account for their scope 1 and 2 emissions when most emissions are scope 3 emissions which are released when the fossil fuel is combusted to generate electricity, rather than during mining or production. While a company may claim that the electricity it uses to power its mining operations is carbon neutral (depending on its source), it would be misleading to claim that the entire business is carbon neutral.

An example of potentially confusing information about whole of life cycle is electric vehicles. Nissan's website, for example, states that "electric is sustainable", using "renewable energy with solar panels can power EVs", and refers to "sustainable battery recycling".⁴² We are not aware, however, of any information accompanying these claims clarifying the emissions required to produce the vehicles, which can be emissions intensive as they require lithium-ion batteries to run. Moreover, the use of the heading "why electric is sustainable" followed by mention of "sustainable battery recycling" implies that the car batteries are being recycled after use. Consumers may assume that battery recycling is readily available when in fact, while Nissan does have a few small initiatives to recycle batteries, it acknowledges elsewhere on its website that the "industry is still in its infancy."⁴³ As it stands, only around 5% of car batteries are recycled across the

⁴¹ Australian Competition and Consumer Commission, *Green marketing and the Australian Consumer Law* (Report, 11 March 2011)

<<https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf>> page 11.

⁴² Nissan, 'Nissan EV HUB' (Web Page, 2023) accessed online at <<https://www.nissan.com.au/about-nissan/ev-hub/sustainability.html>>.

⁴³ Nissan, 'How Long Do EV Batteries Last?' (Web Page, 2023) <<https://www.nissan.com.au/about-nissan/ev-hub/technology/how-long-do-ev-batteries-last.html#ev-batteries>>.

industry which presents a major problem for ongoing sustainability as significant amounts of waste are destined for landfill.⁴⁴

2.5. Claims based on offsetting schemes

We are concerned about the prevalence of positive environmental and sustainability claims based on emissions offsetting schemes.

We have noted examples of such claims above, including in relation to net zero claims reliant on offsets (for example Lock the Gate and GetUp's complaint to ASIC and ACCC regarding Tamboran⁴⁵ and Comms Declare's complaint to Ad Standards regarding Shell Australia Pty Ltd⁴⁶), and in relation to claims of carbon neutrality reliant on offsets (for example, Comms Declare's complaint to Ad Standards regarding Ampol,⁴⁷ ASIC's infringement notice to Tlou Energy Ltd,⁴⁸ and the Federal Court's findings in relation to GM Holden⁴⁹).

There is a fundamental difference between a company *reducing* its emissions and *offsetting* its emissions. Reducing emissions means reducing the quantity of greenhouse gases released into the atmosphere whereas offsetting emissions involves offsetting greenhouse gas emissions that have already been released. Offsetting schemes allow individuals and companies to invest in projects to balance their own greenhouse gas emissions. The projects may develop clean energy technologies for the future or absorb carbon dioxide directly from the air through tree planting, through which the owner of the project earns carbon credits.

Claims that a company has or is planning on reducing its emissions should not be based on offsets, but rather on actual reductions. This issue often arises in the context of net zero claims. For example, in current proceedings against Santos, ACCR alleges that Santos engaged in misleading or deceptive conduct by, amongst other things, failing to disclose the extent to which its net zero plan relies on the use of offsets.⁵⁰ As noted above, the SBTi does not accept the use of offsets under its net zero standard to contribute to near-term emissions reduction targets, with credits only being accepted in relation to the neutralisation of residual emissions or to finance additional climate mitigation beyond

⁴⁴ Emma Woollacott, 'Electric Cars: What Will Happen to All the Dead Batteries' *British Broadcasting Corporation* (Article, 27 April 2021) <<https://www.bbc.com/news/business-56574779>>.

⁴⁵ 'Complaint regarding misleading representations by Tamboran Resources Ltd' (5 April 2023) <https://assets.nationbuilder.com/lockthegate/pages/8241/attachments/original/1681252925/20230404_ASIC_and_ACCC_complaint_re_Tamboran_-_Lock_the_Gate_and_GetUp_%281%29.pdf?1681252925>.

⁴⁶ Ad Standards, *Case Report into Shell Company of Australia Ltd* (Case Report, 25 January 2023) <https://adstandards.com.au/sites/default/files/reports/0280-22_0.pdf>.

⁴⁷ 'Complaint about Ampol - Powering better journeys, today and tomorrow' (26 August 2022) <<https://www.edo.org.au/wp-content/uploads/2023/02/Comms-Declare-Ampol-EV-Complaint.pdf>>.

⁴⁸ ASIC, '22-294MR ASIC acts against greenwashing by energy company' (27 October 2022) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-294mr-asic-acts-against-greenwashing-by-energy-company/>>.

⁴⁹ *ACCC v GM Holden Ltd* (ACN 006 893 232) [2008] FCA 1428 [9].

⁵⁰ *Australasian Centre for Corporate Responsibility v Santos Ltd* (NSD858/2021).

absolute reduction targets.⁵¹ Similarly, the UN Expert Report does not allow net zero plans to rely on offsets except for residual emissions.⁵²

A further issue related to offsets is the integrity and credibility of offsets. Offsets vary in quality and effectiveness.⁵³ For example, growing trees reduces less carbon than ensuring old forests remain unlogged.⁵⁴ There are also issues associated with ensuring forests remain as carbon sinks, with the impacts of climate change leading to greater bushfires which jeopardises the permanency of the projects.⁵⁵ Integrity issues with the Australian carbon credit units (**ACCU**) methodologies have been raised by Professor Andrew Macintosh, who voiced concerns that companies were earning ACCUs for not clearing forests that were never going to be cleared and for planting trees that were already there.⁵⁶ The Australian Academy of Science recently reviewed the four ACCU generating methods criticised by Professor Macintosh and found similar issues with the ACCU methodologies.⁵⁷

There are similar concerns in relation to the international carbon market which has no unified governance structures or common accounting and verification standards and is highly fragmented as a result.⁵⁸

⁵¹ Science Based Targets Initiative, 'Does the SBTi accept all approaches to reducing emissions?', FAQs (Webpage, 2023) <<https://sciencebasedtargets.org/faqs#does-the-sbti-accept-all-approaches-to-reducing-emissions>>.

⁵² United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions* (Report, November 2022) <https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf>.

⁵³ Carbon Offset Guide, *Concerns About Carbon Offset Quality Examples of Criticisms* (Webpage, 2023) <<https://www.offsetguide.org/concerns-about-carbon-offset-quality/>>; Climate Social Science Network, 'CSSN Position Paper: Net Zero, Carbon Removal and the Limitations of Carbon Offsetting', *CSSN Position Paper: Net Zero, Carbon Removal and the Limitations of Carbon Offsetting* (Briefing, 13 June 2022) <<https://cssn.org/cssn-position-paper-net-zero-carbon-removal-and-the-limitations-of-carbon-offsetting/>>.

⁵⁴ Waring et al, 'Forests and Decarbonization – Roles of Natural and Planted Forests' (2020) 3(58) *Frontiers in Forests and Global Change* 1, page 3.

⁵⁵ Michael Tausz and Rob MacKenzie, 'Using forests to manage carbon: a heated debate', *The Conversation* (online, 25 July 2017) <https://theconversation.com/using-forests-to-manage-carbon-a-heated-debate-81363>>.

⁵⁶ Australian National University, 'Australia's carbon market a fraud on the environment' (Media Release, 24 March 2022) <<https://law.anu.edu.au/news-and-events/news/australia%E2%80%99s-carbon-market-fraud-environment>>.

⁵⁷ Australian Academy of Science, *Review of Four Methods for Generating Australian Carbon Credits Units* (Report, October 2022) <<https://www.science.org.au/files/userfiles/support/reports-and-plans/2022/review-of-four-accu-methods-october-2022.pdf>>.

⁵⁸ For example, research into Verra offsets revealed that 90% of rainforest offsets are worthless and do not provide any beneficial carbon impacts: Patrick Greenfield, 'Revealed: more than 90% of rainforest carbon offsets by biggest certifier are worthless, analysis shows', *The Guardian* (online, 19 January 2023) <<https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe>>. An investigation into offsets sold by an American company NIHT Inc to businesses in Australia found that logging was taking place on part of NIHT's dedicated carbon project, the land its offsets were linked to protecting: ABC, 'Carbon Colonialism' (14 February 2023) <<https://www.abc.net.au/news/2023-02-14/carbon-credits-projects-papua-new-guinea-logging-four-corners/101936714>>.

2.6. Vague sustainable or ethical claims

There are numerous examples of companies making vague claims about their sustainability or ethical credentials or general green image. Several examples of vague environmental and sustainability claims on companies' websites are included at **Annexure C**.

We are concerned that such broad terms have the potential to mislead where they do not have a commonly accepted definition and where insufficient substantiation information is required and made available to consumers.

In 2008, the UKASA found that an advertisement by Shell representing that an oil project was "sustainable" was misleading.⁵⁹ The advertisement 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.

Another example of broad representations about a company's positive impact without adequate details is the concerns raised by Lock the Gate, Comms Declare and the Plains Clan of Wonnarua People, represented by EDO, in complaint to Ad Standards regarding Glencore's advertising campaign "Advancing everyday life" (a copy of which is at **Annexure D**). Our clients alleged Glencore made misleading statements in advertising Glencore's mining of essential minerals that it claimed were "laying the foundation for a low-carbon future" whilst not disclosing that its current mining operations, and capital investment, are focused on coal production and the expansion of its coal operations. Our clients alleged that the campaign was misleading because most of Glencore's coal mines are expected to operate until 2040, with new mines currently in development, and that Glencore's transition to a focus on renewables will take considerable time. The Ad Standards panel found that the advertisement did not breach the Environmental Code.⁶⁰

We have observed a prevalence of vague claims of this nature in the superannuation industry. Several examples of such claims made in the superannuation industry are included in **Annexure B**.

We are concerned that in many instances there is not a sufficient evidence base for these claims to be made and that companies may be overstating their investment screens.

In March 2023, ASIC commenced proceedings against Mercer Superannuation (Australia) Limited in relation to statements on Mercer's website about its "Sustainable Plus"

⁵⁹ World Wildlife Fund, 'Advertising not sustainable, authority tells Shell' (Media Release, 13 August 2008) <[Advertising not sustainable, authority tells Shell | WWF](#)>.

⁶⁰ Ad Standards, 'Case Report into Glencore Australia Holdings Pty Limited' (Report, 28 September 2022) <<https://adstandards.com.au/sites/default/files/reports/0224-22.pdf>>.

investments options.⁶¹ ASIC alleges that Mercer misled prospective members of the Sustainable Plus option by claiming on its website that it excluded investments in companies involved in fossil fuels, and those involved in alcohol production and gambling, and that the Sustainable Plus options were suitable for members who “are deeply committed to sustainability”. However, ASIC alleges that the Sustainable Plus funds held stocks in companies involved in fossil fuels and across the alcohol and gambling industries.

In May 2023, ASIC issued an infringement notice to Future Super for a post on its Facebook page which talked about investors moving nearly \$400m out of fossil fuels. At the time of the post, Future Super had approximately \$400m in total funds under management and had no basis to represent that the entirety of those funds had previously been invested in fossil fuels. ASIC said Future Super had “overstated the positive environmental impact of the fund” in a way which could be misleading for investors and potential investors.⁶²

2.6.1. Sustainable finance

A subset of these claims is those relating specifically to “sustainable finance”, the process of taking environmental, social and governance considerations into account when making investment decisions within the finance industry. This enables both lenders and borrowers to use “sustainable” financing for marketing purposes – borrowers may claim that their business is transitioning to be more “sustainable”, and lenders may claim that a certain percentage of its loans are “sustainable”.

An industry body, the Australian Sustainable Finance Institute (**ASFI**), is currently developing an Australian sustainable finance taxonomy (**Taxonomy**) which is being co-funded by the Commonwealth government. EDO is concerned that the advisory group overseeing the proposed Taxonomy is comprised almost entirely of financial market participants which may not be sufficiently independent to facilitate a robust taxonomy design process and presents a real risk that the definition of “sustainable” will not be based in climate science. For example, the EU Taxonomy has been criticised for classifying natural gas as “sustainable”⁶³, which is now being challenged by environmental groups.⁶⁴ EDO is also concerned that sustainable finance (such as green bonds) may be provided to a business’s “sustainable” activities despite participating in other activities

⁶¹ ASIC, ‘23-043MR ASIC launches first Court proceedings alleging greenwashing’ (Media Release, 28 February 2023) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-043mr-asic-launches-first-court-proceedings-alleging-greenwashing/>>.

⁶² ASIC, ‘23-110MR ASIC issues infringement notice to superannuation fund promoter for greenwashing’ (Media Release, 2 May 2023) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-110mr-asic-issues-infringement-notice-to-superannuation-fund-promoter-for-greenwashing/>>.

⁶³ ClientEarth, ‘What’s wrong with the EU’s new green investment rules?’ (Press Release, 29 September 2022) <<https://www.clientearth.org/latest/latest-updates/news/what-s-wrong-with-the-eu-s-new-green-investment-rules/>>.

⁶⁴ ClientEarth, ‘EU Taxonomy: Environmental groups condemn Commission’s commitment to ‘sustainable’ label for fossil gas’ (Press Release, 9 February 2023) <<https://www.clientearth.org/latest/press-office/press/eu-taxonomy-environmental-groups-condemn-commission-s-commitment-to-sustainable-label-for-fossil-gas/>>.

that are not sustainable. Since money is fungible, this would enable fossil fuel companies to use preferential sustainable capital to fund renewable aspects of their business, such as wind farms to power their operations, whilst redirecting capital to fund their fossil fuel expansion activities.

We consider that, to be credible, the Taxonomy must be consistent with science-based guidance such as the SBTi and the UN Expert Report and should be developed with expert scientists.

2.7. Environmental and sustainability labels and trade marks

EDO has observed an increasing proliferation of environmental and sustainability claims made in the form of labels. The labels are often in a form of a trust mark, quality mark or equivalent setting apart and promoting a product, service or business with reference to its environmental or sustainable aspects. These labels are sometimes based on certification schemes which certify that a product, service or business meets the requirements set up by the scheme. These also include certification trade marks (**CTMs**), specific trade marks which have rules about how the mark can be used and require ACCC approval prior to registration and for variation of the CTM rules.⁶⁵

ACCC's report on its recent greenwashing internet sweep noted concerns that businesses were using their certifications in a misleading or confusing way.⁶⁶ Several businesses reviewed throughout ACCC's sweep who claimed affiliation with certification schemes did not describe the nature of the certification scheme, or how it applied to their product or business.⁶⁷

We have worked with clients who are concerned about the potentially misleading or deceptive nature of certain environmental and sustainability labels. For example, our client the Australia Institute recently lodged a complaint with ACCC alleging misleading representations by Climate Active about the Climate Active trade mark program.⁶⁸ The complaint raised concerns that consumers may be misled into thinking that companies using the Climate Active trade mark have met a higher threshold than is required by the certification scheme.⁶⁹

Another EDO client, Tangaroa Blue Foundation, also lodged a complaint with the ACCC which raised concerns in relation to the use of the terms "ocean plastic" and "ocean bound plastic" without communicating an exact definition (a copy of which is at **Annexure E**). The

⁶⁵ *Trade Marks Act 1995* (Cth), s173. ACCC approval is also required to assign a CTM to a new owner: sections 180, 181.

⁶⁶ 'Greenwashing by businesses in Australia- findings of ACCC's internet sweep' (Final Report, March 2023) <<https://www.accc.gov.au/about-us/publications/greenwashing-by-businesses-in-australia-findings-of-acccs-internet-sweep>>.

⁶⁷ Ibid.

⁶⁸ 'Climate Active trademarks – carbon neutral claims' (February 2023) <<https://australiainstitute.org.au/wp-content/uploads/2023/02/Australia-Institute-complaint-Climate-Active-WEB.pdf>>.

⁶⁹ We note that the Climate Active trade mark has a pending application to register the Climate Active Carbon Neutral mark as a certification trade mark.

complaint noted that the industry definition of “ocean bound plastic” may be at odds with what ordinary consumers understand the term to mean, for example plastic already in the ocean or shoreline. The plastics industry has defined ocean bound plastics as “any plastics located within 50km from shores where waste management is inefficient and therefore could end up in the ocean”.¹⁰

Issues with industry generated standards which may not align with consumer expectations were also raised in the case of *ACCC v Kimberley-Clark Australia Pty Ltd*,⁷⁰ which concerned, in part, allegedly misleading representations in relation to “flushable” Kleenex wipes. Kimberley-Clark Australia assessed the flushability of the Kleenex wipes against guidelines published by the disposables industry’s international bodies entitled “Guidelines for Assessing the Flushability of Disposable Nonwoven Products” and found that the wipes satisfied the criteria set out in the guidelines. While the court dismissed the element of the ACCC’s case regarding “flushable” representations, on the basis that the ACCC was required to prove that the Kleenex Wipes had in fact caused or contributed to real harm in particular instances, the Full Federal Court recognised concerns about environmental harm, noting that:

“Blockages and fatbergs pose what has become an increasing problem for households and municipal wastewater authorities. One response would be to introduce legislation or standards governing the characteristics of what can and what cannot be marketed or sold as ‘flushable’.”

We also note the concerns which have been raised by various interest groups in relation to certifications used in the salmon industry.⁷¹ The Aquaculture Stewardship Council (**ASC**) certification scheme was founded in 2010 by the salmon industry and global conservation group World Wide Fund for Nature (**WWF**). WWF recognised ASC certification as the “highest global standard available international for responsibly farmed seafood; providing credible, third-party validation for practices which reduce impacts on the marine environment, protecting local surroundings and wildlife, and supporting local communities.”⁷² However, there were issues with the clarity of what the certification represented to consumers alongside concerns about the rigour and transparency of audit processes. Salmon producer Tassal lost certification after more than 1.3 million salmon and trout died in its Macquarie Harbour farms in 2018. A review following the 2018 events, commissioned by WWF, found the ASC certification scheme had been successfully

⁷⁰ [2019] FCA 992 (first instance); *ACCC v Kimberley-Clark Australia Pty Ltd* [2020] FCAFC 107 (Full Federal Court appeal).

⁷¹ See, for example, ‘Letter re ASC Farm Standard Public Consultation V, Criterion 2.1 Intermediate Sites’ (30 April 2022) <<https://www.seachoice.org/wp-content/uploads/2022/05/ASC-Interim-Farm-Standard-stakeholder-letter-FINAL.pdf>>.

⁷² See Tassal, ‘Tassal announces a global first in responsible aquaculture’ (Media Release, 15 November 2014) <<https://www.asx.com.au/asxpdf/20141117/pdf/42trf3dr3srph5.pdf>>.

implemented, but the ASC standard had not been set up to “avoid” or “prevent” adverse situations occurring in the first place.⁷³

An example of a CTM which in our view may raise concerns relevant to greenwashing is the Responsible Wood CTM, which is said to help companies and consumers identify and promote materials from sustainably managed forests.⁷⁴ We are concerned that the use of the word “responsible” in the CTM may have the potential to mislead consumers. Contrary to what consumers may expect when they see the words “Responsible Wood” on an end product, the certification rules do not certify ethical practices but, similar to the salmon certification example above, a sustainable forest management *system* which is based on general criteria developed by Responsible Wood. For example, a report from a Responsible Wood certifier BSI Australia found no nonconformance with the CTM in relation to VicForests despite a finding in the Federal Court that VicForests past and proposed logging breached Victorian logging laws.⁷⁵ Forestry Corporation of NSW has also retained its certification despite significant prosecution by the Environmental Protection Agency in recent years, including for breaching conditions of its integrated forestry operations approval,⁷⁶ breaching conditions of a biodiversity licence⁷⁷ and breaching conditions of a threatened species licence.⁷⁸

2.8. Claims relating to First Nations Peoples

We also note our concerns about an ancillary category to environmental and sustainability claims, relating to companies overstating their concern and respect for First Nations Peoples. We are concerned about claims which represent that a company is respectful of the customs, interests and rights of First Nations Peoples to bolster their environmental, social and governance credentials in circumstances where their corporate behaviour is inconsistent with those claims.

We raise these concerns here as, in our experience, they are often made alongside or in a similar way to potential greenwashing claims.

For example, in its complaint to ACCC and ASIC in relation to Glencore (see above at 2.2.2), EDO’s clients also alleged that Glencore’s claim to recognise and respect the role of First

⁷³ Seafood Advisory Ltd, ‘Review of Eco-labelling Standards in Relation to Salmon Farming in Macquarie Harbour (commissioned by World Wide Fund for Nature)’ (Report, 1 September 2021) <https://assets.wwf.org.au/image/upload/v1/website-media/resources/Review-of-Ecostandards-for-salmon-farming-in-MH_1Sept2021?_a=ATO2Bfg0>.

⁷⁴ We also note the International Consortium of Investigative Journalists’ findings that environmental auditing and certification programs intended to promote responsible forestry and other social goals frequently validate products linked to deforestation, logging in conflict zones and other harmful activity. Although the investigation did not include specific findings in relation to Australia, we are concerned that similar issues may also arise.

⁷⁵ *VicForests v Friends of Leadebeater’s Possum Inc* [2021] FCAFC 66.

⁷⁶ *Environment Protection Authority v Forestry Corporation of NSW* [2022] NSWLEC 75.

⁷⁷ *Environment Protection Authority v Forestry Corporation of New South Wales* [2022] NSWLEC 70.

⁷⁸ *Chief Environmental Regulator of the Environment Protection Authority v The Forestry Corporation of New South Wales* [2017] NSWLEC 132.

Nations Peoples was inconsistent with its corporate behaviour.⁷⁹ EDO’s clients alleged that Glencore ran an advertising campaign against the relevant Aboriginal Corporation and two Elders which represented that, in exercise of their right to protect a significant cultural heritage site, they were attempting to stop mining and other industry activities in the Hunter Valley and were making inaccurate claims about the sites impacted by the proposed mine expansion. Copies of the relevant advertisement run in the Hunter Valley Times in are included at **Annexure F**.

3. Greenhushing

In the context of increasing scrutiny of greenwashing, it is also important to raise a related issue of “greenhushing”. Greenhushing refers to the practice of a company purposively retracting or qualifying its public commitments to climate action and sustainability to avoid scrutiny and potential allegations of greenwashing.

For example, following ASIC commencing proceedings against Mercer, UniSuper removed 16 pages from its 2022 Climate Risk Report that referred to its commitments to continually improve its emissions disclosure and pathway to net zero, how it calculates the carbon footprint for investment options and how it calculates its carbon intensity. Active Super removed its 70-page Responsible Investment Report on 2 March 2023 showing how its portfolio was assessed for ESG risk and AustralianSuper deleted both its Climate Report and its “Net Zero by 2050” factsheet from its website, followed by edits to its “How we invest: Climate change” webpage.⁸⁰

In 2022, Swiss carbon finance consultancy, South Pole, released an international report that found nearly a quarter of the 1,200 companies surveyed have decided not to talk about their net zero commitments at all.⁸¹

ASIC Chair Joe Longo has described this conduct as “another form of greenwashing; an attempt to garner a ‘green halo’ effect without having to do the work.”⁸² In order to ensure fairness and transparency, therefore, it is essential that disclosure obligations are pursued alongside increased regulation targeted at eliminating greenwashing (**Recommendation 2**).

⁷⁹ ‘ACCC/ASIC Complaint re Glencore’ (2 September 2022) <<https://www.edo.org.au/wp-content/uploads/2023/02/Glencore-complaint-FINAL.pdf>>.

⁸⁰ *Australian Financial Review*, ‘Super funds delete climate commitments’ (26 March 2023) <<https://www.afr.com/rear-window/super-funds-delete-climate-commitments-20230326-p5cva5>>.

⁸¹ South Pole, *Net Zero And Beyond: South Pole’s 2022 Net Zero Report* (2022) <<https://www.southpole.com/publications/net-zero-and-beyond>>.

⁸² ASIC Chair Joe Longo, ‘ASIC Chair’s AFR ESG Summit Speech’ (Speech, AFR ESG Summit, 5 June 2023) <[ASIC Chair’s AFR ESG Summit speech | ASIC](#)>.

ToR (b) the impact of misleading environmental and sustainability claims on consumers;

In response to ToR (b) we discuss the impacts of misleading environmental and sustainability claims on consumers, as well as on competition.

Impacts of misleading environmental and sustainability claims on consumers are far reaching. From an inability to make informed purchasing and investment decisions due to vague or ambiguous language, a lack of evidence in support of claims, or the misuse of CTMs, to a loss of consumer confidence due to breaches of trust or watering down of standards. Competition may also be skewed, as businesses who are compliant may be detrimentally impacted with the resulting disincentive to invest in sustainability.

A recent report produced by the Consumer Policy Research Centre (**CPRC**)⁸³ found:

- 45% of Australians always, or often consider sustainability in their decision making;
- 69% of people said they were likely to trust a green claim that had a CTM with it;
- 45% of Australians think a trusted third party checks green claims before they are used, either government, industry associations or Ad Standards;
- at least 50% of people worry about the truthfulness of these green claims; and
- 47% of consumers said they would stop buying from a business if they found the business had engaged in greenwashing.

These statistics indicate the reliance consumers place on representations made by corporations in relation to environmental performance and sustainability claims when deciding whether to purchase goods and services or make financial investments.

The impacts of misleading environmental and sustainability claims on consumers include:

- Consumers cannot readily verify the accuracy of a business' environmental credentials and must trust the claims or impressions made. Misleading, meaningless, or unclear claims breach consumer trust and hurt confidence in both the claim itself and sustainability claims in general.
- Consumers generally pay a premium for ethical and environmentally sustainable goods and services and, where false or misleading claims are made, may be exposed to unjustified greater costs for goods and services that do not fulfil those claims.
- Effective competition is undermined as businesses that are genuinely making efforts to improve are likely to have increased costs compared to businesses making the claims but not actually improving their products or processes. These misleading practices can also create a disincentive for businesses to invest in

⁸³ Consumer Policy Research Centre, 'The consumer experience of green claims in Australia' (Report, December 2022) <https://cprc.org.au/wp-content/uploads/2022/12/CPRC-Green-Claims_Final.pdf>.

sustainability. ASIC has described greenwashing as a “corrosive agent to market integrity and thus to fair, efficient and informed markets.”⁸⁴

As noted above, ACCC’s recent greenwashing internet sweep found that 57% of all businesses reviewed were making concerning environmental claims. The review found that some businesses are using vague or unclear claims; insufficient evidence is used to clarify or substantiate claims; goals are being set without clear plans on how they will be achieved; and businesses are using third-party certifications and symbols in a confusing way.⁸⁵

The use of vague language and imagery has little value for consumers with the ambiguity making it difficult for consumers to make informed purchasing decisions. The use of undefined or unqualified terms and claims leads to confusion and a loss of consumer confidence in the claims being made. The lack of specificity and detail makes it difficult for consumers to undertake comparative analysis of products to make an informed decision. Environmental and sustainability claims that are unsupported, either by data or clear implementation plans, mean consumers are unable to verify the accuracy of the claims. They must therefore trust that the representations made are accurate. As noted above, 69% of consumers will trust a product with a CTM and 45% of consumers assume the representations have been checked by a trusted third party. It is therefore essential that claims are not misleading as this would have a detrimental impact on many consumers.

In relation to CTMs, the review found that some businesses were broadly referring to certification without identifying whether the certification applied to all products, certain products, or to the overall operations of the business. These broad, unqualified statements can be misleading and confusing for consumers. Without sufficient information consumers are unable to test the veracity of the claims in a way that is necessary to make fully informed decisions when making the decision to purchase the goods, services or make an investment.

Further, the ACCC review found some businesses create their own certification schemes for their own products. Additionally, some businesses were using imagery, symbols and logos which appeared to be a CTM. This use of self-certification and misleading imagery may result in CTMs becoming meaningless, no longer assisting consumers to distinguish between products. As noted above, consumers rely on CTMs when making decisions for purchasing and investing. The watering down of these standards breaches consumer trust and hurts consumer confidence in the certification process. Further, it undermines effective competition as businesses who are complying with the certification standards are being detrimentally impacted by the misleading practices and claims of others.

⁸⁴ ASIC Deputy Chair Karen Chester, ‘ASIC and greenwashing antidotes’ (Speech, RI Australia 2023 annual conference, 10 May 2023) <<https://asic.gov.au/about-asic/news-centre/speeches/asic-and-greenwashing-antidotes/>>.

⁸⁵ ACCC, ‘Greenwashing by businesses in Australia – findings of ACCC’s internet sweep’ (Final Report, March 2023) <<https://www.accc.gov.au/about-us/publications/greenwashing-by-businesses-in-australia-findings-of-acccs-internet-sweep>>.

The introduction of legally enforceable standards on environmental and sustainability claims (**Recommendation 1**), together with the adoption of mandatory disclosure requirements (**Recommendation 2**), the review and reform of CTMs (**Recommendations 3 and 4**) and changes to the Environmental Claims Code and Practice Notes (**Recommendations 5 and 6**) will all go toward ensuring consumer confidence in relying on environmental and sustainability claims and reducing potential harm to consumers.

ToR (c) domestic and international examples of regulating companies' environmental and sustainability claims;

In response to ToR (c), we discuss:

- domestic regulation of environmental and sustainability claims, in particular:
 - the current misleading or deceptive conduct prohibitions applicable to greenwashing;
 - regulatory guidance relevant to greenwashing;
 - regulatory enforcement; and
 - third party enforcement;
- international examples of regulation of environmental and sustainability claims in the European Union, France and South Korea; and
- international examples of disclosure obligations relevant to environmental and sustainability claims.

4. Domestic regulation of environmental and sustainability claims

In Australia, environmental and sustainability claims are not presently subject to specific regulation,⁸⁶ but are subject to general laws prohibiting misleading or deceptive conduct.

4.1. Legislative regime: misleading or deceptive conduct

Misleading or deceptive conduct is proscribed by a range of statutory provisions.⁸⁷ The core provisions are set out in the table below.⁸⁸

Act	Section	Title of section
<i>Australian Consumer Law, Schedule 2 of the Competition and Consumer Act 2010 (Cth)</i>	18	Misleading or deceptive conduct
	29	False or misleading representations about goods or services
<i>Corporations Act 2001 (Cth)</i>	1041E	False or misleading statements
	1041F	Inducing persons to deal
	1041H	Misleading or deceptive conduct (civil liability only)
<i>ASIC Act 2001 (Cth)</i>	12DA	Misleading or deceptive conduct
	12DB	False or misleading representations

⁸⁶ We note for completeness that in 2022, Sue Higginson, 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, reportedly aiming to prohibit advertising by fossil fuel companies for the purposes of protecting human health. That bill has now lapsed. Certain local councils have also introduced restrictions on fossil fuel advertising and sponsorship (see, for example, News and Campaign updates from Fossil Ad Ban at <https://fossiladban.org/news/>).

⁸⁷ Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (LexisNexis Butterworths, 5th ed, 2019) 4.

⁸⁸ Note, however, that there are other provisions that also invoke the 'misleading or deceptive' concept in the context of more specific prohibitions, for instance in relation to takeover and disclosure documents (*Corporations Act 2001 (Cth)* sections 670A and 728); see also sections 1308 and 1308B which relate to 'false or misleading' statements.

	12DC	False or misleading representations in relation to financial products that involve interests in land
	12DF	Certain misleading conduct in relation to financial services

In our view, the proliferation of misleading and deceptive conduct provisions across different laws, overlapping in certain instances, creates unnecessary complexity and warrants simplification.

The Australian Law Reform Commission (**ALRC**) recently considered the provisions on misleading and deceptive conduct in corporations and financial services law.⁸⁹ The ALRC found that those provisions give rise to significant complexity and increase compliance and other costs, to the detriment of all stakeholders. The ALRC proposed a solution of strengthening some of the key legislative “highways” (the core provisions) and removing the relatively unused and more complex “back streets and alleyways” (the lesser used provisions). The ALRC also noted that there is a powerful need — and significant support — for simplification of misleading or deceptive conduct provisions in other contexts, including in the ACL, but that a more fulsome review of the ACL for this purpose would be necessary.

We support the ARLC’s recommendations in relation to corporations and financial services law and agree that there a more fulsome review of misleading or deceptive conduct provisions in other contexts, including in the ACL, would be beneficial.

4.2. Regulatory guidance relevant to environmental and sustainability claims

ACCC and ASIC have published the following guidance relevant to environmental and sustainability claims:

- (a) ACCC’s Green Marketing Guide, published in 2011,⁹⁰ which outlines general principles for businesses to consider in making environmental claims and identifies common examples of broad or unqualified claims which may give rise to risk.⁹¹ However, the guide does not offer definitions or specific guidance in relation to environmental and sustainability claims, but rather generic guidance about misleading or deceptive conduct with some examples of potentially misleading environmental claims. Moreover, ACCC’s guide has not been updated since its

⁸⁹ Being the relevant provisions of the *Corporations Act 2001* (Cth) and the *ASIC Act 2001* (Cth): ALRC: ‘All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law’, Background Paper FSL9 in Review of the Legislative Framework for Corporations and Financial Services Regulation, December 2022.

⁹⁰ Australian Competition and Consumer Commission, *Green marketing and the Australian Consumer Law* (Report, 11 March 2011) <<https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf>>.

⁹¹ The examples identified are “green”, “environmentally friendly”, “environmentally safe”, “energy efficient”, “recyclable”, “carbon neutral”, “renewable” and “green” energy.

initial publication in 2011 and therefore does not incorporate current science or international best practice.

- (b) ASIC’s “Information Sheet 271”, published in June 2022, which defines greenwashing in the context of investments, and provides some guidance on avoiding greenwashing in the context of managed funds, superannuation and investment vehicles.⁹² Similarly, however, this guidance is general in nature and does not specifically define key terminology or verification and communication requirements.
- (c) We note that ACCC has indicated that it intends to produce updated economy-wide guidance material relevant to greenwashing, as well as targeted guidance for specific sectors.⁹³

We consider that there are significant gaps in the current available regulatory guidance, including the following.

- (a) There is insufficient authoritative and specific guidance on what is or is not acceptable in making environmental and sustainability claims, including in relation to the accepted meanings of key terminology and the substantiation, verification and communication requirements for claims.
- (b) The available guidance is not updated at regular intervals and does not explain or incorporate the current climate science and international best practice, which we consider essential in the context of the rapidly evolving landscape for environmental and sustainability claims.
- (c) There is a lack of uniformity between regulators about the components of an entity’s environmental and sustainability obligations, such as greenwashing, climate risk disclosure and directors’ duties.

Greater legal certainty for companies, consumers and investors is essential for the effective regulation of greenwashing. It is important for all stakeholders to understand the expectations on businesses’ environmental and sustainability claims.

In our view, this may be best achieved through legally binding standards on environmental and sustainability claims which set out the substantiation requirements for all such claims, and for certain claims set out more specific requirements – reflecting best available scientific and technical information, including relevant international standards – and

⁹² ASIC, *How to avoid greenwashing when offering or promoting sustainability-related products* (Information Sheet No 271, June 2022) <<https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>>.

⁹³ ACCC, 'Greenwashing by businesses in Australia – findings of ACCC's internet sweep' (Final Report, March 2023) <<https://www.accc.gov.au/about-us/publications/greenwashing-by-businesses-in-australia-findings-of-acccs-internet-sweep>>, page 9.

provide that inconsistent uses of those claims are misleading or deceptive (**Recommendation 1**).

4.3. Enforcement of greenwashing

4.3.1. Regulatory enforcement

ACCC and ASIC have taken enforcement action regarding environmental and sustainability claims under the current legal framework, including in instances referred to at section (a).

However, in the context of increasingly prolific potentially misleading environmental and sustainability claims, the requisite investigation and enforcement processes mean that the regulators are limited in the number of cases which they have the resources to investigate and even more so in those they litigate.⁹⁴ ASIC Deputy Chair Karen Chester has recently recognised that case-by-case intervention is “not a cost effective nor comprehensive antidote to greenwashing.”⁹⁵ For this reason, we welcome the Federal Government’s budget provision of \$4.3 million in 2023-24 for ASIC to investigate and undertake enforcement action in relation to greenwashing and other sustainable finance misconduct.⁹⁶ We also support ACCC’s establishment of an internal taskforce focused on sustainability issues related to the competition and consumer law.⁹⁷

We recommend that ACCC and ASIC are provided with further resources directed at the investigation of greenwashing and taking action to stop its proliferation (**Recommendation 7**). We also recommend that ACCC and ASIC be granted further powers to take immediate action to remove misleading claims or issue warnings in relation to advertising and financial reports (**Recommendation 7**). Coupled with the introduction of clearer standards (see **Recommendation 1**) and disclosure requirements (see **Recommendation 2**), these measures would facilitate more efficient and comprehensive regulation of greenwashing.

4.3.2. Third party enforcement

Third parties also play an important enforcement role in relation to greenwashing, including, for example, the current case against Santos Ltd brought by the Australasian Centre for Corporate Responsibility (represented by EDO).⁹⁸

⁹⁴ ASIC reported that between 1 July 2022 and 31 March 2023, it achieved 23 total corrective disclosure outcomes, issued 11 infringement notices and commenced one civil penalty proceeding related to greenwashing: ASIC, ‘ASIC’s recent greenwashing interventions’ (Report 763, May 2023) <<https://download.asic.gov.au/media/ao0lz0id/rep763-published-10-may-2023.pdf>>.

⁹⁵ ASIC Deputy Chair Karen Chester, ‘ASIC and greenwashing antidotes’ (Speech, RI Australia 2023 annual conference, 10 May 2023) <<https://asic.gov.au/about-asic/news-centre/speeches/asic-and-greenwashing-antidotes/>>.

⁹⁶ Australian Government, *Budget 2023-24: Budget Measures* (9 May 2023) <https://budget.gov.au/content/bp2/download/bp2_2023-24.pdf> page 209.

⁹⁷ CEDA Speech, ‘2023-24 Compliance and Enforcement Priorities’ (7 March 2023) <<http://www.accc.gov.au/speech/ceda-speech/>>.

⁹⁸ *Australasian Centre for Corporate Responsibility v Santos Ltd* (NSD858/2021).

Third party enforcement is essential for the development of the law, increased public confidence in the administration of the law, contribution to market regulation and public sector accountability and providing impetus for reform and structural change.

However, in our experience, third parties – who are generally not-for-profits with limited resources – face immense challenges to undertaking public interest litigation due to the significant associated risks. These risks include the legal uncertainty surrounding greenwashing, as discussed in this submission, and also prohibitive costs risks. The barrier to access to justice occasioned by the usual costs rule, particularly in the context of environmental litigation, has been commented on extensively.⁹⁹

In addition to improving guidance and disclosure, it is important in our view that changes are made to the costs rules applicable to public interest litigation. In particular, we consider that the onus of proof be reversed for applications for protective or maximum costs orders by applicants who bring proceedings in the public interest (**Recommendation 8**).

5. International regulation of environmental and sustainability claims

We set out below key examples of international regulation of companies' environmental and sustainability claims. We note that these examples are in no way exhaustive, but rather focus on those that we consider most relevant to our concerns identified in this submission and the legislative options we set out at section (e).

5.1. European Union

The European Commission has put forward the following two proposals for more targeted regulation of greenwashing, which are aimed to together tackle a common set of problems by implementing different elements of the same policy package:¹⁰⁰

- (a) the proposed directive amending the Unfair Commercial Practices Directive 2005/29/EC and the Consumer Rights Directive 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information (**Green Transition Amendments Directive**),¹⁰¹

⁹⁹ See, for example, Preston J's remarks in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* (No 3) [2010] NSWLEC 59; (2010) 173 LGERA 280 (at [30]-[33]); Toohey J's comments in an address to an International Conference on Environmental Law in 1989 quoted in *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236.

¹⁰⁰ The preferred policy package is identified in the Impact Assessment published together with the proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information (30 March 2022) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2022:85:FIN>>.

¹⁰¹ Report on the proposal for a directive of the European Parliament and of the Council on amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information' (**Proposed Green Transition Amendments Directive**) (11 May 2023) <https://www.europarl.europa.eu/doceo/document/TA-9-2023-0201_EN.html>.

which proposes, among other things, to expand misleading and unfair commercial practices to certain environmental claims; and

- (b) the proposed directive on substantiation and communication of explicit environmental claims (**Green Claims Directive**),¹⁰² which proposes to address specific aspects and requirements for the substantiation, communication and verification of explicit environmental claims, complementing the rules on consumer protection as a *lex specialis* (i.e. more specific rules prevailing over the general rules).

The European Union has also introduced a sustainable finance taxonomy, set out in the EU Sustainable Finance Action Plan and codified in the Taxonomy Regulation 2020/852, which seeks to define which investments or economic activities can be considered sustainable or climate friendly.¹⁰³

5.1.1. Green Transition Amendments Directive

In March 2022, the European Commission proposed amendments to the Unfair Commercial Practices Directive and Consumer Rights Directive (**Green Transition Amendments Directive**).

On 11 May 2023, the European Parliament voted to approve the adoption of the new proposed rules, with amendments comprising its negotiating mandate. The Council of the European Union previously adopted its own negotiating mandate on 3 May 2023, and as such negotiations between the Parliament and the member states on the final content and wording of the directive will commence soon.¹⁰⁴

The amendments proposed in the Green Transition Amendments Directive include the following (amendments put forward by the European Parliament are indicated in bold italicised text):

- (a) The list of product characteristics about which a trader should not deceive a consumer in Article 6(1) of the Unfair Commercial Practices Directive is

¹⁰² European Union, *Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims* (22 March 2023) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A0166%3AFIN>> (**Green Claims Directive**).

¹⁰³ European Union, *Regulation 2020/852 of the establishment of a framework to facilitate sustainable investment and amending regulation* [2020] OJ L 198/13 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R0852>>.

¹⁰⁴ *European Parliament*, 'Parliament backs new rules for sustainable, durable products and no greenwashing' (European Parliament Media Release, 11 May 2023) <<https://www.europarl.europa.eu/news/en/press-room/20230505IPR85011/parliament-backs-new-rules-for-sustainable-durable-products-and-no-greenwashing#:~:text=Parliament%27s%20approved%20negotiating%20mandate%20foresees,not%20come%20with%20detailed%20evidence>>.

amended to include “environmental or social impact”, “durability”, “reparability”, “**reusability**” and “**recyclability**”.¹⁰⁵

- (b) The list of actions which are to be considered misleading if they cause or are likely to cause the average consumers to take a transactional decision that they would not have otherwise taken, in Article 6(2) of the Unfair Commercial Practices Directive, is amended to include ‘making an environmental claim related to future performance **solely based on carbon offsetting schemes or** without clear, objective, **quantified, science-based** and verifiable commitments, **without a detailed and realistic implementation plan with reference to budgetary and technological commitments, without feasible** targets, and without an independent monitoring system **that is based on relevant data**’;¹⁰⁶
- (c) The list of commercial practices which are considered unfair in all circumstances, in Annex I of the Unfair Commercial Practices Directive, is extended to certain practices associated with greenwashing, including:
- (i) making a generic environmental claim for which the trader **does not provide evidence of the** recognised excellent environmental performance relevant to the claim.¹⁰⁷ Examples of such generic environmental claims include “environmentally friendly”, “eco-friendly”, “eco”, “green”, “nature’s friend”, “**natural**”, “**animal-friendly**”, “**cruelty-free**”, “**sustainable**”, “ecological”, “environmentally correct”, “climate friendly”, “gentle on the environment”, “**deforestation-free**”, “carbon friendly”, “climate neutral”, “energy efficient”, “biodegradable”, “**plastic neutral**”, “**plastic-free**”, “biobased” or similar statements, as well as broader statements such as “conscious” or “responsible” that suggest or create the impression of excellent environmental performance;¹⁰⁸
 - (ii) making an environmental claim about the entire product **or the trader’s business** when it actually concerns only a certain aspect of the product **or of the trader’s business**;¹⁰⁹
 - (iii) **making an environmental claim that cannot be substantiated in accordance with legal requirements**;¹¹⁰

¹⁰⁵ Proposed Green Transition Amendments Directive, Amendment 38.

¹⁰⁶ Proposed Green Transition Amendments Directive, Amendments 3 and 41.

¹⁰⁷ Proposed Green Transition Amendments Directive, Amendments 6 and 68.

¹⁰⁸ See Proposed Green Transition Amendments Directive, Amendment 6.

¹⁰⁹ Proposed Green Transition Amendments Directive, Amendment 69.

¹¹⁰ Proposed Green Transition Amendments Directive, Amendment 71.

- (iv) ***claiming, based on carbon offsetting, that a product has a neutral, reduced, compensated or positive greenhouse gas emissions’ impact on the environment;***¹¹¹ and
 - (v) the displaying of sustainability labels which are not based on a certification scheme, fulfilling minimum transparency and credibility conditions, or not established by public authorities.¹¹²
- (d) The proposed definitions of the terms “environmental claim”, “generic environmental claim” and “carbon offsetting” are as follows:
- (i) “environmental claim” means any message or representation which is not mandatory under Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, ***and*** which states or implies that a product, ***product category, brand*** or trader has a positive or no impact on the environment or is less damaging to the environment than other products, ***brands*** or traders, respectively, or has improved their impact over time;¹¹³
 - (ii) “generic environmental claim” means ***an*** environmental claim, not contained in a sustainability label, where the specification of the claim is not provided in clear and prominent terms on the same medium;¹¹⁴
 - (iii) ***“carbon offsetting” means the purchase of carbon credits or the provision of financial support for environmental projects, that aim to neutralise, reduce, compensate or inset the purchaser’s own environmental impact, or that of their goods or services.***¹¹⁵
- (e) The proposal also aims to address the practice of early obsolescence by requiring traders to inform consumers on durability, reparability and availability of updates for goods and making a failure to inform on certain features an unfair commercial practice.

¹¹¹ Proposed Green Transition Amendments Directive, Amendments 6 and 70.

¹¹² Proposed Green Transition Amendments Directive, Amendment 5. The monitoring of compliance of the certification scheme should be supported by methods that are proportionate and relevant to the nature of the products, processes and businesses that are subject to the scheme. It should be carried out by a third party whose competencies and independence, from both the scheme owner and the trader, have been verified by the Member States. Furthermore, certification schemes should include a complaints system that is available to consumers and other external stakeholders, focuses on non-compliance and ensures the withdrawal of the sustainability label in cases of non-compliance.

¹¹³ Proposed Green Transition Amendments Directive, Amendment 28.

¹¹⁴ Proposed Green Transition Amendments Directive, Amendment 30.

¹¹⁵ Proposed Green Transition Amendments Directive, Amendment 37.

We consider that regard should be had to the Green Transition Amendments Directive in the development of standards for environmental and sustainability claims in Australia (as we have recommended in **Recommendation 1**).

5.1.2. Green Claims Directive

In March 2023, the European Commission proposed a directive on substantiation and communication of explicit environmental claims (**Green Claims Directive**).

The Green Claims Directive complements the Green Transition Amendments Directive by addressing specific aspects and requirements for explicit environmental claims (being an environmental claim that is in textual form or contained in an environmental label)¹¹⁶ as regards their substantiation, communication and verification.¹¹⁷ Once adopted, the Green Claims Directive would prevail over the requirements in the UCPD with regard to those aspects in case of conflict.¹¹⁸

The proposal is yet to be assessed by the European Parliament and the Council for their joint approval, and then will have to be transposed by Member States into their national legal systems.

Key elements of the proposed Green Claims Directive include:

Substantiating and verifying green claims

- (a) Traders¹¹⁹ are required to carry out an assessment to substantiate “explicit environmental claims”, which:
 - (i) relies on recognised scientific evidence and state of the art technical knowledge;
 - (ii) demonstrates the significance of impacts, aspects and performance from a life-cycle perspective;
 - (iii) takes into account all significant aspects and impacts to assess the performance;

¹¹⁶ Article 2 (2). Note that ‘textual form’ is not defined in the proposed Directive, however ‘environmental label’ is: “Environmental labels are a subset of environmental claims. The labels are in a form of a trust mark, quality mark or equivalent setting apart and promoting a product/process or business with reference to its environmental aspects. These labels are sometimes based on certification schemes (environmental labelling schemes) which certify that a product/process or business meets the requirements set up by the scheme and monitor compliance.” (Proposed Green Claims Directive, Recital 14).

¹¹⁷ Proposed Green Claims Directive, Explanatory Memorandum, 1.1.

¹¹⁸ Proposed Green Claims Directive, Recitals (14); Proposed Green Transition Amendments Directive, Article 3(4).

¹¹⁹ Note, microenterprises (fewer than 10 employees and with an annual turnover not exceeding EUR 2 million) are exempted from the requirements: Article 3(3).

- (iv) demonstrates whether the claim is accurate for the whole product or only for parts of it (for the whole life cycle or only for certain stages, for all the trader's activities or only a part of them);
 - (v) demonstrates that the claim is not equivalent to requirements imposed by law;
 - (vi) provides information on whether the product performs environmentally significantly better than what is common practice;
 - (vii) identifies whether a positive achievement leads to significant worsening of another impact;
 - (viii) requires greenhouse gas offsets to be reported in a transparent manner;¹²⁰ and
 - (ix) includes accurate primary or secondary information;¹²¹
- (b) Information used for substantiation would be required to be reviewed and updated by traders within 5 years and at any time when circumstances arise that may affect the accuracy of a claim.
- (c) In making a "comparative explicit environmental claim",¹²² traders would have to comply with additional requirements. For example, the data and information used for assessing the environmental impacts, aspects or performance of a product or trader subject to the claim must be equivalent to the information and data used for assessing the same in relation to the compared products or traders and must be generated or sourced in an equivalent manner.¹²³
- (d) "Substantiation" of all environmental claims and labelling schemes would need to be independently verified, and Member States would need to adopt appropriate verification procedures for traders to be able to comply with their obligations.¹²⁴ An officially accredited body will carry out this ex-ante verification of claims submitted by the company wishing to use it. The proposal also defines detailed requirements for "verifiers" to fulfil in order to be

¹²⁰ In addition, this information should also specify whether these offsets relate to emission reductions or removals and ensure that the offsets relied upon are of high integrity and accounted for correctly to coherently and transparently reflect the claimed impact on climate. *European Commission*, 'Circular Economy: Commission proposes new consumer rights and a ban on greenwashing', (Media Release, 30 March 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2098>.

¹²¹ Article 3. Note microenterprises (fewer than 10 employees and with an annual turnover not exceeding EUR 2 million) are exempted from the requirements.

¹²² Comparative environmental claims are "claims that state or imply that a product or trader has less environmental impacts or a better environmental performance than other products or traders" (see Article 4(1) of the proposed Green Claims Directive).

¹²³ Proposed Green Claims Directive, Article 4(1)(a)-(b).

¹²⁴ Proposed Green Claims Directive, Articles 10-11.

accredited by the Member States.¹²⁵ Once the verification is completed, the verifier would need to draw up, when appropriate, a certificate on conformity saying that the explicit environmental claim or label complies with the Directive.¹²⁶ Crucially, all "substantiated" environmental claims and labels would have to be independently verified and certified before any such claim could be used in a commercial communication (i.e., before the environmental claim is made public or the environmental label is displayed).¹²⁷

- (e) The Commission is empowered to adopt delegated acts to supplement the requirements for substantiation of explicit environmental claims, and in specifying further such requirements the Commission is to take into account scientific or other available technical information, including relevant international standards.¹²⁸

Communicating substantiated green claims to consumers

- (f) Traders¹²⁹ would have to communicate, next to the product information, any explicit environmental claim together with its "substantiation" in a physical form or in the form of a weblink, QR code or equivalent.¹³⁰ The information provided would need to include, at a minimum, the environmental aspects covered by the claim, the relevant Union or international standards (where appropriate), underlying studies or calculations used, the certificate of conformity regarding the substantiation of the claim, information on the extent to which claims rely on offsets and whether those relate to emissions reductions or removals (where relevant) and a summary of the assessment that is clear and understandable to the customers targeted by the claim.¹³¹

Environmental labelling schemes

- (g) Article 8 further details requirements for environmental labelling schemes, including:
 - (i) requirements on transparency and accessibility of information on ownership, decision-making body and objectives;
 - (ii) the criteria underlying the award of labels are developed by experts and reviewed by stakeholders;
 - (iii) the existence of complaint and resolution mechanisms; and

¹²⁵ Proposed Green Claims Directive, Article 11.

¹²⁶ Proposed Green Claims Directive, Article 10(6).

¹²⁷ Proposed Green Claims Directive, Article 10(4).

¹²⁸ Proposed Green Claims Directive, Article 3(4)-(5).

¹²⁹ Note microenterprises (fewer than 10 employees and with an annual turnover not exceeding EUR 2 million) are exempted from the requirements: Proposed Green Claims Directive, Article 3.

¹³⁰ Proposed Green Claims Directive, Article 5.

¹³¹ Proposed Green Claims Directive, Article 5(6)(e).

- (iv) procedures for dealing with non-compliance and possibility of withdrawal or suspension of labelling in case of persistent and flagrant non-compliance.
- (h) Article 8 also introduces additional provisions to target the proliferation of labelling schemes, notably:
 - (i) prohibition of establishment of new national or regional publicly owned schemes; and
 - (ii) a validation procedure for new schemes established by private operators from the EU and third countries that should be assessed by national authorities and validated only if they demonstrate added value in terms of their environmental ambition, their coverage of environmental impacts, of product category group or sector and their ability to support the green transition of SMEs as compared to the existing Union, national or regional schemes.

We consider that regard should also be had to the Green Transition Amendments Directive in the development of standards for environmental and sustainability claims in Australia (as we have recommended in **Recommendation 1**), and in particular in relation to potential requirements for environmental and sustainability labels. However, we caution that care should be taken in the development of those requirements to ensure that not for profit schemes that seek to test or rate environmental claims, such as CHOICE, may continue to do so as they provide an important third party analytical function for many consumers.

5.1.3. EU Taxonomy

The EU Taxonomy is a regulatory classification system, which helps companies and investors identify “environmentally sustainable” economic activities to make sustainable investment decisions.¹³²

Environmentally sustainable economic activities are described as those which “make a substantial contribution to at least one of the EU’s climate and environmental objectives, while at the same time not significantly harming any of these objectives and meeting minimum safeguards.”¹³³

However, the EU Taxonomy is not without its controversy, and is currently the subject of a challenge for classifying certain uses of gas as environmentally “sustainable”.¹³⁴ As noted

¹³² *European Commission*, ‘EU Taxonomy Navigator’, <<https://ec.europa.eu/sustainable-finance-taxonomy/>>.

¹³³ *Ibid.*

¹³⁴ *ClientEarth*, ‘EU Taxonomy: Environmental groups take EU to court over ‘green’ gas label’ (18 April 2023) <<https://www.clientearth.org/latest/press-office/press/eu-taxonomy-environmental-groups-take-eu-to-court-over-green-gas-label/>>.

above, we also have concerns about the AFSI's sustainable finance taxonomy which is currently in development.

5.2. France

France has recently adopted legislation which amends other laws to include specific penalties, prohibitions and codes of conduct relating to greenwashing.

France recently adopted the Climate and Resilience Law,¹³⁵ which includes the following key provisions in relation to greenwashing:

- (f) *Express reference to and greater penalties for greenwashing:*¹³⁶ the definition of misleading commercial practices in Article L. 121-2 of the Consumer Code is amended to expressly refer to false or misleading claims, indications or presentations concerning the “environmental impact” of a good or service or the scope of the advertiser's commitments.¹³⁷

The penalties available under Article L132-2 of the Consumer Code in relation to misleading commercial practices are greater in relation to misleading environmental claims than other practices. While a fine of EUR 300,000 for misleading commercial practices may be increased to 10% of the average annual turnover or to 50% of the expenditure incurred in carrying out the advertising or practice constituting that offence, this rate is increased to 80% of the advertising expenses when the advertising is based on misleading environmental claims.¹³⁸

- (g) *Prohibition of certain claims:*¹³⁹ the Environmental Code is amended to introduce prohibitions on companies claiming in an advertisement that their products or services are carbon neutral, or using any wording of equivalent meaning or scope unless the advertiser makes available to the public the following information:¹⁴⁰
 - (i) a greenhouse gas emissions report integrating the direct and indirect emissions of their products or services;
 - (ii) the process by which the GHG emissions of their products or services are avoided as a priority, then reduced and finally offset. The trajectory for

¹³⁵ *Loi n° 2021-1104 du 22 août 2021* [Law No 2021-1104 of 22 August 2021] (24 August 2021) (**Climate and Resilience Law**) <<https://www.legifrance.gouv.fr/loda/id/LEGISCTA000043957631>>.

¹³⁶ Climate and Resilience Law, Articles 10 and 11.

¹³⁷ Climate and Resilience Law, Article 10.

¹³⁸ Climate and Resilience Law, Article 11.

¹³⁹ Climate and Resilience Law, Article 12.

¹⁴⁰ Climate and Resilience Law, Article 12. In order to provide guidance for the implementation of Article 12 of the Climate and Resilience Law, the French government adopted a decree on April 13, 2022 (Decree 2022-539), which came into force on January 1, 2023. According to this decree, companies will have to prepare a summary report, updated annually, containing the company's annual greenhouse gas emissions covering the entire life cycle of the advertised products or services, the reduction plan for greenhouse gas emissions associated with the advertised products or services with annual progress targets over 10 years, and the details of the arrangements for offsetting residual greenhouse gas emissions.

reducing emissions must be described using quantified annual progress targets; and

- (iii) the methods for offsetting residual GHG emissions that comply with minimum standards.

The specific implementation of this provision is to be determined by decree of the Council of State. Under conditions set by decree, the administrative authority may sanction non-compliance with the prohibition and a failure to comply with the obligations provided for in this section by a fine of EUR 20,000 for a natural person and EUR 100,000 for a legal person, which may be increased to the full amount of the expenditure devoted to the illegal operation.

- (h) *Prohibition of advertising for fossil fuels and the highest polluting vehicles:*¹⁴¹ The Environmental Code is amended to introduce prohibitions on advertising relating to the marketing or promotion of certain fossil energy, except for fuels composed of at least 50% renewable energy. A decree by the Council of State will specify the list of energy types concerned as well as the rules applicable to renewable energy types incorporated into fossil fuels.

Similarly, from 1 January 2028, advertising for the most polluting new private cars (vehicles emitting a certain level of carbon dioxide per km, which will be specified in a decree) will be prohibited.

A fine of EUR 20,000 for natural persons and EUR 100,000 for legal persons is available for contravention of these provisions, pursuant to Chapter II of Title II of Book V of the Consumer Code, which may be increased to the amount of the expenses devoted to the illegal operation. In the event of a repeat offence, the amounts may be doubled.

- (i) *Codes of conduct:*¹⁴² Article 14 of Law No. 86-1067 on freedom of communication is amended to require the “Conseil superieur de l'audiovisuel” (French Superior Audiovisual Council) to promote sectoral and cross-sectoral codes of good conduct on environmental advertising (“climate contracts”) aimed at significantly reducing commercial communications on audiovisual communication services and online platform services relating to goods and services that have a negative impact on the environment. These codes of conduct are to be made public and shall include objectives and indicators for annual monitoring of their implementation.

As noted above, there has been some enforcement of greenwashing under the current prohibitions on misleading or deceptive conduct in Australian law. While greater legal certainty is necessary, in our view this may be best achieved through legally enforceable

¹⁴¹ Climate and Resilience Law, Article 7.

¹⁴² Climate and Resilience Law, Article 14.

standards and, if such standards are introduced, a separate legislative prohibition on greenwashing is not necessarily required.

5.3. South Korea

South Korea has proposed amendments to the current Environmental Technology and Industry Support Act which would introduce administrative fines for entities making false environmental claims in advertising. Under the proposal, a financial penalty of up to 3 million won (~\$3,300 AUD) would be available for companies that are deemed to have misled the public about their environmental impacts and green credentials. The proposed penalty extends to entities' advertisements but not to greenwashing in the promotion of a company's general brand image.

The Ministry of Environment will also be empowered to issue corrective measures, such as ordering a company to correct an advertisement found to contain a misrepresentation.

Under Article 37 of the current Environmental Technology Industry Support Act, administrative fines do not apply to greenwashing in advertising.

While we recognise this amendment as a positive improvement to South Korea's current regime, this is of limited relevance to Australia as regulators are already equipped to issue penalties and corrective measures (as illustrated by enforcement action to date discussed at section (a) above). However, we do consider that ACCC and ASIC should further powers to take immediate action to remove misleading claims or issue warnings in relation to advertising and financial reports.

6. Disclosure regulations

In our view, disclosure obligations are an essential element of effective greenwashing regulation, as they provide greater transparency, enable verification of claims and facilitate more efficient enforcement.

Moreover, compulsory disclosure obligations are necessary for accountability where greater scrutiny and enforcement of greenwashing may result in "greenhushing".

The United Kingdom,¹⁴³ European Union,¹⁴⁴ United States,¹⁴⁵ New Zealand,¹⁴⁶ Switzerland,¹⁴⁷ Hong Kong,¹⁴⁸ and Japan¹⁴⁹ have introduced or are contemplating mandatory climate-disclosure requirements that broadly align with the recommendations of the Task Force on Climate-related Financial Disclosures (**TCFD**).

EDO made a submission to Treasury’s Consultation Paper on climate-related financial disclosure earlier this year.¹⁵⁰ We refer to our detailed comments and recommendations in that submission. In particular, we reiterate our recommendation of the adoption of mandatory disclosure requirements, incorporating as a baseline the International Sustainability Standards Board’s (**ISSB**) draft standards for climate-related disclosures, and at a minimum supplemented by:

- (b) the inclusion of “double materiality” as adopted by the European Union in December 2022;
- (c) a requirement that entities disclose their emissions on an equity basis, to improve the consistency and comparability of emissions disclosures; and
- (d) a requirement that entities use climate-related scenario analysis and pathways consistent with limiting warming to 1.5°C and disclose transition plans aligned with the Science Based Target Initiative’s Corporate Net Zero Standard and findings of the UN’s High-Level Expert Working Group on Net Zero Emissions Commitments of Non-State Entities.

¹⁴³ *Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022* (UK); *Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022* (UK).

¹⁴⁴ *Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022]* OJ L 322/15.

¹⁴⁵ US Securities and Exchange Commission, *Proposed rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors* (4 November 2022) 87 FR 21334.

¹⁴⁶ *Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021* (NZ).

¹⁴⁷ *Ordinance on Climate Disclosures* (Switzerland) SR 220.

¹⁴⁸ *Main Board Listing Rules* (Hong Kong) Appendix 27: Environmental, Social and Governance Reporting Guide.

¹⁴⁹ JPX, *Corporate Governance Code* (11 June 2021) Principle 3.1.

¹⁵⁰ Environmental Defenders Office, *Submission to Treasury on climate-related financial disclosure* (Treasury Submission, 17 February 2023) < [230224-Climate-Related-Financial-Disclosure-EDO-submission-to-Treasury-1.pdf](#) >.

ToR (d) advertising standards in relation to environmental and sustainability claims;

In response to ToR (d), we discuss:

- the role of advertising standards in relation to environmental and sustainability claims; and
- issues related to environmental and sustainability labels and certification trade marks, which we consider to be an area of particular concern in relation to greenwashing.

7. Advertising standards

The Australian Association of National Advertisers' (**AANA**) advertising self-regulatory system includes code making and a complaints handling system administered by Ad Standards. AANA manages five advertising self-regulatory codes including, relevantly, the Environmental Claims Code.

EDO commented on the issues with the Environmental Claims Code and associated processes in detail in a recent submission to AANA.¹⁵¹ We refer to our comments and recommendations in that submission. In particular, we reiterate our recommendations that:

- (a) the Environmental Claims Code be updated to incorporate the whole of life cycle approach to assessing claims, in similar terms to rule 11.4 of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing. Scientific and expert advice should also be used to assess claims (**Recommendation 5**); and
- (b) the Environmental Claims Code Practice Notes be updated to:
 - (i) align with the case law on what is misleading or deceptive under the ACL, particularly in relation to the use of headline statements and the overall impression of the advertisement;
 - (ii) align with the case law under the ACL in relation to use of disclaimers and fine print, which state that prominent claims can still mislead even if used with disclaimers; and
 - (iii) ensure net zero claims are consistent with the recommendations of the UN Expert Report entitled "Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and regions",

(Recommendation 6).

EDO has to date assisted clients to lodge 3 complaints with Ad Standards, which we refer to at (a) above. So far none of those complaints have been upheld, the detail of which was

¹⁵¹ Environmental Defenders' Office, Submission to the Australian Association of National Advertisers, *Environmental Claims Code Review* (February 2023) <<https://www.edo.org.au/publication/edo-submission-to-the-australian-association-of-national-advertisers-aana-environmental-claims-code-review/>>.

discussed extensively in our submission to AANA.¹⁵² As stated in that submission, we consider that it is important that Ad Standards be strengthened and obtain scientific members to assist with environmental claims, as well as update their Practice Note, in order to be more impactful in regulating greenwashing as certain of Ad Standards' overseas counterparts have been.

8. Environmental and sustainability labels

As outlined at above at 2.7, EDO has observed an increasing proliferation of environmental and sustainability labels.

As there are no consistent substantive requirements for these labels or certification schemes, they are subject to vastly different levels of robustness, supervision and transparency.

For example, certain labels are underpinned by industry-generated and self-regulated certification schemes. It is not always apparent to consumers on the face of the label who has generated or regulates the scheme or what the actual criteria of the label or scheme are.

In these circumstances, we are concerned that consumers may be misled about what is being represented by certain labels. In many cases, it is difficult or impossible for consumers to access further information about the label and / or the user of the label.

This is reflected in ACCC's Green Marketing Guide which cautions that claims using endorsement or certification should be used with care, stating:¹⁵³

Consumers may be unfamiliar with local or international environmental endorsement schemes and the certification on your product. You should be aware that when using a logo from such a scheme, consumers may make assumptions and consequently be misled. Offering consumers details of further information on the scheme may help alleviate these concerns.

It is also very difficult for consumers to compare products which adopt different labels, exacerbated by the significant and increasing number of different environmental and sustainability labels in the market. In addition to potential consumer harm, this also raises competition concerns, as products, services or businesses may be advantaged over others by the use of labels where they are in fact no different.

In order to address these concerns, we consider that legally binding standards on environmental and sustainability claims should specify further substantiation, communication and verification requirements for the use of environmental and sustainability labels (**Recommendation 1**).

¹⁵² Environmental Defenders' Office, Submission to the Australian Association of National Advertisers, *Environmental Claims Code Review* (February 2023) <<https://www.edo.org.au/publication/edo-submission-to-the-australian-association-of-national-advertisers-aana-environmental-claims-code-review/>>.

¹⁵³ ACCC, *Green marketing and the Australian Consumer Law* (2011) <<https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf>>.

8.1. Certification trade marks

Environmental and sustainability labels may also be in the form of CTMs which ACCC must certify prior to registration of the trade mark.

In our view, consideration should be given to expanding the powers of ACCC in relation to CTMs.

We understand the role of ACCC in relation to CTMs to be limited to reviewing applications for CTMs, variations to CTM rules and applications to transfer CTMs.¹⁵⁴

In order to issue a certificate approving a CTM application, ACCC must be satisfied that:

- (a) the attributes required of approved CTM assessors are sufficient to enable the person to competently assess whether goods and / or services meet the certification requirements; and
- (b) the CTM rules would not be to the detriment of the public and are satisfactory having regard to the principles of competition, unconscionable conduct and consumer protection.¹⁵⁵

ACCC can require an applicant to make amendments or modifications to the proposed CTM rules prior to issuing a certificate.¹⁵⁶ However, once a CTM is registered, ACCC has no statutory power under the *Trade Marks Act 1995* (Cth) (**Trade Marks Act**) to independently revoke a CTM or require changes to CTM rules. Once registered, a CTM registration lasts for 10 years unless it is cancelled or removed from the register.¹⁵⁷

Our clients have raised with us concerns about certain approved CTMs relating to competition and consumer issues. While ACCC can investigate certain complaints under general misleading or deceptive conduct laws, for example where a user of a CTM is misrepresenting what the CTM represents, ACCC is limited in its ability to require changes to a CTM or CTM rules under the Trade Marks Act.

While requests to cancel CTMs may be made with the Registrar (under the Trade Marks Act), the Registrar does *not* have a duty to consider whether to revoke the registration where a request is made.¹⁵⁸ Further, to revoke the registration of a trade mark the Registrar must be satisfied that that the trade mark should not have been registered, taking account of all the circumstances that existed *when the trade mark became registered*.¹⁵⁹ Therefore, there is a limit to the information that can be considered, for example new scientific information or technical developments that may impact whether or not a CTM is likely to

¹⁵⁴ *Trade Marks Act 1995* (Cth), Part 16.

¹⁵⁵ *Trade Marks Act*, section 175; *Trade Mark Regulations 1995* (Cth), regulation 16.6; see also ACCC, *Certification Trade Marks and the Role of the ACCC* (2011) <https://www.accc.gov.au/system/files/Certification%20Trade%20Marks_0.pdf>.

¹⁵⁶ *Trade Marks Act*, section 175(3).

¹⁵⁷ *Trade Marks Act*, sections 72(3) and 170.

¹⁵⁸ *Trade Marks Act*, section 84A(6).

¹⁵⁹ *Trade Marks Act*, section 84A.

mislead a consumer may be excluded from consideration. This is particularly worrying given the rapidly evolving nature of the relevant science, international standards and best practice.

In our view, to achieve more efficient and consistent enforcement of greenwashing, it is critical that ACCC is able to directly intervene to investigate, amend or cancel a CTM where competition and consumer law issues arise.

We consider that changes should also be made to the processes for review of CTMs, including:

- (a) granting ACCC the power to initiate reviews of CTMs where it considers competition or consumer issues may arise from the use of the CTM or the CTM rules or new information arises about the use of the CTM;
- (b) granting ACCC power to withdraw approval for a CTM where it considers that the use of the CTM or the CTM rules may be of detriment to the public, having regard to the principles of competition, unconscionable conduct and consumer protection, taking into consideration all relevant contextual factors at the time of the review (including best available technical and scientific information); and
- (c) enabling complaints to be made directly to ACCC in relation to competition and consumer issues arising in relation to a CTM or CTM rules,

(Recommendation 4).

We also note ACCC's comments, in its report on its greenwashing internet sweep, that CTMs are becoming increasingly common and a variety of different certification schemes may exist for the same type of product.¹⁶⁰ ACCC observed that it can be difficult for consumers to understand what every CTM means or to assess how robust the scheme is and that, in the context of an increasingly proliferation of non-CTM certification schemes created by businesses or industry, this also raises concerns that CTMs may be becoming meaningless and no longer help consumers to distinguish between products.

In light of these findings, we consider that an urgent review of existing CTMs should be initiated to ensure that those CTMs are sound having regard to the principles of competition, unconscionable conduct and consumer protection, and having regard to the best available technical and scientific information. **(Recommendation 3).**

¹⁶⁰ ACCC, 'Greenwashing by businesses in Australia – findings of ACCC's internet sweep' (Final Report, March 2023) <<https://www.accc.gov.au/about-us/publications/greenwashing-by-businesses-in-australia-findings-of-acccs-internet-sweep>>, page 7.

ToR (e) legislative options to protect consumers from green washing in Australia;

In response to ToR (e) we discuss the following interventions which we consider necessary to improve protection from greenwashing:¹⁶¹

- legally enforceable standards for environmental and sustainability claims;
- more rigorous non-litigious enforcement of greenwashing through changes to the Environmental Claims Code and associated processes and to the statutory powers of ACCC in relation to CTMs;
- the introduction mandatory disclosure requirements to increase transparency and enable more nimble enforcement of greenwashing; and
- facilitating more effective enforcement of greenwashing laws through greater resources to ACCC and ASIC and changes to the rules around public interest costs orders.

In addition to protecting consumers, these interventions would provide greater clarity to all stakeholders, including businesses and investors, support effective and fair competition and contribute to Australia meeting its international and statutory climate-related commitments.

9. Legally enforceable standards

Recommendation 1: *The introduction of legally enforceable standards on environmental and sustainability claims, which:*

- (a) set out the substantiation requirements for all environmental and sustainability claims;*
- (b) for certain environmental and sustainability claims, set out the specific requirements which apply, reflecting best available scientific and technical information, including relevant international standards, and provide that uses of those claims which are inconsistent with the requirements are misleading or deceptive; and*
- (c) set out the further substantiation, communication and verification requirements for the use of environmental and sustainability labels.*

Such standards should have legal enforceability, similar to accounting and auditing standards made under the Corporations Act.¹⁶²

At a minimum, the standards should:

- (a) set out the substantiation requirements for all environmental and sustainability claims, including requirements that claims:
 - (i) are based on and able to be substantiated by recognised scientific evidence and technical knowledge;

¹⁶¹ We note that, as discussed above at 4.1, we also consider review of the misleading or deceptive conduct provisions would be beneficial.

¹⁶² *Corporations Act 2001* (Cth), sections 334-338.

- (ii) take into account the whole life cycle of relevant products and / or services;
 - (iii) identify whether a positive achievement leads to significant worsening of another impact; and
 - (iv) for comparative claims, make clear the precise products or services that are being compared and the basis for the comparison.
- (b) for certain environmental and sustainability claims, set out the specific requirements which apply, reflecting best available scientific and technical information, including relevant international standards, and provide that uses of those claims which are inconsistent with the requirements are misleading or deceptive. For example:
- (i) clearly define which energy sources are “clean” energy;
 - (ii) require that “net zero” commitments or claims are aligned with the Science Based Target Initiative’s Corporate Net Zero Standard and findings of the UN’s High-Level Expert Working Group on Net Zero Emissions Commitments of Non-State Entities;
 - (iii) require that “carbon neutral”, “net zero” and similar claims cannot be based on offsetting schemes;
 - (iv) require that “nature positive”, “nature’s friend”, “environmentally friendly”, “eco”, “green” and similar claims are aligned with the forthcoming Taskforce on Nature-related Financial Disclosures framework; and
 - (v) require that generic environmental and sustainability claims cannot be made unless there is evidence of the recognised excellent performance relevant to the claim. Examples of such generic environmental claims, drawn from the European Union’s proposed Green Transition Amendments Directive, should include “environmentally friendly”, “eco-friendly”, “eco”, “green”, “nature’s friend”, “natural”, “animal-friendly”, “cruelty-free”, “sustainable”, “ecological”, “environmentally correct”, “climate friendly”, “gentle on the environment”, “deforestation-free”, “carbon friendly”, “climate neutral”, “energy efficient”, “biodegradable”, “plastic neutral”, “plastic-free”, “biobased” or similar statements, as well as broader statements such as “conscious” or “responsible” that suggest or create the impression of excellent environmental performance;
- (c) set out the further substantiation, communication and verification requirements for the use of environmental and sustainability labels, which apply in addition to the general requirements for all environmental and sustainability claims, including:

- (i) bans on labels which are not based on a certification scheme or are based on self-certification;
- (ii) bans on labels which do not add value, for example where the label certifies features that are industry standard or legally required;
- (iii) requirements on transparency and accessibility of information regarding the label including on ownership, decision-making body and objectives;
- (iv) requirements for the transparent development of certification criteria with a solid scientific basis and subject to regular review;
- (v) requirements for independent third-party verification of compliance with the certification criteria, subject to periodic reviews and immediate notification and review obligations in the case of a material change in circumstances;
- (vi) requirements for the communication of certification criteria and substantiation of a business, product or service's compliance with this criteria to consumers where labels are used;
- (vii) procedures for dealing with non-compliance and the possibility of withdrawal or suspension of labelling in case of persistent and flagrant non-compliance; and
- (viii) mechanisms for dealing with complaints related to the use of a label or the label itself.

In relation to environmental and sustainability labels, we consider that the impact on third party labels which exist to provide guidance to consumers should be carefully considered. For example, not for profit schemes that seek to test or rate environmental claims, such as CHOICE, should not be banned as these schemes perform an important function in guiding consumers and ensuring accountability. For example, ACCC's investigation and subsequent prosecution of Kimberly-Clark commenced following a complaint from CHOICE in 2015 after it awarded a "Shonky" award to the company.

10. Non-litigious enforcement

10.1. Advertising standards

Recommendation 5: *The Environmental Claims Code be updated to incorporate the whole of life cycle approach to assessing claims, in similar terms to rule 11.4 of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing. Scientific and expert advice should also be used to assess claims.*

Recommendation 6: *The Environmental Claims Code Practice Notes be updated to:*

- (a) align with the case law on what is misleading or deceptive under the ACL, particularly in relation to the use of headline statements and the overall impression of the advertisement;
- (b) align with the case law under the ACL in relation to use of disclaimers and fine print, which state that prominent claims can still mislead even if used with disclaimers; and
- (c) ensure net zero claims are consistent with the recommendations of the UN Expert Report.

As stated above, EDO commented on the issues with the Environmental Claims Code in a recent submission to AANA.¹⁶³ We refer to our detailed comments on these recommendations in that previous submission.

10.2. Certification trade marks

Recommendation 3: Urgent review of existing CTMs to ensure that those CTMs are sound having regard to the principles of competition, unconscionable conduct and consumer protection, and having regard to the best available technical and scientific information.

Recommendation 4: Reforms to the mechanisms for review of certification trade marks (CTMs), including enabling ACCC to independently initiate a review of a CTM and to withdraw approval for a CTM or require changes to the CTM rules.

For the reasons outlined above at 8 above, we consider that ACCC should have additional powers in relation to CTMs to ensure effective and consistent enforcement of greenwashing. ACCC should be able to consider all relevant information at the time of the review, including the current best available scientific and technical information.

In order to limit the potential for greenwashing in relation to current CTMs, an urgent review should also be undertaken.

11. Disclosure

Recommendation 2: The adoption of mandatory disclosure requirements, incorporating as a baseline the ISSB's draft standards for climate-related disclosures, and at a minimum supplemented by:

- (a) the inclusion of "double materiality" as adopted by the EU in December 2022;
- (b) a requirement that entities disclose their emissions on an equity basis, to improve the consistency and comparability of emissions disclosures; and
- (c) a requirement that entities use climate-related scenario analysis and pathways consistent with limiting warming to 1.5 °C and disclose transition plans aligned

¹⁶³ Environmental Defenders' Office, Submission to the Australian Association of National Advertisers, *Environmental Claims Code Review* (February 2023) <<https://www.edo.org.au/publication/edo-submission-to-the-australian-association-of-national-advertisers-aana-environmental-claims-code-review/>>.

with the Science Based Target Initiative’s Corporate Net Zero Standard and findings of the UN’s High-Level Expert Working Group on Net Zero Emissions Commitments of Non-State Entities.

As stated above, EDO commented on climate-related financial disclosure in a recent submission to Treasury.¹⁶⁴ We refer to our detailed comments on this recommendation in that previous submission.

12. Enforcement

Recommendation 7: *ACCC and ASIC be provided with further resources directed at the investigation of greenwashing and taking action to stop its proliferation, and further powers to take immediate action to remove misleading claims or issue warnings in relation to advertising and financial reports.*

Recommendation 8: *The onus of proof be reversed for applications for protective or maximum costs orders by applicants who bring proceedings in the public interest.*

For the reasons outlined above at 4.3, we consider both regulators and third parties are essential to effective enforcement of greenwashing, including in implementing enforceable standards as we recommend in **Recommendation 1**, and disclosure obligations as we recommend in **Recommendation 2**.

ToR (f) any other related matters.

We make no further comments on related matters.

¹⁶⁴ Environmental Defenders Office, *Submission to Treasury on climate-related financial disclosure* (Treasury Submission, 17 February 2023) < [230224-Climate-Related-Financial-Disclosure-EDO-submission-to-Treasury-1.pdf](#) >.

Annexure A Examples of gas is “clean” or “cleaner” claims

We set out below several examples of claims that gas is a “clean” or “cleaner” energy source, that gas produces low or lower greenhouse gases, or similar.

Statements made by Santos Ltd¹

- “These price rises also undermine the world’s climate goals. In 2021, instead of continuing to switch away from coal to cleaner energy such as natural gas, coal-fired electricity generation increased by nine per cent to a global all-time high.”²
- “As a proudly Australian energy producer, Santos has improved the lives of people throughout Australia and Asia for more than 65 years by providing safe, clean, reliable products.”³
- “To meet the needs of this large proportion of the world’s population, massive expansion of affordable and reliable energy is recognised as critical. This includes clean fuels for cooking, such as gas and electricity.”⁴
- “A proudly Australian company, Santos is a leading supplier of natural gas, a fuel for the future providing clean energy to improve the lives of people in Australia and Asia.”⁵
- “In Australia, natural gas is the perfect clean energy partner for renewables providing reliable power 24/7.”⁶
- Our target is to grow liquefied natural gas exports to at least 4.5 million tonnes per annum (mtpa) by 2025 to contribute to global emissions reduction by supporting the growing demand for clean gas as an increasing part of the energy mix of developing economies.”⁷

¹ We note that Santos’ claim in its 2020 Annual Report that gas is “clean energy” is currently the subject of ongoing litigation in the Federal Court brought by the Australasian Centre for Corporate Responsibility (represented by EDO), alleging misleading and deceptive conduct.

² Santos Ltd, 2022 Climate Change Report <https://www.santos.com/wp-content/uploads/2022/03/Santos-2022-Climate-Change-Report_web.pdf>, page 6.

³ Santos Ltd, 2021 Climate Change Report <<https://www.santos.com/wp-content/uploads/2021/02/2021-Climate-Change-Report.pdf>>, page 4.

⁴ Ibid, page 7.

⁵ Santos Ltd, ‘Santos welcomes IPC Narrabri Gas Project approval and thanks the Narrabri community for its strong support’ (ASX/Media Release, 30 September 2020) <<https://www.santos.com/news/santos-welcomes-ipc-narrabri-gas-project-approval-and-thanks-the-narrabri-community-for-its-strong-support/>>.

⁶ Santos Ltd, 2019 Climate Change Report <<https://www.santos.com/wp-content/uploads/2020/02/2019-climate-change-report.pdf>>, page 4; Santos Ltd, 2018 Shareholder Review <<https://www.santos.com/wp-content/uploads/2020/02/2018-shareholder-review.pdf>>, page 2.

⁷ Santos Ltd, 2019 Climate Change Report <<https://www.santos.com/wp-content/uploads/2020/02/2019-climate-change-report.pdf>>, page 4; Santos Ltd, 2018 Shareholder Review <<https://www.santos.com/wp-content/uploads/2020/02/2018-shareholder-review.pdf>>, page 2.

Statements made by Woodside Energy Group Ltd:

- “LNG is a reliable, affordable and clean energy source.”⁸
- “We supply affordable and clean energy to developed and developing nations, mainly in the form of gas, which is the hydrocarbon with the lowest emissions and the least impact on air quality and is an ideal partner for renewable energies.”⁹
- “Powering Western Australia with clean and reliable trucked LNG.”¹⁰
- “For 35 years, the North West Shelf project has supplied a reliable and clean energy source to customers in Western Australia.”¹¹
- “Today we operate around 6% of global LNG supply, providing our international customers with safe, reliable and clean energy.”¹²
- “Natural gas is clean, it is reliable and it is the ideal partner for renewables.”¹³
- “The [Pluto] facility will... create a distribution hub to transport highly reliable and clean LNG across WA for use in remote power generation.”¹⁴
- **“Affordable and clean energy: Our Aspiration:** Continue to provide LNG as a cleaner source of fuel for global markets and pursue the development of lower carbon energy sources.”¹⁵

Statements made by Beach Energy Limited:

- Natural gas, inherently, is a low carbon fuel as the CO₂ emissions from combustion of natural gas are lower than those from other fossil fuels such as coal.¹⁶

⁸ Santos Ltd, 2019 Climate Change Report <<https://www.santos.com/wp-content/uploads/2020/02/2019-climate-change-report.pdf>>, page 20.

⁹ Woodside Energy Group Ltd, ‘Our Energy Future in a Lower Carbon World’ (Online Brochure, undated) <<https://www.woodside.com/docs/default-source/sustainability-documents/climate-change/our-energy-future-in-a-lower-carbon-world.pdf>>, page 2.

¹⁰ Woodside Energy Group Ltd, LNG Trucking Brochure (Online Brochure, undated) <https://www.woodside.com/docs/default-source/our-business---documents-and-files/marketing-trading-and-shipment/woodside-lng-trucking-brochure.pdf?sfvrsn=25955a0f_2> 1.

¹¹ Meg O’Neill, ‘COO Speech at AmCham Sydney’ (Speech, AmCham Sydney, 21 November 2019) page 1.

¹² Meg O’Neill, ‘COO Speech at AmCham Perth’ (Speech, AmCham Perth, 29 July 2019) page 1.

¹³ Meg O’Neill, ‘COO Speech at Pluto LNG Loading Facility Opening Ceremony’ (Speech, Pluto LNG Truck Loading Facility Opening Ceremony, 12 April 2019) page 2.

¹⁴ Meg O’Neill, ‘COO Speech at Pluto LNG Loading Facility Opening Ceremony’ (Speech, Pluto LNG Truck Loading Facility Opening Ceremony, 12 April 2019) page 3.

¹⁵ Woodside Energy Group Ltd, Sustainable Development Goals (Web Page)

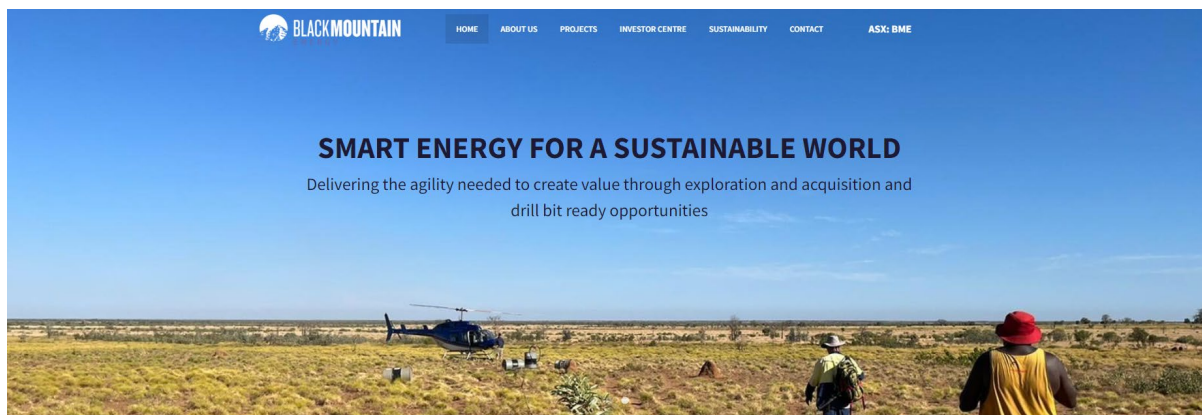
<<https://www.woodside.com/sustainability/un-sustainable-development-goals?goal=7>> (accessed 7 June 2023).

¹⁶ Beach Energy Limited, ‘Our Environment’ (Web Page) <<https://www.beachenergy.com.au/sustainability-2/our-environment/>> (accessed 7 June 2023).

Statements made by Tamboran Resources Limited:

- "Tamboran Resources Limited is a public natural gas company with a vision of supporting the net zero CO₂ energy transition in Australia and Asia-Pacific through developing low CO₂ unconventional gas resources in the Northern Territory of Australia"¹⁷
- "Play a role in the transition to a lower carbon economy through the production of low CO₂ natural gas resources"¹⁸
- "This industrial strategy has now been shown around the world to rapidly result in roughly a halving of emissions intensity in the power generation sector – the world's highest-emitting sector and the most important for achieving international Paris goals by 2030... With abundant low-carbon natural gas resources sitting right under our feet, including the Beetaloo Basin, where my company operates, Australians have their greatest opportunity for immediate global climate change action... But we must get it out of the ground quickly to turn the tables on the increasing proliferation of high-emissions coal if the world is to have a hope of hitting its Paris targets."¹⁹

Black Mountain Energy website:²⁰



OUR VISION

Forging a path for smarter natural resource extraction to ensure the world has clean, reliable, and affordable energy.

¹⁷ Tamboran Resources (Web Page) <<https://www.tamboran.com/>> (accessed 7 June 2023).

¹⁸ Tamboran Resources, 'Sustainability Plan' (November 2022) <https://www.tamboran.com/wp-content/uploads/2022/11/20221129_TBN_2022-Sustainability-Plan.pdf>.

¹⁹ The Australian, 'Banning gas would drive an emissions explosion' (20 February 2023) <<https://www.theaustralian.com.au/business/mining-energy/banning-gas-would-drive-an-emissions-explosion/news-story/e98d3401556c80df8dbde8c46c11c826>>.

²⁰ Black Mountain Energy (Web Page) <<https://www.blackmountainenergy.com/site/content/>> (accessed 7 June 2023).

Australian Petroleum Production and Exploration Association website:²¹



²¹ APPEA, 'The Future of Gas' (Web Page) < <https://futureofgas.com.au/>> (accessed 7 June 2023).

Annexure B Examples of net zero and vague environmental and sustainability claims in the superannuation industry

We set out below several examples of net zero claims and vague environmental and sustainability claims in the superannuation industry.

Statements made by HESTA:

- “We consider members’ best financial interests are served through a timely, equitable and orderly transition to net zero emissions by 2050 in order to minimise the systemic risks of climate change. This requires transition of our economy in line with the Paris Agreement. HESTA has an important role to play in the transition to a low-carbon economy. And we believe this creates important investment opportunities that will help deliver long-term value for HESTA members.”¹
- “We also take a total portfolio approach as we recognise the impact of climate change can present in many ways. In order to mitigate climate risk and capture climate-related opportunities, we need to achieve change in the real economy. In response, we have developed the following Climate Change Transition Plan to guide our actions.”²
- “Direct engagement and collaboration with other asset owners to amplify our voice is a strong focus for us. We use ongoing dialogue with high emitters and other industries dependent on fossil fuels to encourage them to transition their business models to be viable in a low carbon economy.”³

Statements made by UniSuper:

- “Accordingly, we fully support the Paris Agreement and intend to play our part in ensuring Australia fulfills its commitments as a signatory”⁴
- “Our actions will be consistent with the ultimate goals of the Paris Agreement—in particular, targeting net-zero emissions at a whole-of-fund and portfolio level by 2050.”⁵

¹ HESTA, ‘Climate Action’ <<https://www.hesta.com.au/about-us/hesta-impact/un-sustainable-development-goals/climate-action>> (accessed 7 June 2023).

² HESTA, ‘Climate Action’ <<https://www.hesta.com.au/about-us/hesta-impact/un-sustainable-development-goals/climate-action>> (accessed 7 June 2023).; HESTA, ‘Climate Change Statement’ <<https://www.hesta.com.au/content/dam/hesta/Documents/hesta-climate-change-statement.pdf>> (accessed 7 June 2023); HESTA, ‘Our Path to Net Zero Climate Report’, available at <<https://www.hesta.com.au/about-us/hesta-impact/un-sustainable-development-goals/climate-action>>; HESTA, ‘Annual report 2020-2021’, available at <<https://www.hesta.com.au/about-us/super-with-impact/reports-magazines>>.

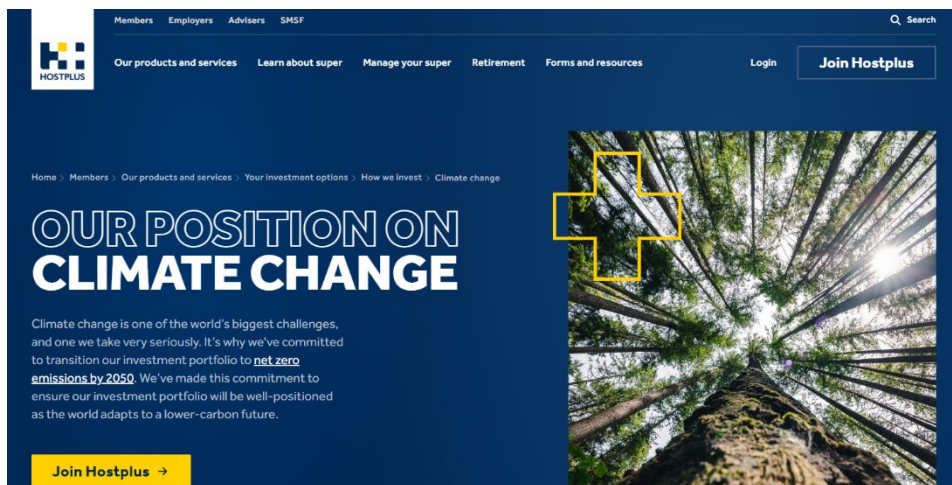
³ HESTA, ‘Our Path to Net Zero Climate Report’, available at <<https://www.hesta.com.au/about-us/hesta-impact/un-sustainable-development-goals/climate-action>>.

⁴ UniSuper, ‘Climate Risk and our Investments’ (April 2023) <<https://www.unisuper.com.au/-/media/files/investments/climate-risk-and-our-investments-2023.pdf?rev=f9e134fd4aea43c1813e708160682b57&hash=C02E7AB9515A7E757082DC56A512B528>>.

⁵ Ibid, 5

- “We’ll contribute a 45% reduction in Australia’s emissions by 2030 through company engagement, advocacy and investing capital in companies needed to achieve a net-zero future”⁶
- “Shape a brighter future with Australia's largest sustainable investor. With 100% responsible investments options and a pledge for net zero by 2050, you'll see a future that won't cost the earth.”⁷
- “As a large investor in the Australian share market, we’re in the position to influence the companies we invest in. Our influence is strongest when we’re dealing with companies in our Australian portfolios, managed by our in-house investment team. In these circumstances our ability to vote on company resolutions is reinforced by direct and regular engagement with companies. We’re aiming for 100% of Australian companies held in our actively managed portfolios **to have publicly stated Paris-aligned commitments by the end of 2021** [emphasis added].”⁸

Hostplus website:⁹



⁶ Ibid, 7

⁷ UniSuper (Web Page) <https://www.unisuper.com.au/greater-super?utm_source=google_ads&utm_medium=keywords&utm_campaign=osem_feb2022_branded_paid_alwayso_n&gad=1&gclid=CjwKCAjwsvujBhAXEiwA_UXnAIYfZ94MEhWMD2RLJRzN3T7VeaSSNV5btpFxW9LvvrDgn8ENkMiMo_hoCzH8QAvD_BwE> (accessed 7 June 2023).

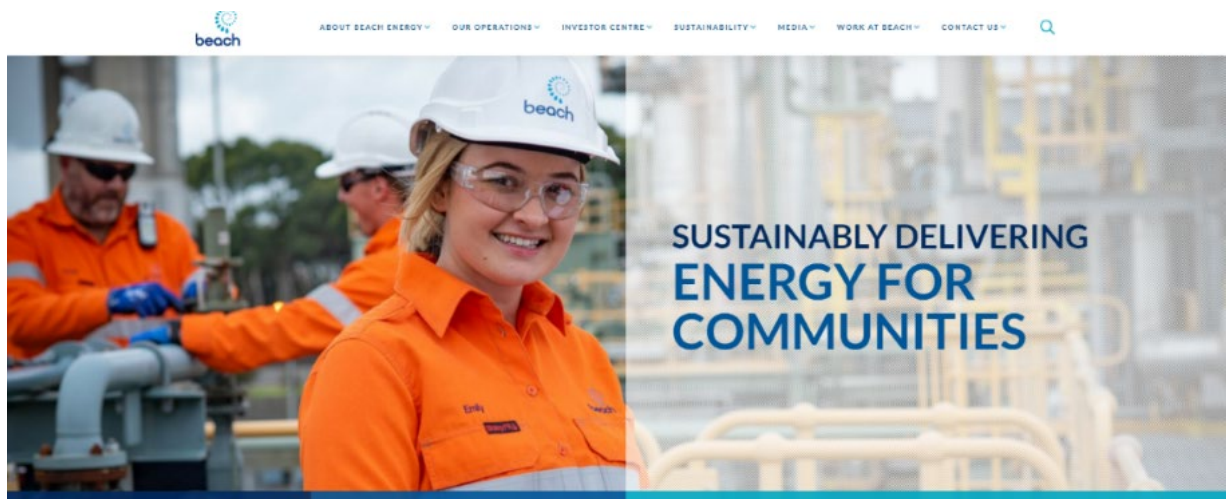
⁸ UniSuper, ‘Our Climate Change Position Statement’ 28 October 2020) <<https://www.unisuper.com.au/news-and-insights/our-climate-change-position-statement>>.

⁹ Hostplus, ‘Our position on climate change’ <<https://hostplus.com.au/members/our-products-and-services/investment-options/how-we-invest/climate-change>> (accessed 7 June 2023).

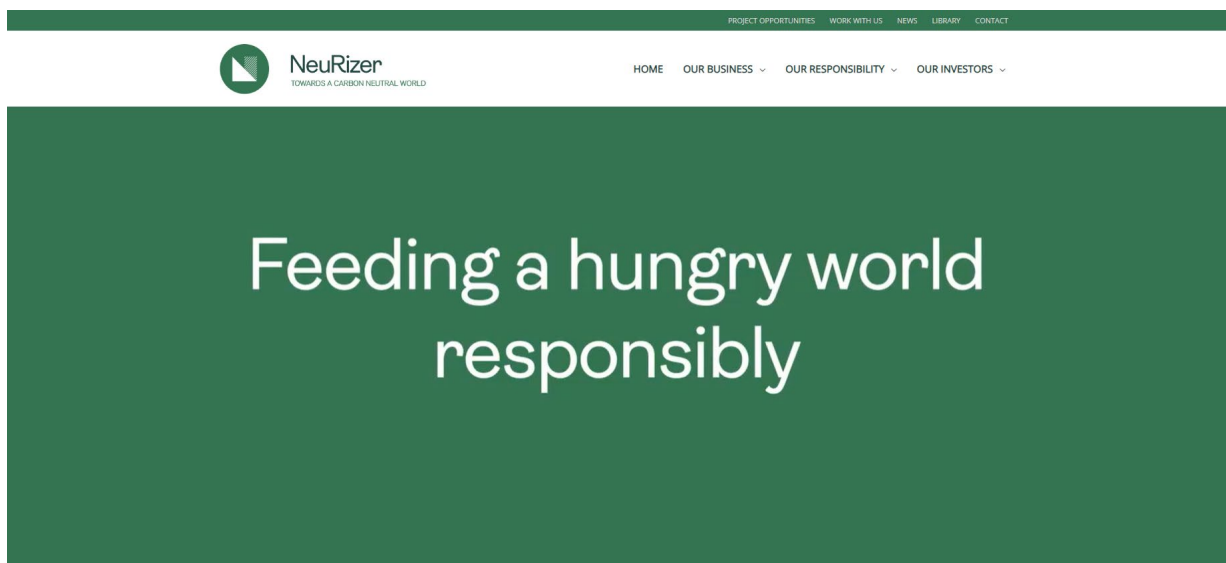
Annexure C Examples of vague environmental and sustainability claims on companies' websites

We set out below screen captures of several examples of vague environmental and sustainability claims on companies' websites.

Beach Energy Limited website:¹



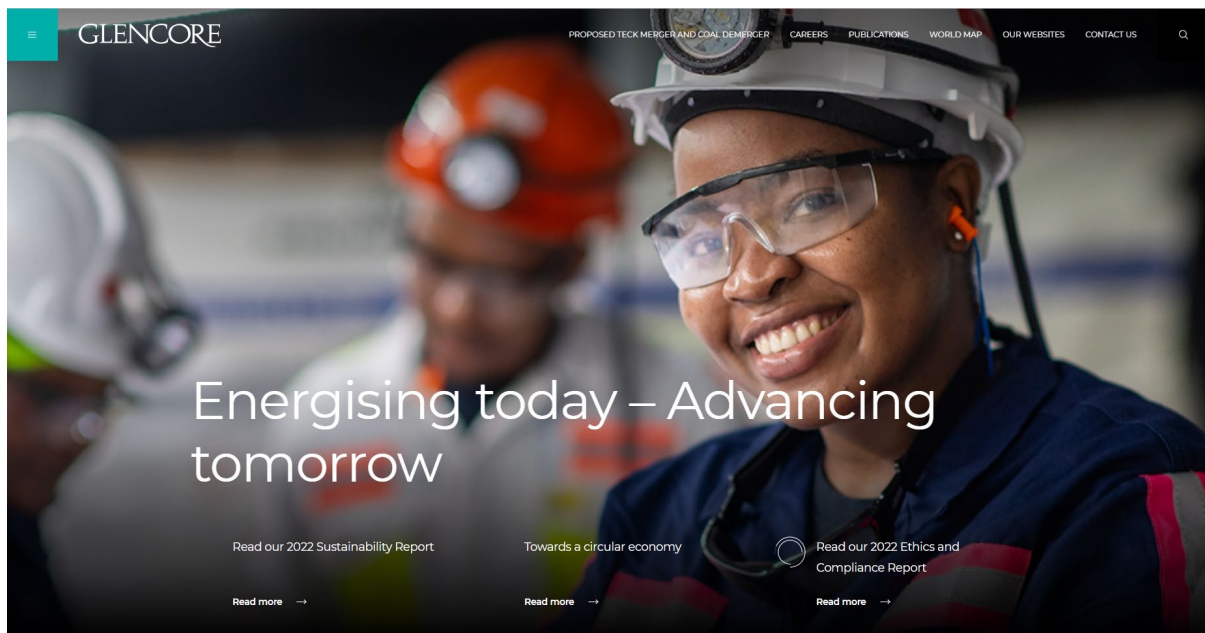
NeuRizer website:²



¹ Beach Energy (Web page) <<https://www.beachenergy.com.au/>> (accessed 8 June 2023).

² NeuRizer (Web Page) <<https://neurizer.com.au/>> (accessed 8 June 2023).

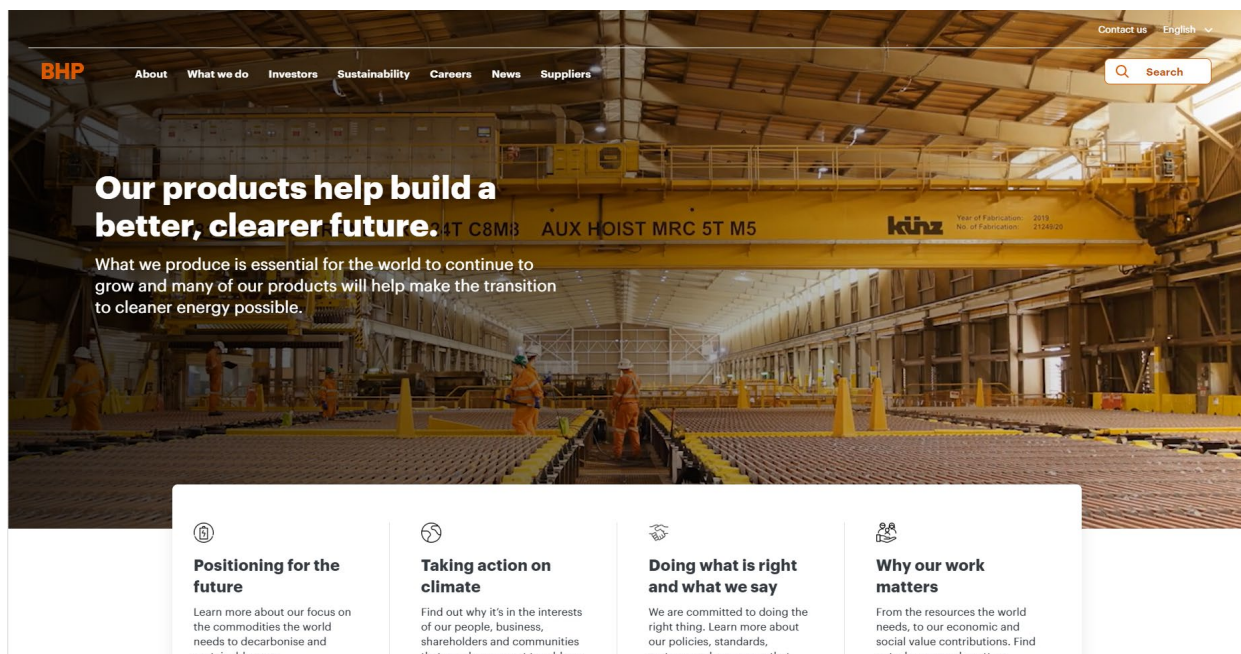
Glencore website:³



Our Purpose

Responsibly sourcing the commodities that advance everyday life

BHP website:⁴



³ Glencore (Web Page) <<https://www.glencore.com/>> (accessed 8 June 2023).

⁴ BHP (Web Page) <<https://www.bhp.com/>> (accessed 8 June 2023).

H2coco website:⁵



⁵ H2coco (Web Page) <<https://h2coconut.com/>> (accessed 8 June 2023).



Environmental Defenders Office

2 September 2022

Ad Standards
PO Box 5110
BRADDON ACT 2612

Complaint lodged via website at adstandards.com.au.

Advancing everyday life campaign and advertising associated with Glendell expansion by Glencore Australia.

1. We act for the Lock the Gate Alliance, Comms Declare and the Plains Clan of Wonnarua people (PCWP). We are writing on their behalf to ask that you investigate whether advertisements made by Glencore Australia on their Australian website a breach the Environmental Claims Code. The recent launch of the advertising campaign by Glencore is headlined “Advancing everyday life”, connected to their net zero by 2050 campaign.¹ It discusses Glencore’s involvement in mining of essential minerals that are “laying the foundation for a low carbon future” while being silent on their current mining operations that are focused on coal mining. A description of the representations in the advertising can be found at **Annexure A**.

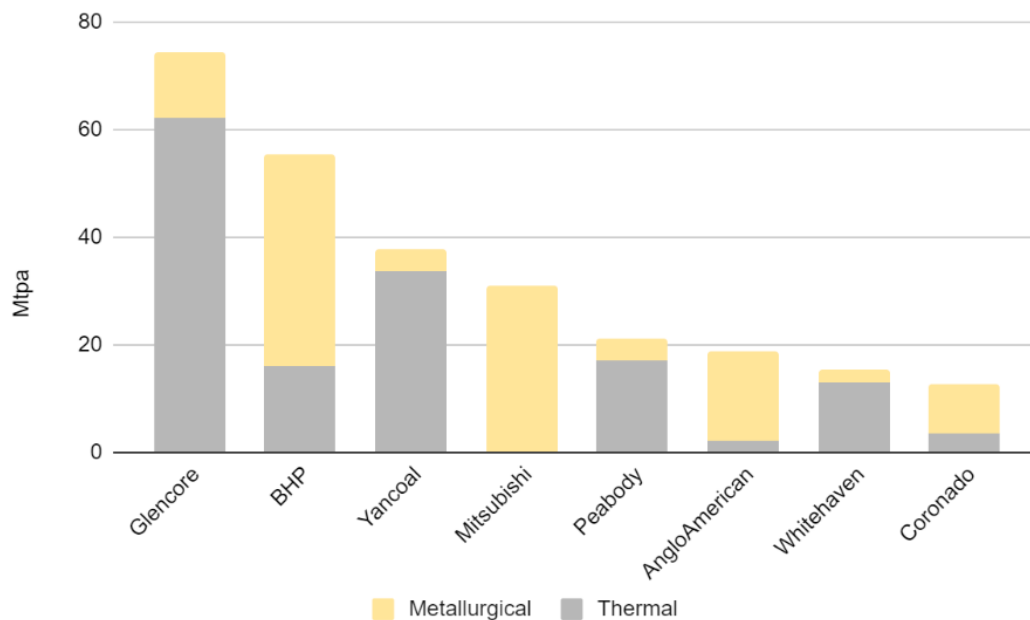
Environmental Claims Code

2. Section 1 of the Environmental Claims Code relates to misleading or deceptive conduct in relation to environmental claims. Clause 1 of the Code requires environmental claims in advertising or marketing communication to not be misleading or deceptive or likely to mislead or deceive, to display disclaimers or important limitations and qualifications prominently and 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 explain the significance of the claim, not overstate the claim or imply the product is more socially acceptable overall.
3. Lock the Gate and PCWP are concerned that the current advertising campaign on the Glencore websites overstates that Glencore are committed to addressing climate change and their mining is focused on supporting smart phones and electric cars and other renewable resources. It is misleading as it is silent on their current mining production and investment in Australia being mostly related to coal. Glencore has invested around \$259 million in the expansion of thermal coal and only around

¹ <https://www.glencore.com.au/who-we-are/advancing-everyday-life>.

\$2million in the expansion of minerals supporting renewables such as cobalt, nickel and copper in 2020 and 2021. ² Of their 24 mines in Australia, 17 are involved in coal mining. To suggest they are climate friendly and investing significantly in renewable resources and the mining that supports those industries is not currently correct. It will take some time for Glencore to transition to focus on renewables, with the majority of their coal mines operating until 2040 and several new mine expansions occurring at present. The omissions of these details are particularly misleading to consumers in breach of clause of the Environmental Claims Code. Details of the range of ways that Glencore’s net zero claims are misleading can be found at **Annexure B**. This is a copy of a recently lodged complaint with both ASIC and ACCC about misleading or deceptive conduct relating to net zero representations made by Glencore PLC and its Australian subsidiaries.

4. Glencore is the largest coal producer in Australia, see the chart below relating to their production in 2019.



5. Glencore does mine other resources. However the bulk of their greenhouse gas emissions are created from their coal production, rather than their other resources. This means their coal products are having a significant impact on climate change. See ACCR analysis below.

² <https://www.theguardian.com/environment/2022/jul/21/mining-giant-glencores-australian-pr-blitz-forgets-the-coal-driving-the-climate-crisis>.

MtCO2e	Scope 1	Scope 2	Scope 3*
Coal	5.9	1.2	300.0
Copper	1.3	1.6	4.5
Ferroalloys	3.0	4.1	4.5
Nickel	2.6	0.0	4.5
Oil	0.2	0.0	25.0
Zinc	2.0	2.4	4.5
Total	15.0	9.3	343.0

**Estimated commodity breakdowns*

- Given recent concern about greenhouse gas emissions, these statements form a strong overall impression of Glencore’s commitment to addressing climate change to differentiate itself to investors and consumers from other fossil fuel companies. Companies cannot cherry-pick the “green” part of their operations in advertising where it misleads consumers about the overall nature of their business and fossil fuel plans in accordance with clause 2 of the Environmental Claims Code.

International action by UK and Dutch Advertising Standards Associations

- The United Kingdom Ad Standards Authority has reviewed many environmental claims and found the following:

Since September, we have carried out our planned reviews of environmental claims in the heating/energy and transport sectors, which have identified a number of issues in ads for products and services in these sectors. The main issues we have identified for follow up action are:

- Aspirational claims about advertisers’ intentions to transition to net zero by particular dates (for example, 2030 or 2050), and the appropriate evidence needed to back up such claims*
- Claims by high-emitting companies, which focus on narrow environmentally beneficial aspects of their businesses but may not provide a complete picture of their overall environmental impact³*

- We understand from media reports that the UK Ad Standards may be in fact ruling on a greenwashing by omission claim against HSBC bank. They quoted:

³ <https://www.asa.org.uk/news/asa-statement-on-world-environment-day.html>.

In a draft seen by the paper, the ASA said people seeing the ads would assume the bank to be making “a positive overall environmental contribution as a company” while in fact the bank funded £14.3bn of fossil fuels last year, according to the Rainforest Action Network.⁴

9. The Dutch Advertising Standards has also ruled on a similar advertisement by Shell where is advertised it was “the driver of the energy transition” and “we’re changing”. It found:

The Commission considers it plausible that the average consumer will interpret the contested statement in such a way that Shell is currently undergoing a process of change in which it is changing its core strategic activity, also known as its core business, and is already investing to a significant extent in renewable energy at the expense of fossil fuels. After all, the announcement that Shell is turning into one of the biggest drivers of the energy transition implies that this process has already started and that a real change in the core business is taking place. However, as acknowledged, it has been established that, in addition to investing in transition projects, Shell is currently maintaining its investments in fossil fuels and is only phasing out very slowly. In that situation, the Commission considers it unjustifiable for Shell to refer to itself as “one of the biggest drivers of the energy transition”, giving the impression that it is an initiator and accelerator of the transition.⁵

10. If you have any further queries, please do not hesitate to contact me by email on kirsty.ruddock@edo.org.au or by phone at (02) 7229 0031.

Yours faithfully

Environmental Defenders Office



Kirsty Ruddock
Managing Lawyer
Safe Climate (Corporate and Commercial)

⁴ <https://esgclarity.com/hsbc-ad-warning-sets-industry-precedent/>.

⁵ <https://verbiedfossielereclame.nl/shell-may-not-call-itself-driver-of-the-energy-transition-rules-dutch-ad-watchdog/>.

Annexure A – Glencore advertisements as at 31 July 2022

<https://www.glencore.com.au/who-we-are/advancing-everyday-life>

“For 25 years across Australia, we’ve been responsibly mining the metals and minerals that advance everyday life. We provide natural resources that power the world around us – from businesses to homes, smartphones to laptops, airplanes to electric cars. And as a leading producer of green metals, we’re laying the foundations for a low carbon future”

“We operate 24 mines across the country and are part of a team of over 135,000 people in over 35 countries. That makes us one of the world’s largest mining companies that you’ve probably never heard of”

“Our in-house global marketing business places Australia’s resources into products made by some of the world's most recognisable brands. These companies are using Australian resources to produce the everyday items we couldn’t live without – like cars, phones, computers, electric cars, TVs, appliances, life-saving medical equipment and more”.



Environmental Defenders Office

16 December 2022

Rami Greiss
Executive General Manager
Consumer and Fair Trading Division
ACCC
23 Marcus Clarke St
CANBERRA ACT 2601

By email: rami.greiss@accc.gov.au

Complaint about misleading Ocean Plastic labelling

1. We act for Tangaroa Blue Foundation. Tangaroa Blue Foundation is an Australia-wide not for profit organisation dedicated to removal and prevention of marine debris- one of the major environmental issues worldwide.
2. We write on behalf of Tangaroa Blue to request that you investigate various representations made by several companies in relation to products that state that they are made from '100% ocean plastic' or other similar claims in relation to ocean plastic. Details of the claims are set out below and in the Annexures.
3. Tangaroa Blue is concerned that the representations relating to ocean plastic are potentially misleading or deceptive when:
 - a. in the absence of a definition of 'ocean plastic', consumers are likely to assume that 'ocean plastic' is removed from the ocean whereas most 'ocean plastic' is not removed from ocean;
 - b. it is impossible to generate a plastic container made of 100% ocean plastic recycled feedstock
 - c. there is no evidence that recycling plastic that is removed from the ocean improves the marine environment
 - d. there is no evidence that recycling plastic that is removed from the ocean benefits marine life; and
 - e. There is no evidence that ocean bound plastic items recovered for processing into ocean bound plastic feedstock, would have ever ended up in the ocean during their lifecycle.

(Claims)

Tangaroa Blue is referring this matter to the Australian Competition and Consumer Commission (**ACCC**) for investigation because of your Compliance and Enforcement Priorities for 2022-2023 which includes "consumer and fair-trading issues in relation to environmental claims and sustainability". We note Delia Rickard, the ACCC Deputy Chair, emphasised the importance of this priority during a speech to the Sydney Morning Herald Sustainability Summit on 20 September 2022. She said, "False or misleading sustainability

claims undermine consumer trust in all green claims and reduces confidence in the market – something the ACCC is keen to guard against”¹

Representations

4. Several companies have made representations about the use of ‘100% ocean plastic’ in their products.
5. Moo Yoghurt made the following representations on its yoghurt tubs in relation to its packaging being ‘100% ocean plastic’.
 - a. “100% ocean plastic recycled tubs” with an image of a turtle below the text;
 - b. A trademark with the text ‘100% ocean plastic waste’ around a recycling sign with a wave in the middle;
 - c. “Each tub has saved the equivalent of 2 plastic bottles from the ocean- our tubs and lids are made from 100% ocean bound plastic”; and
 - d. “Every time you buy our delicious Australian yoghurt you actively remove plastic from oceans, beaches and ocean bound waterways”.

(Annexure A)

6. Moo Yoghurt made the following representations on its website:
 - a. “Using our ocean plastic tubs, we are on track to saving the equivalent of 439, 277 bottles of plastic bottles entering the ocean this year and helping transform the lives of those living in underprivileged coastal communities around the world;”² and
 - b. Moo Yoghurt uses tubs made from 100% ocean plastic washed up on beaches in Malaysia.³
7. Zero Co made the following representations about its packaging being ‘ocean plastic’ on its social media:
 - a. “Our dispensers are made from plastic waste removed from the ocean. So every hero who joins the Zero Co crew are literally funding real world ocean clean-ups. Our first order of Zero Co dispensers will remove 6,000 kgs of plastic from our oceans”; and
 - b. “One of our favourites is that each Zero Co dispenser is made from plastic rubbish that’s been pulled out of the ocean. When you receive your bottles in October, you’ll be able to find out which part of the ocean you’ve cleaned by entering the tracking code into the TRACE YOUR CLEAN-UPS section of the Zero Co website”.

(Annexure B)

8. Lo Bros made representations on its drinks packaging that drinks cans for its “not soda” product:
 - a. “Removes two x plastic bottles from our oceans”; and
 - b. “We’re on a mission to free our oceans of plastics bottles and hydrate everyone with tasty drinks just like this one!”

(Annexure C)

¹ <https://www.accc.gov.au/speech/speech-to-smh-sustainability-summit>

² Moo Premium Foods, accessible at: [Impact — Moo Premium Foods](#)

³ <https://www.packagingnews.com.au/latest/aussie-first-food-pack-from-100-ocean-bound-plastic>

9. There are several other companies promoting ‘100% ocean plastic’ including Better Packaging Co and Ocean Bound Plastics which prominently depict images of turtles in their marketing material and make similar representations about the benefits of ocean plastic to the marine environment.

(Annexure D)

10. The representations listed at [5]-[10] above carry the following imputations:

- a. that 100% ocean plastic is made entirely of recycled plastic recovered from the ocean;
- b. that purchasing ocean plastic products directly removes plastic from the ocean;
- c. that ocean plastic is a product that helps reduce marine plastic pollution worldwide;
- d. that purchasing ocean plastic products improves the marine environment; and
- e. that purchasing ocean plastic products reduces the impact of plastic pollution on marine life (such as turtles).

11. The representations are potentially misleading or deceptive for the reasons set out at [3] above.

Law on misleading or deceptive conduct

12. Section 18 of the *Australian Consumer Law* states:

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

13. The representations are likely to also raise concerns about potential breaches of s29 of the ACL. Section 29 states:

(1) 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:

(b) make a false or misleading representation that services are of a particular standard, quality, value or grade;

14. 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”.⁴ Courts have also looked at the general impression made by the representations. As Burley J said in *Homart Pharmaceuticals Pty Ltd v Careline Australia Pty Ltd* [2017] FCA 403, because misrepresentations focus is on the “overall impression”, it is erroneous and artificial to take an unduly analytical approach to the consideration of the question of the misrepresentation.⁵

15. The representations are potentially misleading because they provide the general impression that the product is made of ocean plastic when, for the reasons set out at [19]-[33] below, that

⁴ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 319 [25] (French CJ)

⁵ *Homart Pharmaceuticals Pty Ltd v Careline Australia Pty Ltd* [2017] FCA 403 at 188.

is not the case. All of the claims are what we would describe as headline claims on consumer products which increases the likelihood consumers are misled.

16. The ACCC Guide ‘Green marketing and the Australian Consumer law’ (**Guide**) states that there should be a good faith basis for making an environmental representation which may require scientific or test data.⁶ The Guide also says that pictures can be representations, and that environmental images may be capable of making a sweeping environmental claim of environmental benefit that may be misleading and says that claims using endorsement or certification should be used with caution.⁷ The Guide also discusses claims about recyclable products, although it does not directly address the issue of products that are claimed to be made from a ‘100% recycled ocean plastic’ feedstock.⁸ This may be an issue the ACCC can consider in updating its Guide to address emerging environmental claims.

17. The audience for the representations relating to ocean plastic is a wide group of consumers, particularly those who are environmentally conscious and want to ensure their purchases are contributing to a sustainable marine environment. There is significant community awareness of the global environmental issues associated with marine pollution: there are around 14 million tons of plastic that end up in the ocean every year, and plastic makes up 80% of marine debris found in surface waters and deep sea beds,⁹ and the ‘Great Pacific Garbage Patch’ is a 1.6 million square kilometre of rubbish floating in the ocean, comprised of around 79,000 tonnes of plastic debris and 1.8 trillion plastic pieces, made from fishing nets and other plastic debris.¹⁰ The claims also target investors and potential investors in these companies.

Claim 1: In the absence of a definition of ‘ocean plastic’, consumers are likely to assume that ‘ocean plastic’ is removed from the ocean, whereas most ‘ocean plastic’ is not removed from the ocean.

18. There is no government accepted definition of ‘ocean plastic’ or ‘ocean bound plastic’. Scientific studies originally considered ocean plastic to be waste located within a certain distance of the ocean that had the potential to end up in the ocean or become ‘ocean bound through wind or water transport or mismanaged’.¹¹ The plastics industry has accordingly defined ‘abandoned plastic waste’ or ‘ocean bound plastic’ as any plastics located within **50km** from shores where waste management is inefficient and therefore could end up in the ocean.¹² There is however no science or substantiation of this claim or definition.

⁶ <https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf>, p 8

⁷ <https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf>, p 11-12

⁸ <https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf>, p 13-14

⁹ International Union for Conservation of Nature (IUCN) Issues brief on Marine Plastic pollution at [Marine plastic pollution - resource | IUCN](#)

¹⁰ Lebreton et al, “Evidence that the Great Pacific Garbage patch is rapidly accumulating plastic”, Scientific reports 8, (March 2018) article 4666 at [Evidence that the Great Pacific Garbage Patch is rapidly accumulating plastic | Scientific Reports \(nature.com\)](#)

¹¹ Jambeck et al, “Plastic waste inputs from land into the ocean” Science, v.347, issue 6223 at: [Plastic waste inputs from land into the ocean | Science](#)

¹² Ocean Bound Plastic Neutral at: [What Is Ocean Bound Plastic \(OBP\)? - Ocean Bound Plastic Certification \(obpcert.org\)](#)

19. This is quite different to the ordinary consumer's understanding of the term 'ocean plastic' or 'ocean bound plastic'. Most consumers are likely to assume that the term 'ocean plastic' includes plastic in the ocean or washed up on adjacent beaches but would not understand that it also captures other environments, including freshwater and drainage systems up to 50km from the shore. As such, we would argue that 'ocean bound plastic' is better defined as 'post-consumer plastic waste'.
20. Furthermore, the industry definition of 'ocean plastic' (being plastics located within 50km from shores which could end up in the ocean) makes it difficult to determine what is, in fact, 'ocean plastic'. Very little ocean plastic is collected and processed in Australia. Much of it is sourced from locations such as Indonesia or Malaysia where there is little regulation of the industry. Investigative reporters explored the issue of what is ocean plastic and determined that it is almost impossible to claim to be 100% or even 50% ocean plastic.
21. For example, an investigation into Zero Co, which sells dispensers for household goods called 'Forever Bottles', found that its suppliers, PackTech, could not provide an audited certification of the amount of ocean plastic in its plastic resin. Zero Co's first project claimed that the production of its "Forever Bottle" resulted in the removal of 6000kg of plastic waste from the ocean.¹³ This was despite a later statement on its blog that "neither PackTech nor Zero Co know the exact percentage of ocean plastic in our first generation Forever Bottles. It could be 50%. It could be 49%. It could be 3%.¹⁴ We do not know". To add to the confusion, Ocean Plastic Waste, a movement established by PackTech, discloses on its website that "we underline that there is no plastic from the oceans and rivers in our current packaging".¹⁵
22. For two years, Kevin Murphy claimed to be using 100% ocean waste plastic packaging for its hair products. After being informed by its plastic supplier that the plastic was not made from 100% ocean waste plastic, Kevin Murphy issued an apology for making misleading claims about its products.¹⁶
23. Similarly, recent discussions between consumers and Bunnings reveal that Bunnings pulled the ocean bound plastic Tech Bin because it could not be satisfied that the plastic used to make the product was wholly recovered from the ocean (**Annexure F**).
24. Environmental scientist and campaigner, Dr Kieran Kelly, said that many organisations claiming to be collecting 'ocean bound plastics' do so in dubious ways.¹⁷ Mr Kelly described how one organisation collected plastic bottles from resorts and sold the bottles to be recycled, charging \$3000-\$4000 a tonne. Technically this would meet the industry definition if the resort

¹³ Luke Stacey, "Ocean Waste: how plastic recyclers downplay their use of new plastics", Michael West Independent Journalists at [Ocean Waste: how plastic recyclers downplay their use of new plastics - Michael West](#)

¹⁴ Ibid.

¹⁵ Ocean Waste Plastic website at: [What is OWP? \(oceanwasteplastic.com\)](#)

¹⁶ Kevin Murphy website at: [Ocean Waste Plastic - kevinmurphy.com.au](#)

¹⁷ Paul Harvey blog, "Ocean bound plastic: the marketing campaign fooling conscious consumers" at: [Ocean bound plastic: the "marketing campaign" fooling conscious consumers - Dr Paul Harvey - The Plasticology Project \(docpiharvey.com\)](#)

is within 50km of the shore, and if there is a possibility that the bottles would end up in the ocean, but this is not consistent with the ordinary consumer's likely understanding of 'ocean plastic' (being plastic that is removed directly from the ocean or adjacent beaches).

25. In light of the above, there is considerable uncertainty surrounding what constitutes 'ocean plastic', with the industry definition far broader than that likely to be understood by the average consumer or understood by looking at broad claims on packaging. Furthermore, there is also uncertainty as to the quantity of 'ocean plastic' found in products that claim to be made of either 50 to 100% ocean plastic, with those claims often being unsubstantiated. The result is that there is a real possibility that consumers of products which claim to be made of ocean plastic have been misled about the constitution of that product.

Claim 2: It is impossible to generate a plastic container made of 100% recycled ocean plastic feedstock.

26. Ocean plastic products cannot be produced from 100% ocean plastics. Many ocean plastics are damaged through their journeys and interactions in the ocean and break up into small plastics that are difficult to collect. Because plastics do not biodegrade, they remain in the marine environment. During the different stages of a plastic's long life there is the potential for chemicals to latch on to, and leach out of, the plastic, even if it is able to be collected later. Old and degraded plastic is particularly susceptible to leaching and has surface area for chemicals to cling on to. Banned chemicals which are known to be toxic, like pesticide DDT, have been found on marine plastic and in sensitive ecosystems.¹⁸
27. There are also restrictions on being able to recycle plastic for food grade packaging. Most manufacturers follow the US Food and Drug Administration standards which provide guidelines about the use of recycled plastics to avoid packaging being contaminated.¹⁹ As there are strict rules in relation to contamination even from food, it would be difficult for ocean plastic to meet the criteria needed for re-use in food grade plastic. The FDA criteria require strict source control and thorough cleaning efficiency of the recycling process with testing for contaminants.²⁰ It is for this reason that most plastics collected in kerbside recycling schemes are recycled into plastic furniture, carpet, panelling, fibre cables and polar fleeces rather than reused to make more bottles. To be reused for bottles, the PET plastic bottle needs to be kept in a very good state, and therefore it is unlikely most ocean plastic collection would allow for such recycling. In fact, most plastic collected from the ocean is incinerated for this reason.²¹
28. As such, it is only possible to generate recycling from plastic found on the shore or that is prevented from entering the ocean.²² Many of these schemes should not be described as 'ocean plastic' but rather collection or clean up based systems in developing countries designed to

¹⁸ <http://www.pelletwatch.org>

¹⁹ <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-use-recycled-plastics-food-packaging-chemistry-considerations>

²⁰ <https://www.fda.gov/food/packaging-food-contact-substances-fcs/recycled-plastics-food-packaging>

²¹ <https://www.preventedoceanplastic.com/four-need-to-knows-about-ocean-plastic-recycling/>

²² <https://www.preventedoceanplastic.com/spectra-make-prevented-ocean-plastic-commitment>

collect post-consumer plastic waste and prevent plastic reaching the ocean, which is why some plastic collection programs describe this as “prevented ocean plastic”.

29. The term ‘ocean bound plastic’ is misleading in this context, particularly where most of the plastic is not generated in Australia with the requisite checks and balances to verify where it has been collected. Furthermore, there is no proof that any of the items that are called ‘ocean bound’ would have ended up in the ocean if not collected.
30. The process of recycling itself often requires the addition of virgin plastic resin to any recycled product to ensure that it is sufficiently durable for use in food and other packaging; often virgin plastic will be required as an inner layer designed to prevent interaction with the recycled product to meet the various food standards.
31. Recent discussions between consumers and Zero Co have also confirmed that the manufacturing of the bottles happens in Australia, but with a resin imported from overseas. Their response claims 50% ocean bound plastic, but not what the other 50% consists of in their products (**Appendix B**).
32. In light of the above, companies that claim that their products are made from 100% ocean plastic are likely to mislead the average consumer because it is not possible for any product to be made from 100% recycled ocean plastic material.

Claim 3: There is no evidence that recycling plastic that is removed from the ocean improves the marine environment

33. Ocean plastic pollution is having a significant impact on the marine environment. Many sources of plastic come from land, stormwater and littering as well as inadequate waste management facilities. Ocean based plastic also comes from the fishing industry, shipping and aquaculture.
34. Under the influence of solar radiation, wind and currents, plastic breaks into smaller particles called microplastics. Around 92% of plastics found on the surface of the ocean is microplastic, and the concentration of microplastic found on the ocean floor is increasing. Because microplastic is so small, it is more likely that marine life ingests it accidentally which causes injury and death. It can also limit their ability to reproduce, resulting in smaller population.²³
35. Much ocean plastic also settles on the ocean floor, with only 1% floating on the surface, causing permanent damage to the ocean environment.²⁴ Scientists involved in studies of ocean plastic have highlighted the importance of policy interventions to limit the future flow of plastics into natural environments to minimise impacts on ocean ecosystems.²⁵ Plastic pollution threatens food safety, human health, coastal tourism and contributes to climate

²³ American Oceans -Everything you need to know about microplastics in the ocean-

<https://www.americanoseans.org/blog/microplastics-in-ocean/>

²⁴ <https://www.manchester.ac.uk/discover/news/scientists-find-highest-ever-level-of-microplastics-on-seafloor/>

²⁵ <https://www.manchester.ac.uk/discover/news/scientists-find-highest-ever-level-of-microplastics-on-seafloor/>

change. The solutions to ocean plastic are likewise complex and require better regulation and waste management systems, including preventing dumping at sea, but also less plastic being used and generated in the first place.

36. There is no evidence that systematic removal of ocean plastic through ocean clean ups to produce ocean plastic improves marine pollution. Research undertaken by the Pew Trust found that the removal of a certain quantity of plastic from the environment is insufficient to address the scale of the problem. It is estimated there is around 14 million tonnes of plastic entering the oceans a year, and at the current rate of production, that number will increase to 29 million tonnes by 2040. That is equivalent to 50kg of plastic on every metre of coastline around the world.²⁶
37. The solutions proposed by the Pew Trust's research include a dramatic drop in production and use of plastics by avoiding our throw away culture, as well as reusing and recycling plastic. In relation to microplastics, new technologies are required to avoid these plastics in the manufacturing process, as they are too small to collect and recycle once they enter the ocean. As such, encouraging consumers to use more plastic by buying "ocean plastic" products will not improve the marine environment; rather it adds to the problem. More fundamental reforms are needed.
38. Considering the above, there is a strong likelihood that representations that give the overall impression that products made from ocean plastic improve the marine environment will mislead the average consumer of those products. This will be particularly the case with packaging or websites that include brief headline claims.

Claim 4: There is no evidence that recycling plastic that is removed from the ocean benefits marine life

39. Many of the companies' packaging or marketing campaigns use iconic images and symbols of marine species such as turtles, oceans, clean beaches or waves to market their environmental credentials. This is shown in the advertising featured in **Annexure C, D and E**. For example, Moo Yoghurt tubs depicts an image of a turtle under the text "*100% ocean plastic recycled tubs*" which links the product with reducing the impact of marine plastic on marine turtles and other marine life (**Annexure A**)
40. Environmental images such as turtles, when placed alongside text relating to '100% ocean plastic' are potentially misleading because of the suggestion of a clear link between buying products made from ocean plastic and a benefit to marine species and the marine environment.
41. For the reasons provided at [31]-[35] above, there is no evidence that recycling plastic that is removed from the ocean improves the marine environment and is of benefit to marine species

²⁶ Pew Charitable Trust, Confronting Ocean Plastics Pollution at <https://www.pewtrusts.org/en/trust/archive/fall-2020/confronting-ocean-plastic-pollution>

such as turtles; representations that it does are likely to mislead the average consumer of 'ocean plastic' products.

Claim 5: There is no evidence that ocean bound plastic items recovered for processing into ocean bound plastic feedstock, would have ever ended up in the ocean during their lifecycle.

42. As indicated above, a number of companies are using representations around the impacts on the marine environment of their use of ocean plastic or ocean bound plastic, including using turtles and dolphins in their advertising. For the reasons outlined above, there is no clear evidence that the plastic being used would have ended up in the ocean in the first place. In many cases, waste pickers are removing plastic from the environment in Malaysia, that is then processed in a non-regulated plastic factory and shipped to Australia for manufacturing. In the absence of trackability of which country the plastic was removed from the environment, processed and transported from and to for manufacturing, there is no evidence that this process improves the marine environment, compared to using virgin plastic feedstock or non-OBP/OP feedstock. As **Annexure E** illustrates some companies are also going further and citing the carbon benefits of using ocean plastic, again a claim that is difficult to justify.

Harm associated with the conduct

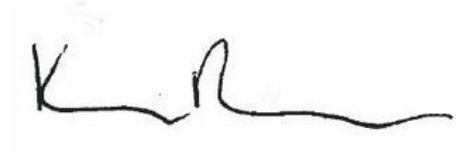
43. This type of misleading conduct is of concern. Given the wide public concern about marine pollution, environmentally conscious consumers are more likely to buy a product if it contains ocean plastic. This disadvantages companies who are not using 'ocean plastic' claims on their packaging. There is also a consumer detriment as consumers are also paying a premium price for these products for a benefit that does not necessarily exist. For example, Moo Yoghurt is 77cents per 100 grams, compared to 45 cents for Woolworths yoghurt brand or 60c per 100 grams for Farmers Union. Similarly, Zero Co laundry detergents are \$9.90 per litre compared to \$3 per litre for Earth Choice brand.

44. The ACCC previously took action against Woolworths Ltd in relation to 'biodegradable and compostable' packaging in *ACCC V Woolworths Ltd* [2020] FCAFC 162 because there is a public interest in companies substantiating such claims prior to making them. We are of the view that it is important that the ACCC similarly take action to ensure that potentially misleading or false claims relating to ocean plastic area do not continue to grow.

45. If you have any further queries, please do not hesitate to contact me by email on kirsty.ruddock@edo.org.au or by phone at (02) 2 7229 0031.

Yours faithfully

Environmental Defenders Office

A handwritten signature in black ink, appearing to read 'KR', with a long horizontal flourish extending to the right.

Kirsty Ruddock

Managing Lawyer

Safe Climate (Corporate and Commercial)

Annexure A – Moo Yoghurt

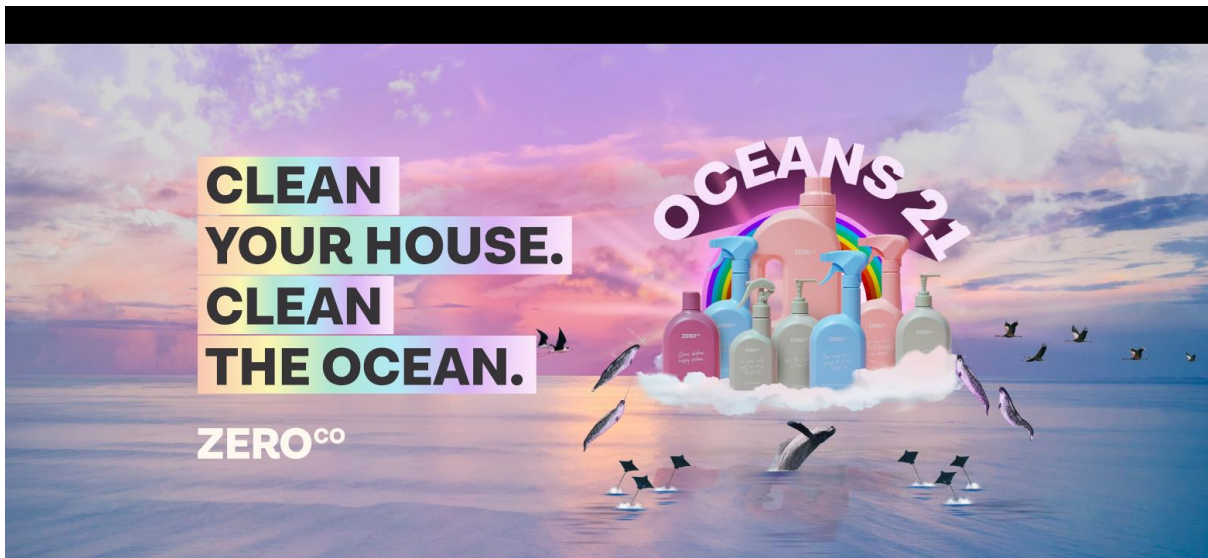
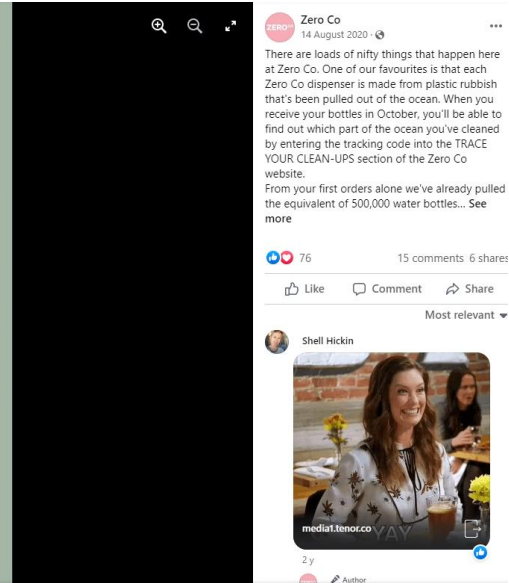






Annexure B: Zero Co







zeroco.com.au 

Instagram

79K followers · 802 posts

You don't follow each other on Instagram

You both follow davidattenborough
and 1 other

[View Profile](#)



Who makes your forever
bottles made in Australia?
And what types of clean up
plastic are used to make
bottles?

[Send](#)

  **Zero Co** 
Active now  

Our Forever Bottles are made from our very own specially created material called OBL (it's a combo of Aussie Ocean, Beach and Landfill HDPE plastic waste).

The bodies of our Forever Bottles are currently being made from 50% OBL and we are fully committed to manufacturing our dispensers as close to 100% OBL as possible in the future. And they are made by an Aussie manufacturer!

Unfortunately we cannot share who we work with as this is a pretty unique and innovative creation and process that we have worked super hard to get right, and we're in a tricky position of brands blatantly copying us

 Message...   



Zero Co's post



Zero Co

Sponsored ·



Clean Hands, Clean Planet!

Every Zero Co purchase funds epic cleanup projects in Australia and around the world, like the one we're doing right now in Egypt, pulling 1 MILLION water bottles of rubbish from the Nile River. 🌊

The plastic from our Aussie cleanups gets turned into our Forever Bottles that you keep at home and refill for life, stopping single-use plastic and funding cleanups at the same time.

Huzzah for Handwash! 🙌

Check out our range of home-cleaning and personal products now 🙌 www.zeroco.com.au

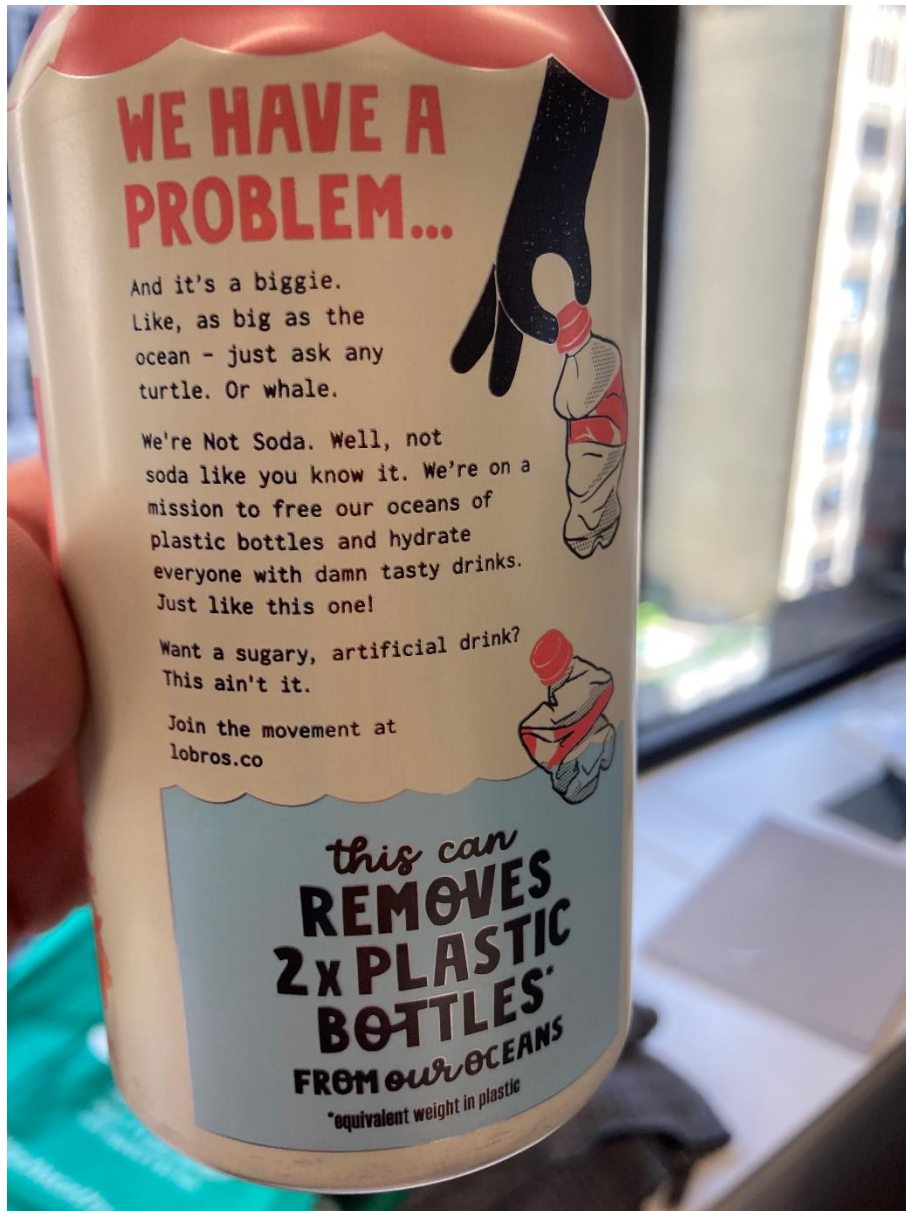


Write a comment...

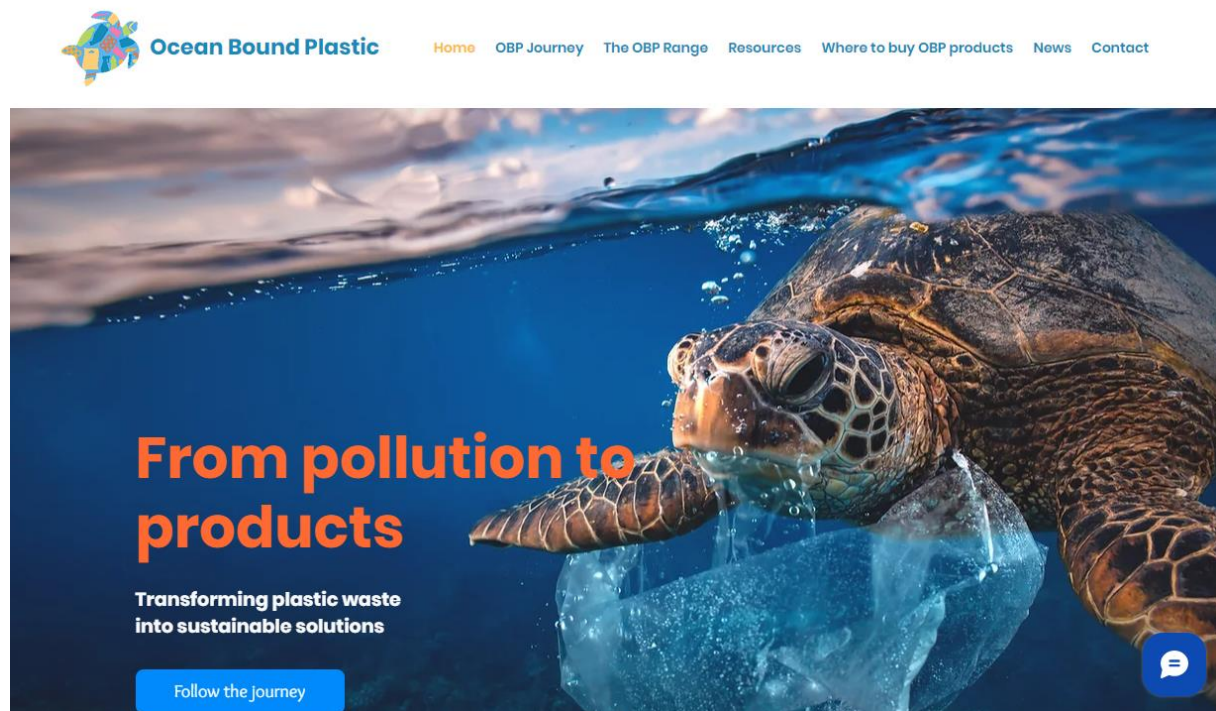


Annexure C: Lo Bros packaging





Annexure D: Marketing for general ocean plastic products at <https://www.oceanplastic.com.au>



Why buy products made from ocean bound plastic?



Diverts plastic from landfill

In Australia, 84% of plastic waste is sent to landfill and takes thousands of years to decompose. To put this into perspective, that's 2.1 million tonnes or 42 million 600ml PET water bottles EVERY SINGLE YEAR. Collecting waste before it hits the ocean and ends up in landfill helps to reduce the amount of waste overall and reduces the environmental impacts of landfill.



Impacts environmental awareness

By buying ocean bound plastic, talking about it to friends and family, posting about it on socials or advocating for its use in your business or workplace, you broaden the conversation about the environmental impact of how we live and work. As stakeholders of our environment, community, Government and business sectors all have a part to play.



Individuals can make a BIG difference

Our individual choices send a message and create change in our world. Through the purchase of products made from ocean bound plastic, you not only reduce the amount of plastic waste polluting the environment, or create safer spaces for ocean wildlife, you support the recycling and reuse of plastic in sustainable ways.

THANK YOU.



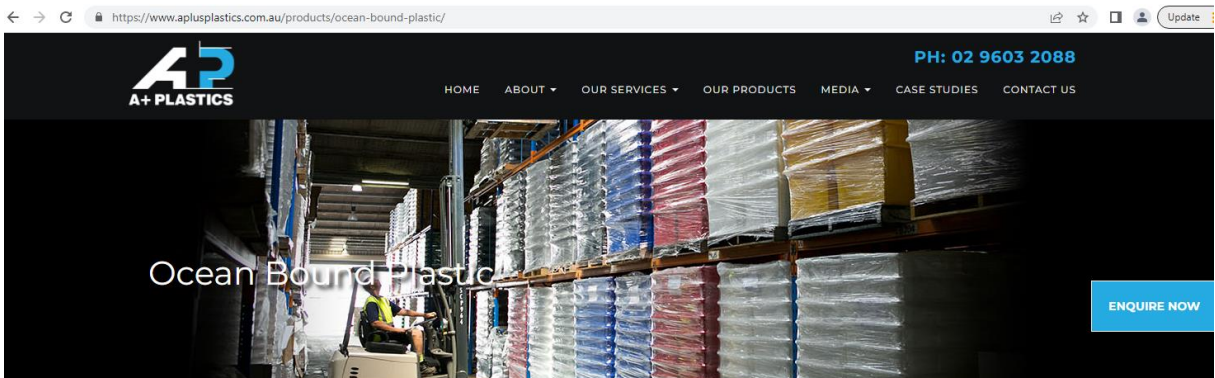
Where can I buy ocean bound plastic products from?



The full OBP Range is available from Australian made and owned A Plus Plastics. Custom moulding options also available.

[Visit the APP website](#)

[Request a quote](#)

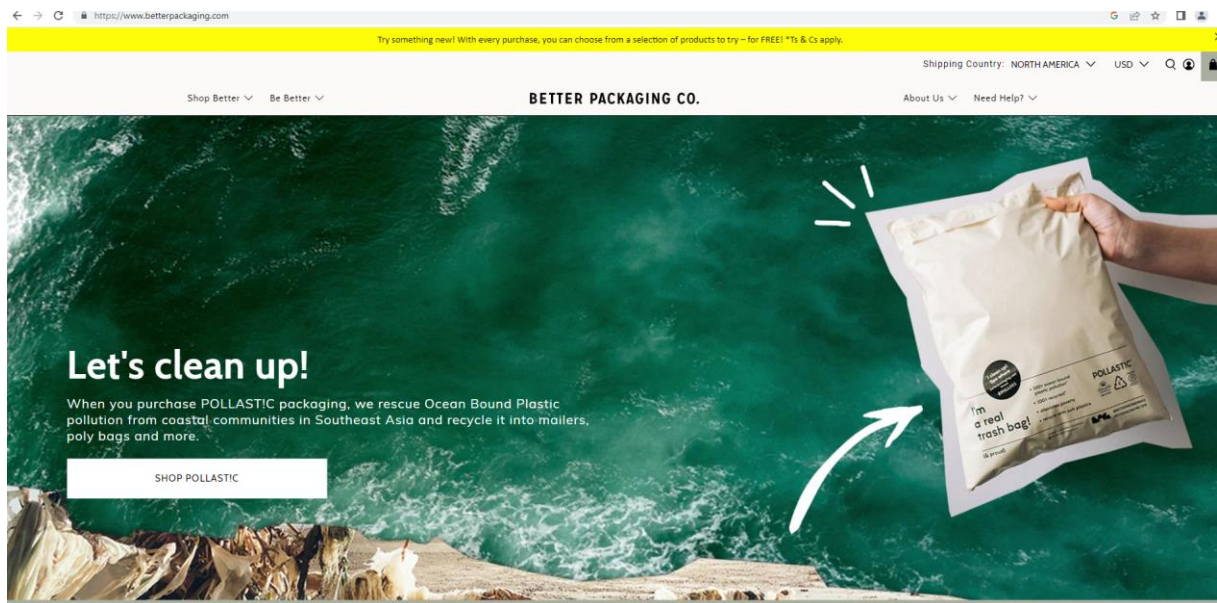


- Select from a category below
- Ocean Bound Plastic
- Bulk Handling
 - Lock & Save
 - Collapsible Bins
 - Lids
- Materials Handling
 - Clear Crates
 - Enviro Crates
 - Fish Crates



Annexure E

Better packaging co- www.betterpackaging.com



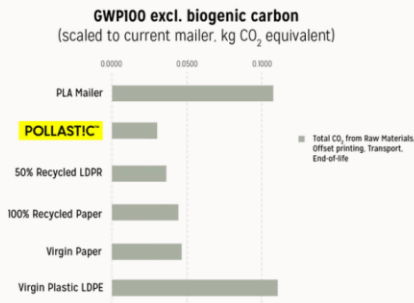
POLLASTIC™

A range of packaging made from recycled Ocean bound Plastic pollution rescued from coastal communities throughout Southeast Asia.

KEEPING PLASTIC POLLUTION OUT OF OUR OCEANS

An estimated **5-13 million tonnes** of plastic enters our oceans every year and this is expected to **triple by 2040**.

Over 70% of that plastic enters oceans via land and over 80% of that comes from Asia. That's why we focus our collection efforts in Southeast Asian coastal communities.



Independent Comparative LCA 2021 Conducted by Sphers Consulting Compared BPO POLLASTIC Mailers to other sustainable packaging solutions

©2021 Sphers


SUPER LOW CARBON FOOTPRINT


Independent Life Cycle Analysis has shown POLLASTIC mailers to be the lowest carbon form of packaging currently commercially available.

They have a CO₂ footprint 75% less than that of a traditional plastic mailer and 30% less even than 100% recycled paper.

Intro



Providers of revolutionary, customised packaging solutions for the new eco-nomy. A circular economy

 Page · Product/Service

 (02) 8073 8343

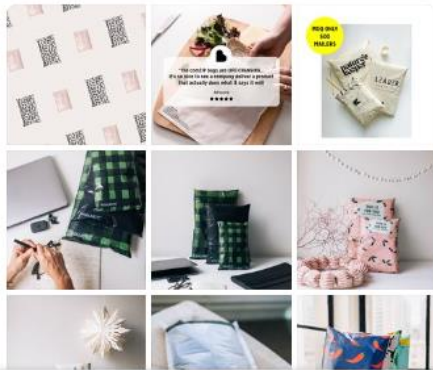
 hello@betterpackaging.com

 [betterpackaging.com](https://www.betterpackaging.com)

 Rating · 4.8 (24 reviews) 

Photos

[See All Photos](#)



Better Packaging Co

11 November at 08:00 · 

It's all about impact with these stunning custom mailers made for Nature's Keeper, [Leader Denim Co](#) and [Cavela Coffee](#). How good would your brand look on some of these too?!?

- ✓ MOQ 500 pieces
- ✓ Made from 100% Ocean Bound Plastic
- ✓ Recycle with soft plastics
- ✓ Unlimited shelf life so you can take as long as you need to use them

Last date to place an order this year is November 20th, so get in pronto!

ORDER HERE: <https://bit.ly/3fWWyHI>



Connect with Better Packaging Co on Facebook

[Log in](#)

or

[Create New Account](#)

Annexure F- email to Tangaroa Blue re Bunnings sales of A& P Tech bins (seen at Annexure D) dated 6 December 2022

Good Morning Heidi,

Thanks for your email. We have been working with the supplier of these storage bins to review in detail the materials used in production. While this work has confirmed that the product contains recycled materials we are not satisfied the chain of custody establishes that it is wholly recovered from oceans. We are in the process of placing new labels on the products before returning them to sale.

Thanks again for bringing this matter to our attention.

Regards,

*Sonya Rand
Head of Sustainability*

Annexure F Copy of Glencore’s advertisement in the Hunter Valley Times (subject of complaint to ASIC and ACCC by Lock the Gate Alliance and the Plains Clans of the Wonnarua People)

We set out below a copy of Glencore’s advertisement in the Hunter Valley Times in November 2011¹ which was, among other things, the subject of a complaint Lock the Gate Alliance and the Plains Clan of the Wonnarua People, represented by EDO, submitted to ASIC and ACCC.²

DEAR COMMUNITY STAKEHOLDER

As reported in The Singleton Argus on Thursday 28 October, Glencore is seeking approval to continue mining to the north of our existing Glendell coal operation.

Located in the proposed project area is the Ravensworth Estate and Homestead, which we have maintained for the past 23 years and are proposing to relocate to allow the project to proceed, creating employment opportunities for the next 20 years.

Mr Scott Franks and Mr Robert Lester, representing a group called the Plains Clans of the Wonnarua People (PCWP), are seeking to stop our project (and the relocation of the Homestead) and have made an application to the Commonwealth Government that could stop mining and other industry activities across a 156km² area in the Hunter Valley.

In response to repeated inaccurate claims being made about our Glendell Continued Operations Project, the history of the Homestead and its connection to a massacre of Aboriginal people on 2 September 1826, here are some relevant facts:

- 1 Glencore has had ongoing engagement with 32 local Registered Aboriginal Parties over the past four years about cultural heritage and our project. The PCWP members are but one of the 32 parties.
- 2 Mr Franks and Mr Lester claim to represent all Wonnarua people when in fact they are not recognised as Native Title holders.
- 3 Glencore has considered and consulted on two options for the relocation of the Homestead, to safely relocate the building and make it more accessible to the general public.
- 4 The other Registered Aboriginal Parties we have consulted have not identified Ravensworth Estate and Homestead as places of special significance requiring protection, which is consistent with our extensive cultural and heritage assessments of the area.
- 5 Independent studies of the written histories, including thorough investigation by a leading local historian, indicate that the September 1826 massacre in question occurred more than 20km away from the Homestead site. The Homestead, as it stands today, was built more than five years after this event.
- 6 Glencore recognises the importance of preserving sites of significant cultural heritage and has assisted Aboriginal groups in the past with protecting sites like the St Clair Mission in the Hunter region.

Something doesn't add up:

2017 Mr Franks was very keen to work with Glencore and provided a proposal for managing the homestead and relocation.

2020 Mr Franks and Mr Lester made an application to the Commonwealth Government seeking preservation and protection of a 156km² specified area described as 'Ravensworth Estate', and including Bowmans Creek and Glennies Creek, in the Hunter Valley.



Ravensworth Homestead at present

An image showing how the Homestead could look at one of the proposed relocation sites.

Further information on our project can be found at www.glencore.com.au

GLENCORE

¹ The Hunter River Times (Newspaper, 5 November 2021)

<<https://hunterrivertimes.com.au/index.php/2021/11/05/issue-36-november-5/>> page 6.

² 'ACCC/ASIC Complaint re Glencore' (2 September 2022) <<https://www.edo.org.au/wp-content/uploads/2023/02/Glencore-complaint-FINAL.pdf>>.