

Greenwashing: background note

Greenwashing - new frontiers and new risks for the energy and resources sector?
ER Law and Allen & Overy, Perth, 23 February 2023

Australia's consumer and corporate laws have long prohibited 'misleading/deceptive' statements.¹ From 1974, the famous s52 of the Commonwealth *Trade Practices Act* proscribed corporations from 'engag[ing] in conduct that is misleading or deceptive', which was mirrored in various state and territory laws, and since 2011 exists in the *Australian Consumer Law*.² The Commonwealth's 1989 *Corporations Act* prohibited conduct 'likely to mislead or deceive' regarding securities, and now various corporate laws prohibit misleading/deceptive conduct, including in documents produced by companies and financial service entities.³

It is regularly *alleged* that statements have been 'misleading/deceptive' but that is far less often found by courts to have occurred.⁴ So it is trite to say that statements in the resources and energy sector should not mislead or deceive – whether made by companies, governments or other actors.⁵ But there are relatively few examples of where a statement has *actually* been adjudged misleading/deceptive.

Historically, there has been some regulator action against parties making unsubstantiated environmental claims.⁶ The Australian Competition and Consumer Commission (ACCC and its predecessor) has also published general material with cautions around 'green marketing'.⁷ Court decisions of *liability* for 'greenwashing' are scarce.

The last year, however, has seen increased attention from regulators. In June 2022, the Australian Securities and Investments Commission (ASIC) published 'How to avoid greenwashing when offering or promoting sustainability-related products'.⁸ In October 2022, ACCC advised it was commencing 'internet sweeps to identify misleading environmental and sustainability marketing claims'.⁹ More recently, there have been proceedings and court rulings.

- These include both energy companies and financiers, eg. Black Mountain Energy Limited (about statements regarding its natural gas development project 'Valhalla')¹⁰ and Diversa Trustees Limited (issuer of superannuation product Cruelty Free Super).¹¹
- There is also continued oversight by ASIC of the content of corporate statements and disclosures, with a recent example the Federal Court's rulings on continuous disclosure requirements regarding Australian Mines Ltd.¹²

ASIC recently announced that '[t]hroughout 2023, ASIC will have a strong focus on enforcement activity targeting sustainable finance practices and disclosure of climate risks...'.¹³

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Endnotes

- ¹ ‘For almost fifty years, the commercial life of this country has been regulated by a basic norm, now reflected in a bewildering array of statutory provisions, being that persons must not engage in conduct which is misleading or deceptive, or likely to mislead or deceive. The pervading influence of the provisions enacting this norm might be seen generally as a reflection of social attitudes that have heralded a retreat from legal formalism on several fronts and, in many ways, the existence of the norm reflects community expectations of acceptable commercial behaviour. But it is not as simple as that. There is a continuum of conduct that can contravene the norm: at one end, wicked, predatory, and highly immoral conduct; and at the other, guileless conduct, engaged in by someone trying to do their best, but which involved an innocent but factually mistaken representation’: *Kumova -v- Davison* [2023] FCA 1, [108] per Lee J.
- ² Lockhart, *The Law of Misleading or Deceptive conduct* (2015, LexisNexis Butterworths), 4. The main contemporary provision is s18 of *Australian Consumer Law* Sch 2 to *Competition and Consumer Act 2010* (Cth).
- ³ North, *Company disclosure in Australia* (2013, Thomson Reuters), 119. The main contemporary provisions are in the *Corporations Act 2001* (Cth) (particularly ss 670A, 728, 953B, 1022B, 1308 & 1309, and Pt 7.10 div 2) with others found in the *Australian Securities and Investments Commission Act* (Cth) and various state/territory regimes.
- ⁴ A text search of all Federal Court decisions (available at <http://classic.austlii.edu.au/au/cases/cth/FCA/>) for the twelve months to 20 February 2023 showed **the phrase ‘misleading and deceptive’ featured in 163 reasons. Of those, only 29 (18%) included orders/findings that misleading and deceptive conduct had occurred.** Thirty four cases (or 21%) included explicit dismissal or rejection of the claims (or cross claims) of misleading/deceptive conduct, including private proceedings and actions by regulators.
- Note this search is only of *decisions* (not pleadings) and only the Federal Court (not Supreme Courts or other courts/tribunals where misleading & deceptive may be alleged). So it is only a sub-set of what litigation may feature claims of ‘misleading and deceptive’.
- Caveats:** the % calculation is only from a cursory review where (1) the phrase was found in court orders, or (2) where the orders reflected some finding for the plaintiff, then review reasons for the term ‘misleading’, to determine whether some finding made. Also, many of these decisions are interlocutory decisions, which may have described some claims without necessarily adjudging those claims as substantiated.
- ⁵ Examples include *Glorie -v- WA Chip & Pulp* [1981] FCA 224; 55 FLR 310; *Burton -v- Fisheries Minister* [2010] WASC 20; *Forrest -v- ASIC* [2012] HCA 39; 247 CLR 486.
- ⁶ eg. *ACCC -v- Holden Ltd* [2008] FCA 1428 (claims about neutral CO2 emissions with Saab vehicle) and *ACCC -v- Sanyo Airconditioners* (Federal Court NSD1403/2003, 10 November 2003, finding of false, misleading and deceptive conduct re advertising of air-conditioning units as "environmentally-friendly" and "for a new ozone era - keeping the world green")
- ⁷ Australian Competition & Consumer Commission *Green marketing and the Trade Practices Act* (Guidelines 02/08, February 2008) Australian Government; Australian Competition & Consumer Commission *Biodegradable, degradable and recyclable claims on plastic bags* (ACCC 01/10_39601) Australian Government; Australian Competition & Consumer Commission *Green marketing and the Australian Consumer Law* (ACCC 03/11_30681_292, 11 March 2011) Australian Government.
- ⁸ Australian Securities and Investments Commission *How to avoid greenwashing when offering or promoting sustainability-related products* (INFO 271, June 2022) Australian Government.
- ⁹ Australian Competition & Consumer Commission *ACCC internet sweeps target 'greenwashing', fake online reviews* (Media Release 141/22, 4 October 2022) Australian Government.
- ¹⁰ Australian Securities and Investments Commission *ASIC issues infringement notices to energy company for greenwashing* (23-001MR, 5 January 2023) Australian Government.
- ¹¹ Australian Securities and Investments Commission *ASIC issues infringement notice against superannuation trustee for greenwashing* (22-379MR, 23 December 2022) Australian Government.
- ¹² *ASIC -v- Australian Mines* [2023] FCA 9. Note **this is not about environmental claims**, but just an example of regular action more generally regarding continuous disclosure.
- ¹³ Australian Securities and Investments Commission *ASIC to expand enforcement focus areas in the coming year* (23-026MR, 15 February 2023) Australian Government.