

22 September 2023

Australian Competition & Consumer Commission (ACCC)
Enforcement Coordination
23 Marcus Clarke Street,
CANBERRA NSW 2600

[Via email: enforcementcoordination@accc.gov.au](mailto:enforcementcoordination@accc.gov.au)

Dear ACCC Enforcement,

Submission on the ACCC's draft guidance for business on Environmental and Sustainability Claims

Thank you for the opportunity to make a submission on the Draft environmental and sustainability claims guidance for business (**Draft Guidance**).

The Australian Institute of Company Directors (AICD)'s mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 50,000 includes directors and governance leaders of not-for-profits, large and small businesses and the public sector.

The AICD supports regulators providing guidance to businesses of their expectations regarding the making of environmental and sustainability claims, given the complexities of this subject matter.

With shifting consumer expectations of how businesses respond to climate and sustainability risks and opportunities, it is critical that the market is free from the distorting effects of greenwashing. However, there also needs to be recognition that many businesses are genuinely struggling to navigate the complex nuances, significant uncertainties and fast-paced regulatory changes associated with a decarbonising economy.

Many businesses are responding to stakeholder and market expectations (including those of consumers) regarding climate and environmental action. However, there is often uncertainty as to how to effectively communicate their efforts, including how to demonstrate their claims are 'evidence-based.' If the bar is set too high, we may see companies providing limited information to consumers, and the market more broadly, for fear of being accused of greenwashing.

In light of this, the AICD recommends that regulators take a balanced and proportionate enforcement approach which targets intentional and egregious greenwashing. Regulators should also provide support to businesses undertaking sustainability and environmental action, given the fast-paced technological and regulatory developments and shifting stakeholder expectations. As a comparison, the Commonwealth Government's legislated 2030 and 2050 emissions targets require detailed underlying policies, nationally and on a sectoral basis, that are still under development and will require the agreement of Parliament. Similarly, many companies are publishing sustainability and/or transition plans which have their own contingencies and look decades into the future, on the basis of today's best available information.

In respect of the Draft Guidance specifically, we offer the following points for consideration:

- a. We note that claims concerning product and service characteristics driven by new and emerging technological developments can be particularly difficult to verify. It is often challenging to obtain comprehensive and/or high-quality data or evidence to demonstrate a specific climate or sustainability benefit. Further, there are often competing expert views on the environmental benefit or harm of a technology. Examples include carbon offsets, hydrogen and carbon capture and storage. Whilst Principles 2 and 8 of the Draft Guidance provide useful guidance, in our view, there needs to be recognition of the complexities of demonstrating something is “evidence-based” in light of the fast-paced technological, regulatory and scientific changes in this area.
- b. We are concerned about the prescriptive and definitive nature of the guidance on ‘Emissions-related claims’ under Principle 5 and the Case study on ‘making claims about sustainability transition’ on page 32. This is a complex and unsettled area which lacks definitive or binding best practice guidance, in particular in relation to transition plans. While some guidance is under development internationally, such as by the [UK’s Transition Plan Task Force](#), these are yet to be adopted or mandated by the Government. It is premature for the ACCC to be providing definitive guidance in the form of the current draft. In the event that guidance on these topics will eventually be provided, we consider that it should be issued on an economy-wide basis, together with relevant regulators, such as ASIC. We caution against providing prescriptive guidance on these topics in a limited and fragmented manner.
- c. As recognised in the Draft Guidance, many environmental and sustainability representations (such as net zero claims) are forward-looking in nature and subject to the requirement that they are made on ‘reasonable grounds.’ However, given the dynamic technological, regulatory and scientific changes in the climate space, there can be debate as to what constitutes ‘reasonable grounds.’ This is particularly the case where a representation is made in respect of new and emerging technologies (for the reasons stated above). In this context, we consider that the current section entitled ‘Representations about the future’ of the Draft Guidance fails to recognise the nuances and difficulties of establishing ‘reasonable grounds,’ and fails to provide any additional assistance to organisations grappling with this complex issue. We note that the AICD has called for legislative clarification of how the ‘reasonable grounds’ test applies in the climate and/or sustainability context. In the absence of this, we encourage that any guidance on this issue be drafted carefully to take into account the complexities of how this test will apply in the climate context, and to ensure that it offers practical assistance, rather than simply restating the legal test. Again, we consider that the better course would be to issue guidance on this issue jointly with other relevant regulators, such as ASIC.
- d. Principle 4 of the Draft Guidance recommends that organisations ‘explain any conditions or qualifications on your claims’ to avoid greenwashing. Whilst we agree with this guidance, it is important to recognise that unlike other jurisdictions such as the US¹, Australian law does not recognise caveats and cautionary language as an effective way to stave off a finding of misleading or deceptive conduct. Whilst we appreciate that the Draft Guidance states that *“you cannot rely on disclaimers, disclosures or clarifications buried in small print, or otherwise not displayed prominently enough compared to your headline claim, as an excuse for making misleading environmental claims,”* in our view, this point should be made clearer.

¹ Private Securities Litigation Reform Act (US). See pages 18-19 of the [HSF July 2023 advice to AICD on directors’ exposure to liability associated with disclosure under the ISSB Standards](#).

- e. We agree that the use of broad and unqualified claims such as carbon neutral, 'net zero' or 'carbon positive' can create greenwashing risk. We are hopeful that the introduction of a sustainable finance taxonomy will be an important step in curbing greenwashing in both the consumer and financial markets. Until such time as a taxonomy is developed, the emphasis should be on transparently explaining what is meant by such claim, including any inherent limitations, dependencies or uncertainties.
- f. To promote regulatory certainty, greenwashing enforcement across the various enforcement and regulatory entities (namely ACCC, ASIC and APRA) needs to be consistent and broadly aligned. Where there are overlapping regulatory remits (such as with future representations on climate targets and transition plans) it should be made clear how enforcement will be approached. Other quasi-regulatory industry or sectoral bodies, such as the Ad Standards Board, should also be consulted to ensure consistency across the economy.

Next steps

We hope our submission will be of assistance to you. If you would like to discuss these matters further, please contact Christian Gergis, Head of Policy at cgergis@aicd.com.au or Anna Gudkov, Senior Policy Adviser at agudkov@aicd.com.au.

Yours sincerely,



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