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**GREENWASHING –  
AUSTRALIAN CARBON  
CREDIT UNITS IN THE  
REGULATORY SPOTLIGHT**



**– THOUGHT LEADERSHIP**

**JULY 2022**



## **GREENWASHING – AUSTRALIAN CARBON CREDIT UNITS IN THE REGULATORY SPOTLIGHT**

As part of the Federal Government's crackdown on greenwashing, an independent review of the Australian Carbon Credit Units regime will be carried out by former Chief Scientist, Professor Ian Chubb. This reflects a global trend of increased regulatory interest and investigation into "green" claims, and companies in this sector should prepare for greater scrutiny.

### **Why is the review happening?**

In March 2022, Professor Andrew Macintosh, former Chair of the Emissions Reduction Assurance Committee, expressed his strong views of the flaws in the methodologies used in the existing Australian Carbon Credits Units (ACCU) regime established under the Carbon Credits (Carbon Farming Initiative) Act 2011 to assess emissions reductions which underpin the issue of ACCUs. Despite the ACCU regime being intended to only award credits to emissions avoidance and carbon sequestration projects, there is concern that companies are being issued credits for projects which have little or no impact on carbon emissions reductions (for example, practices such as avoided deforestation for forests that were never going to be cleared, regeneration for growing trees that already exist, and operating electricity generators at large landfills that would have operated anyway).

The concerns were subsequently dismissed in a review by the administrator of the ACCU regime (being the Clean Energy Regulator) in June 2022. However, on 1 July 2022, the Federal Government announced that it had commissioned an independent review of the ACCU regime. The review will consider whether the ACCU regime's governance structure is fit for purpose (including the division of roles and responsibilities within agencies), management of conflicts of interest, methodologies and review processes for carbon credits, as well as how carbon credits can generate associated benefits such as agricultural productivity, the involvement of Indigenous communities,

and other environmental outcomes. The findings of the carbon credits review are due to be provided to the Federal Government by 31 December 2022.

Given that the integrity of ACCUs is considered to be key to achieving Australia's pledge to cut carbon emissions by 43% from 2005 levels by 2030, and that ACCUs are perceived as a "high integrity" form of carbon offset that generally attract much higher prices than many of the offset units that can be purchased overseas, the ACCU regime is a focus area with critics concerned that greenwashing practices are occurring to the detriment of the public interest.

Greenwashing is also on the radar of regulators such as the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC). As discussed below, there is a renewed focus by regulators on greenwashing practices by companies that misrepresent the extent to which a product, service, financial product or investment strategy is environmentally friendly, sustainable or ethical.

### **Action against greenwashing**

The concern that greenwashing erodes the integrity of the ACCU regime and the public interest may be seen as a reflection of the existing laws and regulatory scrutiny of greenwashing, with the view being that making false or unsubstantiated statements to gain an unfair commercial advantage distorts competition to the detriment of Australian consumers and investors.

The ACCC's 2022/23 enforcement priorities look to include a particular focus on targeting misleading environmental and sustainability claims in the manufacturing and energy sectors (and will not be limited to consumer goods), as the ACCC plans to work closely with other regulators, including ASIC and the Clean Energy Regulator. This is not surprising, as "green" claims have consistently been on the ACCC's radar.

Examples of past ACCC action against greenwashing include:

- Proceedings brought against Volkswagen AG, resulting in AUD\$125 million penalties in relation to false or misleading representations Volkswagen AG made when importing more than 57,000 diesel vehicles into Australia between 2011 and 2015, and when listing those vehicles on the Australian Government's Green Vehicle Guide website.
- Proceedings brought against Pental Limited and Pental Products Pty Ltd, resulting in penalties totalling AUD\$700,000 for making false and misleading representations about its White King "flushable" toilet and bathroom cleaning wipes.
- Proceedings brought against Woolworths, in relation to an environmental claim that a range of disposable cutlery and crockery sold under the "Select Eco" brand were "biodegradable and compostable". In this instance however, the Full Federal Court found that the claim "biodegradable and compostable" was not misleading or deceptive, as it extended only to a representation regarding the inherent properties of the products, rather than a prediction about what would happen to the products in future.

Similarly, equivalent misleading and deceptive conduct prohibitions are also found in the Corporations Act 2001 (Cth) (Corporations Act) and Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act). Recent guidance from ASIC looks to focus on the applicability of these provisions in the context of offering or promoting

sustainability-related products, noting the increase in investor demand for, and the availability of, sustainability-related financial products in the Australian market and, with this, the concern that investors may be confused or misled.

## **Increasing global scrutiny of greenwashing**

The crackdown on greenwashing in Australia looks to be part of a global trend of regulators and stakeholder groups taking action against greenwashing by companies.

In the United States, the Securities and Exchange Commission (SEC) has taken an aggressive regulatory and enforcement position on environmental, social, and governance (ESG) issues. Recent SEC actions against US and non-US companies for greenwashing sound a warning for companies active in ESG investing or that make ESG-related public statements.

In the UK, Ryanair's print and broadcast adverts claiming it to be Europe's "lowest emissions airline" were found to be misleading and poorly substantiated by the Advertising Standards Authority. In the Netherlands, environmental groups are taking Court action against Dutch airline KLM, claiming that KLM's "Fly Responsibly" campaign misleads consumers as to the sustainability of its flights and plans to address its climate impact, amounting to greenwashing.

And in a landmark case, an Italian Court ordered Miko S.r.l. – a company making micro-fibre for the automotive industry – to stop making "green" claims at the request of one of its competitors (Alcantara S.p.A.). The Court granted an interim injunction and ruling that Miko's statements regarding its Dinamica product were vague, generic, false and non-verifiable, and needed to be immediately removed from any promotional material. This decision is particularly noteworthy as it could signal the possible extension of greenwashing cases beyond the realm of consumer protection investigations overseas.

## What does this mean for your investments?

As this is an evolving space, investors should monitor regulatory developments, particularly in respect of disclosure standards for sustainability-related products.

With investors now increasingly concerned as to whether their investments satisfy their ESG objectives, companies should continue to balance the opportunities associated with promoting sustainable finance to their stakeholders, with potential added

verification and reporting costs, and the reputational risks associated with greenwashing.

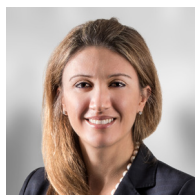
Companies should also ensure that any "green" claims are clear, accurate and capable of being substantiated, as this will be an enforcement focus for Australian regulators going forward. This includes investors and corporates who operate in the ESG sector (including carbon farming) and who may be considering undertaking a sale, IPO or fundraising activities which involve the business being marketed to investors under disclosure documents or otherwise.



## CONTACTS



**Dave Poddar**  
**Partner (Antitrust)**  
**Sydney**  
T: +61 2 8922 8033  
E: dave.poddar@cliffordchance.com



**Nadia Kalic**  
**Partner (M&A/Projects)**  
**Sydney**  
T: +61 2 8922 8095  
E: nadia.kalic@cliffordchance.com



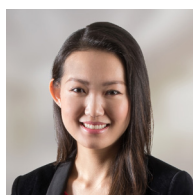
**Reuben van Werkum**  
**Partner (M&A)**  
**Sydney**  
T: +61 2 8922 8054  
E: reuben.vanwerkum@cliffordchance.com



**David Clee**  
**Partner (M&A)**  
**Sydney**  
T: +61 2 8922 8575  
E: david.clee@cliffordchance.com



**Robert Tang**  
**Counsel (L&DR)**  
**Sydney**  
T: +61 2 8922 8502  
E: robert.tang@cliffordchance.com



**Angel Fu**  
**Senior Associate**  
**(Antitrust)**  
**Sydney**  
T: +61 2 8922 8089  
E: angel.fu@cliffordchance.com



**Dale Straughen**  
**Senior Associate**  
**(M&A/Projects)**  
**Sydney**  
T: +61 2 8922 8040  
E: dale.straughen@cliffordchance.com



**Amelia Hirst**  
**Associate (Projects)**  
**Perth**  
T: +61 8 9262 5599  
E: amelia.hirst@cliffordchance.com



**Damian Bachor**  
**Graduate Lawyer**  
**(Antitrust)**  
**Sydney**  
T: +61 2 8922 8079  
E: damian.bachor@cliffordchance.com



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Clifford Chance, Level 16, No. 1 O'Connell Street, Sydney NSW 2000, Australia

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