

NOTICE OF FILING

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File Title: AUSTRALIAN PARENTS FOR CLIMATE ACTION LTD (ACN 637 293
746) v ENERGYAUSTRALIA PTY LTD (ACN 086 014 968)
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Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Defence

No. NSD833 of 2023

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations NPA
Regulator and Consumer Protection Sub-area

Australian Parents for Climate Action Ltd (ACN 637 293 746)

Applicant

EnergyAustralia Pty Ltd (ACN 086 014 968)

Respondent

A. Parties

A.1 AP4CA

1. EnergyAustralia admits paragraph 1 of the Amended Statement of Claim.
2. EnergyAustralia does not know and therefore cannot admit paragraph 2 of the Amended Statement of Claim.

A.2 EnergyAustralia

3. EnergyAustralia admits paragraph 3 of the Amended Statement of Claim.
4. EnergyAustralia admits paragraph 4 of the Amended Statement of Claim.
5. As for paragraph 5 of the Amended Statement of Claim, EnergyAustralia:
 - a. says that customers of EnergyAustralia are supplied with energy from and through the National Energy Market, which will have varying emissions intensity at any given time and region depending on the fuel mix in the National Energy Market at the relevant time and region;
 - b. says that EnergyAustralia:

Filed on behalf of (name & role of party)	EnergyAustralia Pty Ltd (Respondent)
Prepared by (name of person/lawyer)	James Clarke
Law firm	Ashurst Australia
Tel	+61 3 9679 3000 Fax +61 3 9679 3000
Email	james.clarke@ashurst.com
Address for service	Level 16, 80 Collins Street (South Tower), Melbourne, Victoria 3000 Australia

- i. has the rights to more than 850 MW of solar and wind farm power purchase agreements;
 - ii. owns half the Cathedral Rocks wind farm; and
 - iii. has the dispatch rights with respect to the following battery assets:
 1. Ballarat 30 MW;
 2. Gannawarra 25 MW;
 3. Riverina Energy Storage System 65 MW; and
 4. Darlington Pt Energy Storage System 25 MW.
 - iv. admits that, save in respect of the matters identified at subparagraph 5b(i)-(iii) above, the energy generated by EnergyAustralia and supplied to the National Energy Market was and is sourced from the combustion of fossil fuels; and
- c. otherwise denies the paragraph.

B. The EA Website

6. EnergyAustralia admits paragraph 6 of the Amended Statement of Claim.
7. EnergyAustralia admits paragraph 7 of the Amended Statement of Claim.
8. As for paragraph 8 of the Amended Statement of Claim, EnergyAustralia:
 - a. admits that the persons who access the EA Website included and include the classes described in subparagraphs 8(a)-(c);
 - b. does not know and therefore cannot admit that the persons who access the EA Website included and include the classes described in subparagraphs 8(d)-(e).

C. The Go Neutral Program

9. EnergyAustralia admits paragraph 9 of the Amended Statement of Claim.
10. EnergyAustralia admits paragraph 10 of the Amended Statement of Claim.
11. EnergyAustralia admits paragraph 11 of the Amended Statement of Claim.
12. In relation to paragraph 12 of the Amended Statement of Claim, EnergyAustralia:
 - a. admits the allegations insofar as they apply to new or existing customers who are opting in to the “Go Neutral” program having selected a plan which did not already include carbon offsets;
 - b. says further that:

- i. EnergyAustralia offers plans which include carbon offsets as a feature (eg the Family & Friends Plan, the Employee Plan, the Business Carbon Neutral Plan, the Business Carbon Neutral Flexi Plan);
- ii. EnergyAustralia offers bespoke plans to some multi-site customers; and
- iii. in relation to the said plans, offsets occur from the date supply commenced to the property.

13. EnergyAustralia admits paragraph 13 of the Amended Statement of Claim.
14. EnergyAustralia admits paragraph 14 of the Amended Statement of Claim, save for the word “purported” (which is denied).

D. The Go Neutral Representations

D.1 The Go Neutral Material

15. EnergyAustralia admits paragraph 15 of the Amended Statement of Claim.
16. EnergyAustralia admits paragraph 16 of the Amended Statement of Claim.
17. EnergyAustralia admits paragraph 17 of the Amended Statement of Claim.

D.2 The Representations

18. In relation to paragraph 18 of the Amended Statement of Claim, EnergyAustralia:
 - a. denies that it made or continues to make the Go Neutral Product Representations as pleaded in paragraph 18;
 - b. says that the Go Neutral Material must be considered as a whole and in its context, namely in all of the circumstances; and
 - c. says further that the statements made in the Go Neutral Material, including the alleged Go Neutral Product Representations (or any of them) to the extent that they were conveyed (which is denied), would be understood by reasonable members of the Relevant Class as expressions of EnergyAustralia's opinion.
19. In relation to paragraph 19 of the Amended Statement of Claim, EnergyAustralia:
 - a. denies it made the Go Neutral Impact Representations as pleaded in paragraph 19;
 - b. says that the Go Neutral Material must be considered as a whole and in its context, namely in all of the circumstances; and
 - c. says further that the statements made in the Go Neutral Material, including the alleged Go Neutral Impact Representations (or any of them) to the extent that

they were conveyed (which is denied), would be understood by reasonable members of the Relevant Class as expressions of EnergyAustralia's opinion.

D.3 The Pure Energy Conduct

20. In relation to paragraph 20 of the Amended Statement of Claim, EnergyAustralia:

a. says that:

- i. "PureEnergy" is a product which enables customers to choose the amount of accredited renewable electricity that EnergyAustralia will buy on the customer's behalf (being 10%, 25% or 100% per cent of the customer's electricity bill);
- ii. the "PureEnergy" product involves the following steps (as depicted on the EA website):



- iii. "PureEnergy" is an accredited "GreenPower" product which is required to comply with the "GreenPower" program rules;
- iv. the "GreenPower" program rules at all material times required (cl 4.5) that the GreenPower logo must be used in compliance with the conditions of use in the GreenPower Brand Usage Guidelines;
- v. clause 3.2(5) of the GreenPower Brand Usage Guidelines states: "The GreenPower Accredited logo cannot appear in marketing collateral and/or the same webpage where a non-accredited renewable electricity product is promoted"; and

b. otherwise denies the paragraph.

21. EnergyAustralia repeats paragraph 20 above, and otherwise admits paragraph 21 of the Amended Statement of Claim.

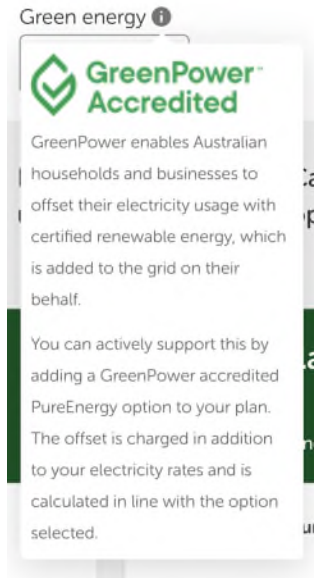
22. In relation to paragraph 22 of the Amended Statement of Claim, EnergyAustralia:

- a. admits that the “PureEnergy” product is not mentioned on the home page of the EA Website;
- b. admits that some parts of the EA Website addressing the “Go Neutral” program do not disclose the existence of the “PureEnergy” product;
- c. admits that the EA Website landing page for “Electricity and gas” does not mention the “PureEnergy” product;
- d. repeats paragraph 20 above;
- e. says further that:
 - i. both the “Go Neutral” and “PureEnergy” options are displayed together on the EA Website at the “Go green with EnergyAustralia” landing page, which can be accessed from the EA Website landing page by selecting the menu for Electricity and Gas and then selecting “Go Green”;
 - ii. customers who select the “Electricity and gas” dropdown menu on the EA Website landing page and then select “Get an energy quote” and “Pick a plan” are shown the following options:

The screenshot shows a search interface on the EnergyAustralia website. At the top, it says "I'm looking for **electricity and gas** v". Below this, there are two radio buttons: "Address" (selected) and "Postcode". A text input field contains "123 Address st". To the right of the input field are two buttons: "All features" (highlighted in green) and "Key features". Below the input field, it says "Your electricity distributor is **Ausgrid**". At the bottom, there are four dropdown menus: "Estimate costs" (set to "Yearly"), "Electricity usage per day" (set to "Low - 5 kWh"), "Gas usage per day" (set to "Low - 24 MJ"), and "Green energy" (set to "0%").

where the “Green energy” field relates to the “PureEnergy” product;

- iii. customers who select the “i” toggle next to the “Green energy” field are shown the following pop-up:



- f. in its independent audit of EnergyAustralia's GreenPower program dated 26 March 2018, Clear Environment Pty Ltd stated:

The GreenPower section of the EA website was viewed by the auditor. The website appears to be in general accordance with the GreenPower Marketing Guidelines. It is noted that the EA 100% Carbon Neutral electricity product is advertised on the same page as GreenPower. The marketing guidelines state that the GreenPower logo cannot appear in marketing collateral and/or the same webpage where a non-accredited renewable energy product is promoted. Although the 100% Carbon Neutral electricity product is not a renewable energy product, it could be considered a competing product. The auditor does not consider that this is 'in the spirit' of the program. As EA has complied with the Marketing Guidelines a recommendation has not been made in relation to this issue. However, the following opportunity for improvement is identified:

Opportunity for Improvement (1): EA should consider separating the GreenPower and Carbon Neutral advertisement to different web pages.

- g. in response to the said recommendation, EnergyAustralia separated the parts of the EA Website addressing the "GoNeutral" program from the parts of the EA Website addressing the "PureEnergy" product; and
- h. otherwise denies the paragraph.

E. True Position

E.1 Climate change

23. EnergyAustralia admits paragraph 23 of the Amended Statement of Claim.

24. EnergyAustralia does not know and therefore cannot admit paragraph 24 of the Amended Statement of Claim.
- 24A. EnergyAustralia does not know and therefore cannot admit paragraph 24A of the Amended Statement of Claim.
25. EnergyAustralia admits paragraph 25 of the Amended Statement of Claim.
26. EnergyAustralia admits paragraph 26 of the Amended Statement of Claim.
27. EnergyAustralia admits paragraph 27 of the Amended Statement of Claim.
28. EnergyAustralia does not know and therefore cannot admit paragraph 28 of the Amended Statement of Claim, and says further that, according to the 2023 IPCC AR6 Synthesis Report (p. 82):

If the annual CO₂ emissions between 2020–2030 stayed, on average, at the same level as 2019, the resulting cumulative emissions would almost exhaust the remaining carbon budget for 1.5°C (50%), and exhaust more than a third of the remaining carbon budget for 2°C (67%) (Figure 3.5).

- 28A. In relation to paragraph 28A of the Amended Statement of Claim, EnergyAustralia admits the definition of "carbon neutrality" in the particularised report includes the words pleaded but says the full definition is:

Carbon neutrality: Condition in which anthropogenic CO₂ emissions associated with a subject are balanced by anthropogenic CO₂ removals. The subject can be an entity such as a country, an organization, a district or a commodity, or an activity such as a service and an event. Carbon neutrality is often assessed over the life cycle including indirect ('scope 3') emissions, but can also be limited to the emissions and removals, over a specified period, for which the subject has direct control, as determined by the relevant scheme.

Note 1: Carbon neutrality and net zero CO₂ emissions are overlapping concepts. The concepts can be applied at global or sub-global scales (e.g., regional, national and sub-national). At a global scale, the terms carbon neutrality and net zero CO₂ emissions are equivalent. At subglobal scales, net zero CO₂ emissions is generally applied to emissions and removals under direct control or territorial responsibility of the reporting entity, while carbon neutrality generally includes emissions and removals within and beyond the direct control or territorial responsibility of the reporting entity. Accounting rules specified by GHG programmes or schemes can have a significant influence on the quantification of relevant CO₂ emissions and removals.

Note 2: In some cases, achieving carbon neutrality may rely on the supplementary use of offsets to balance emissions that remain after actions by the reporting entity are taken into account.

E.2 Types of carbon credits

29. In relation to paragraph 29 of the Amended Statement of Claim, EnergyAustralia:
- a. says that:
 - i. an offset, also called a carbon credit, is a tradeable unit issued to entities that have met relevant requirements for conducting activities that avoid, reduce or remove greenhouse gases from the atmosphere, relative to a business-as-usual baseline;
 - ii. one offset unit represents one tonne of carbon dioxide equivalent (CO₂-e) of emissions avoided, removed or captured from the atmosphere; and
 - b. otherwise admits the paragraph.
30. In relation to paragraph 30 of the Amended Statement of Claim, EnergyAustralia:
- a. says that projects underpinning carbon credits can be characterised in the manner pleaded, but that characterisation is not in common or widespread industry or market use;
 - b. says that there are numerous different projects generating offsets in Australia and around the world, which use different methods to abate carbon including:
 - i. reducing or avoiding emissions, for example by installing renewable electricity or more energy-efficient infrastructure, or by avoiding deforestation;
 - ii. removing greenhouse gases from the atmosphere, for example by planting trees or using direct air capture and sequestration technology;
 - c. says that projects which reduce or avoid emissions have an ongoing effect on carbon abatement in that, during the project's lifecycle, emissions are continuously reduced or avoided;
 - d. says that the Australian Government Department of Industry, Science, Energy and Resources, and Climate Active, publish a list of eligible offset units that:
 - i. satisfy the Climate Active offset integrity principles (see section 1.3.2 of the relevant Climate Active Carbon Neutral Standard); and

- ii. are based on the offsets integrity standards in the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth);
- e. says that that list of eligible offset units includes:
 - i. Australian Carbon Credit Units (**ACCUs**) issued by the Clean Energy Regulator in accordance with the framework established by the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth); and
 - ii. Certified Emission Reductions (**CERs**) issued as per the rules of the Kyoto Protocol from Clean Development Mechanism projects (with certain immaterial exceptions),

which were purchased by EnergyAustralia as part of the “Go Neutral” program;
- f. says that eligible offset projects and offset units are verified by independent auditors through internationally recognised standards, which ensure, inter alia, that the credits they generate represent real and actual emissions sequestered or avoided;
- g. says that, in the premises, ACCUs and CERs are valid to be included as part of a claim to carbon neutrality; and
- h. otherwise denies the paragraph.

31. EnergyAustralia repeats paragraph 30 of the Amended Statement of Claim and says further that "removal credits with long-lived storage" (as defined) as not readily available in the marketplace to date.

E.3 Environmental offset impact of different types of carbon credits

32. EnergyAustralia denies paragraph 32 of the Amended Statement of Claim.

32A. EnergyAustralia denies paragraph 32A of the Amended Statement of Claim.

32B. EnergyAustralia denies paragraph 32B of the Amended Statement of Claim.

33. EnergyAustralia denies paragraph 33 of the Amended Statement of Claim.

34. EnergyAustralia denies paragraph 34 of the Amended Statement of Claim.

35. EnergyAustralia admits paragraph 35 of the Amended Statement of Claim.

E.4 EnergyAustralia's reliance on avoidance and short-lived storage credits

36. In relation to paragraph 36 of the Amended Statement of Claim, EnergyAustralia:

- a. says that EnergyAustralia retired for use in the reporting period ending 31 December 2019:
 - i. 5,100 non-Kyoto Australian Carbon Credit Units (**NKACCUs**);

- ii. 27,900 Australian Carbon Credit Units (**ACCUs**); and
 - iii. 846,081 Certified Emission Reductions (**CERs**).
 - b. says that EnergyAustralia retired for use in the reporting period ending 31 December 2020:
 - i. 24,000 Australian Carbon Credit Units (**ACCUs**); and
 - ii. 1,179,394 Certified Emission Reductions (**CERs**).
 - c. says that EnergyAustralia retired for use in the reporting period ending 31 December 2021:
 - i. 17,630 Australian Carbon Credit Units (**ACCUs**); and
 - ii. 1,359,159 Certified Emission Reductions (**CERs**).
 - d. says that EnergyAustralia retired for use in the reporting period ending 31 December 2022:
 - i. 19,595 Australian Carbon Credit Units (**ACCUs**); and
 - ii. 767,541 Certified Emission Reductions (**CERs**).
 - e. all offset units purchased and retired by EnergyAustralia as part of the “Go Neutral” program were eligible under the Climate Active Carbon Neutral Organisation Standard published by the Australian Government Department of Industry, Science, Energy and Resources, and Climate Active;
 - f. repeats paragraph 30 above; and
 - g. otherwise does not know and does not admit paragraph 36 of the Amended Statement of Claim.
- 37. EnergyAustralia repeats paragraph 36 above, and otherwise does not know and does not admit paragraph 37 of the Amended Statement of Claim.
- 38. EnergyAustralia denies paragraph 38 of the Amended Statement of Claim.
- 39. EnergyAustralia denies paragraph 39 of the Amended Statement of Claim.
- 40. EnergyAustralia denies paragraph 40 of the Amended Statement of Claim.
- 41. EnergyAustralia denies paragraph 41 of the Amended Statement of Claim.
- 42. In relation to paragraph 42 of the Amended Statement of Claim, EnergyAustralia:
 - a. repeats paragraph 20 above;

- b. says further that the “PureEnergy” product does not result in renewable electricity feeding directly into the consumer’s power supply, because all power sockets connect to the same grid;
- c. admits that, by opting into the “PureEnergy” product, customers:
 - i. support the production of electricity from government-accredited renewable sources (such as solar, wind and biomass);
 - ii. reduce over the long term the average proportion of their electricity sourced from fossil fuels; and
 - iii. reduce the extent to which they cause harm to the climate and the environment by using electricity sourced from fossil fuels; and
- d. otherwise denies the paragraph.

F. Misleading conduct

- 43. EnergyAustralia admits that its conduct in publishing the Go Neutral Material and offering the "Go Neutral" program and the "PureEnergy" product was conduct engaged in trade or commerce and otherwise denies paragraph 43 of the Amended Statement of Claim.
- 44. EnergyAustralia denies paragraph 44 of the Amended Statement of Claim.
- 45. EnergyAustralia denies paragraph 45 of the Amended Statement of Claim.
- 46. EnergyAustralia denies paragraph 46 of the Amended Statement of Claim.

G. Relief

- 47. EnergyAustralia denies paragraph 47 of the Amended Statement of Claim.

This pleading was prepared by Kate Morgan SC and Sebastian Hartford-Davis, counsel for the Respondent.

Certificate of lawyer

I, James Clarke, certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 20 October 2023



Signed by James Clarke
Lawyer for the Respondent