

Case Report

1. Case Number :	0295-23
2. Advertiser :	NSW Minerals Council
3. Product :	Energy/Resources
4. Type of Advertisement/Media :	Internet - Social - YouTube
5. Date of Decision:	7-Feb-2024
6. Decision:	Upheld – Modified or Discontinued

ISSUES RAISED

AANA Environmental Code\1 Truthful and Factual
AANA Environmental Code\2 Genuine Environmental Benefit

DESCRIPTION OF ADVERTISEMENT

This YouTube advertisement depicts people speaking to the camera and scenes related to mining activities. The people state:

"There are teams like us all over NSW, restoring the land being used for mining. We make plans before mining even starts, so there's a productive and sustainable use for the land afterwards as well. Like this bushland and farmland for cattle grazing. And it's happening all the time. Like here in the Hunter Valley where 40% of the land used for mining is already under rehabilitation. Because in NSW we mine responsibly. For today and tomorrow.



THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

Complaint about NSW Minerals Council (NSW Mining) Youtube advertising

- 1. We act for an Elder of the Plains Clan of the Wonnarua People.*
- 2. Our client requests that you investigate whether certain statements made in advertisements by NSW Minerals Council (trading as NSW Mining) (NSW Mining) – a mining industry association – are in breach of the Environmental Claims Code adopted by AANA as part of advertising and marketing self-regulation (the Code).*

Claims by NSW Mining

- 3. In NSW Mining’s “Responsible mining” video advertisement, available on YouTube [1] and on NSW Mining’s “Responsible mining” website, which meets the definition of an advertisement, the following statements are made:*

(a) “There are teams like us all over NSW restoring the land being used for mining.”

(b) “We make plans before mining even starts, so there’s a productive and sustainable use for the land afterwards as well.”

(c) “Like here in the Hunter Valley, where 40% of the land used for mining is already under rehabilitation.”

(d) “In NSW, we mine responsibly for today and tomorrow.”

(together, the Statements).

- 4. NSW Mining describes itself as “the leading industry association representing the state’s minerals industry, providing a united voice for our members.”[3] NSW Mining’s members include various coal mining companies, such as Whitehaven Coal, Idemitsu, MACH Energy, Theiss, Peabody, Yancoal, Glencore, The Bloomfield Group and Wyong Area Coal Joint Venture.[4] The advertising in question primarily relates to coal mining. The advertising by NSW Mining is designed to promote the interests and products of those members.[5]*

- 5. Our client considers that the Statements, alone or in combination, represent, expressly or by implication, that:*

(a) NSW Mining's and/or NSW Mining's members' mining operations are consistently conducted sustainably and/or responsibly (Sustainable Mining Claim); and

(b) NSW Mining's and/or NSW Mining's members are engaging in extensive restoration and rehabilitation efforts (Restoration Efforts Claim),

(together, the Claims).

6. Our client considers that the Claims may breach the Code, including sections 1(a), 1(b), 2(a) and / or 2(b), for the following reasons.

Why NSW Mining's Claims may breach the Code

Meaning of Environmental Claim

7. The Code defines "Environmental Claim" as:

"any express or implied representation that an aspect of a product or service as a whole, or a component or packaging of, or a quality relating to, a product or service, interacts with or influences (or has the capacity to interact with or influence) the Environment."

8. The Claims are Environmental Claims to which the Code applies because they represent that NSW Mining's and/or NSW Mining's members' operations have a beneficial, or non-detrimental, influence on the Environment (as defined in the Code).

Relevant provisions of the Code

9. Our client considers the Claims may breach the following provisions of the Code:

(a) s 1(a), which provides that Environmental Claims shall not be misleading or deceptive or be likely to mislead or deceive;

(b) s 1(b), which provides that Environmental Claims shall display any disclaimers or important limitations and qualifications prominently, in clear, plain and specific language;

(c) s 2(a), which provides that Environmental Claims must be relevant, specific and clearly explain the significance of the claim; and / or

(d) s 2(b), which provides that Environmental Claims must not overstate the claim expressly or by implication.

Sustainable Mining Claim

10. In our client's view, the following Statements, alone or in combination, represent that NSW Mining's and/or NSW Mining's members' mining operations are consistently conducted sustainably and/or responsibly (Sustainable Mining Claim):

(a) "We make plans before mining even starts, so there's a productive and sustainable use for the land afterwards as well."

(b) "In NSW, we mine responsibly for today and tomorrow."

11. Contrary to the Sustainable Mining Claim, coal mining is not sustainable:

(a) According to scientific consensus, mining of fossil fuels is in fact is the primary contributor to anthropogenic climate change, accounting for 75% of global greenhouse gas (GHG) emissions.[6]

(b) It is well established that the development of new fossil fuel supply will hinder tackling climate change and the net zero energy transition.[7] As a recent Climate Council report noted, it is not possible to tackle climate change unless fossil fuels are rapidly phased out.[8] The United Nations Environment Programme in its 2023 Emissions Gap Report noted that global emissions have hit a new record, noting that if current policies continue we are on track for 3°C of warming and urgent reductions of GHG are needed to remain on track for 2°C.[9] As the report noted, the coal, oil and gas extracted over the lifetime of producing and under- construction mines and fields as at 2018 would emit more than 3.5 times the carbon budget available to limit warming to 1.5°C with 50 per cent probability, and almost the size of the budget available for 2°C with 67 per cent probability. Global transformation of energy systems is thus essential.[10] The IEA's Net Zero Emissions by 2050 Scenario envisions that all unabated coal generation ends by 2040.[11] A recent IPCC synthesis report observed that pathways consistent with 1.5°C and 2°C CO2 budgets imply rapid, deep, and in most cases immediate GHG emission reductions in all sectors.[12] The report states that about 80% of coal, 50% of gas, and 30% of oil reserves cannot be burned and emitted if warming is limited to 2°C, and significantly more reserves are expected to remain unburned if warming is limited to 1.5°C.[13] Tackling climate change and pursuing emissions reduction and net zero are pivotal to a sustainable future, as demonstrated by Australia recently enshrining such targets in legislation.[14]

(c) Despite this, various of NSW Mining's members continue to pursue their current coal projects as well as substantial new and extension/expansion projects, contrary to scientific consensus of what is required to address climate change and transition to net zero. For example, Yancoal sold 34.2 tonnes of coal from its NSW mines last year and intends to continue mining coal into the "foreseeable future".[15] Whitehaven Coal recently acquired two additional metallurgical coal mines, taking its pro-forma managed Run of Mine

production to around 40 million tonnes per annum.[16] These expansions are contrary to the concept of mining sustainably to limit global warming.

12. NSW Mining emphasises positive activities it and/or its members have undertaken, without providing any information regarding the detrimental impacts of the activities of its members particularly relating to climate change. The Code Practice Note specifically states, in relation to section 2(b) of the Code, that “consideration should be given to whether there is sufficient disclosure of any negative impacts”.[17]

13. For these reasons, the Sustainable Mining Claim may contravene the Code, including: (a) s 1(a): it is misleading or deceptive or likely to mislead or deceive; (b) s 1(b): it does not display important disclaimers that are essential to understand the meaning of the claim;

(c) s 2(a): it fails to be specific and clear in the scope and significance of the claim;

(d) s 2(b): it overstates, expressly or by implication, environmental benefits associated with the claim.

Restoration Efforts Claim

14. In our client’s view, the following Statements, alone or in combination, represent that NSW Mining’s and/or NSW Mining’s members are engaging in extensive restoration and rehabilitation efforts (Restoration Efforts Claim):

(a) “There are teams like us all over NSW restoring the land being used for mining.”

(b) “We make plans before mining even starts, so there’s a productive and sustainable use for the land afterwards as well.”

(c) “Like here in the Hunter Valley, where 40% of the land used for mining is already under rehabilitation.”

15. Contrary to what a reasonable consumer may expect the Restoration Efforts Claim to mean, NSW Mining and/or NSW Mining’s members’ mine restoration activities are legally required under their licences and approvals.

16. The Code Practice Note specifically notes, in respect of section 2(a), “Environmental benefits should not be advertised if they are irrelevant, insignificant or simply advertise the observance of existing law.”[18]

17. Similarly, the ACCC’s draft guidance on environmental and sustainability claims states, in respect of Principle 1 (Make accurate and truthful claims) “you should not make claims that your product, service, or business has a specific environmental benefit if... That environmental impact is a legal requirement (and you don’t make

this clear but instead represent that your business is doing something special to achieve an environmental benefit).”[19]

18. In NSW, amendments to the Mining Act 1992 (NSW) came into force in 2022,[20] prescribing new mining lease conditions relating to rehabilitation and setting “clear, achievable and enforceable requirements” for rehabilitation.[21] Mines are obliged to rehabilitate towards the “final landform” approved in their development consents.[22]

19. These changes followed a “Compliance Blitz” undertaken by the NSW Resources Regulator in June 2019, which identified eight mine sites as being potentially non-compliant with mining laws.[23] This included four coal mines, all of whose companies are members of NSW Mining, being issued statutory notices of direction under the Mining Act 1992 (NSW), requiring assessment and/or improvement of rehabilitation measures and actions.[24]

20. Rehabilitation by mines in the Hunter has remained a community concern for some years. In 2017, the NSW Audit Office found the mine security deposits were unlikely to cover the full costs of rehabilitation in NSW.[25] The Australia Institute also raised concerns around the likely significant costs of mining rehabilitation.[26] Muswellbrook Council also previously took legal action against Mt Arthur mine around whether its Rehabilitation Strategy complied with the conditions of consent.[27]

21. In NSW, all exploration licences, mining leases and production leases contain specific conditions requiring rehabilitation. Licence and lease holders are required to comply with these conditions as well as the statutory requirements set out in the Mining Act 1992 (NSW) / Petroleum (Onshore) Act 1991 (NSW). This includes:[28]

(a) complying with the conditions of the approvals granted (i.e. the exploration activity approval granted by the NSW Resources Regulator or the development consent granted for mining / petroleum operations by the relevant consent authority).

(b) complying with the Exploration Code of Practice: Rehabilitation, Exploration Code of Practice: Environmental Management, Exploration Code of Practice: Produced Water Management, Storage and Transfer and Exploration Code of Practice: Community Consultation (exploration licences only).

(c) preparing, and submitting for approval, rehabilitation objectives, rehabilitation completion criteria and (for large mines) a final landform and rehabilitation plan.

(d) preparing and implementing a rehabilitation management plan (higher-risk prospecting operations, large mines and petroleum production operations only).

(e) undertaking rehabilitation of land and water as soon as reasonably practicable after disturbance occurs.

(f) ensuring that rehabilitation achieves the final land use as set out in the rehabilitation objectives, the rehabilitation completion criteria and (for large mines and petroleum production operations) the final landform and rehabilitation plan.

(g) lodging a security bond that covers the full cost of rehabilitation in the event that the holder of the exploration licence / mining / production lease defaults on their rehabilitation obligations.

(h) annual reporting on the performance of rehabilitation activities against the rehabilitation commitments.

(i) permitting access by government compliance officers to inspect rehabilitation.

22. In respect of the specific examples of rehabilitation efforts highlighted by NSW Mining on its "Responsible Mining" website which is linked to the YouTube video:[29]

(a) NSW Mining states "Glencore's Mangoola Coal has successfully undertaken the largest-scale native orchid translocation project in Australia."

In its project assessment for this mine, the Department found that "without any mitigation, the project would significantly impact 2 threatened flora species, as well as another 2 other terrestrial orchids, all of which predominately occur in the grassland community." The Department concluded that "for the project to be able to represent no net loss to flora and fauna values over the medium to long term (as required by the Director-General in his requirements for the project), it would require vegetation offsets of suitable composition and quality to offset these impacts." [30]

(b) NSW Mining states "At Glencore's Liddell coal mine near Muswellbrook, cattle have been grazing on rehabilitated mined land for almost 10 years."

A condition of Glencore's relevant development application was that Glencore rehabilitate the site including in compliance with several rehabilitation objectives including that it "Maintain, establish and/or restore grassland areas with pockets of native vegetation to support sustainable agricultural activities". [31]

(c) NSW Mining states "Whitehaven Coal's Maules Creek mine is a great example of progressive rehabilitation in NSW that benefits the local environment. The restoration process will ultimately see the site become a woodland forest of more than 1,000 hectares..."

Whitehaven's project approval for this mine includes the requirement that it implement a biodiversity strategy including various areas of "existing native woodland / forest... to be protected and enhanced" and "additional native vegetation to be established".[32] The project itself resulted in the clearing of parts of the Leards State Forest so it is not surprising that conditions were imposed requiring it to be restored.

23. As such, in relation to mining restoration generally, and specifically in relation to the examples identified in the advertisement, the rehabilitation efforts of NSW Mining and/or NSW Mining's members are overstated, and it is not made clear that they are required by law and the relevant approval conditions.

24. Moreover, rehabilitation of mine sites is only necessary due to the severe degradation caused by mining activities. The rehabilitation undertaken by mining companies may improve the land from its post-mining state but does not undo the harm caused by the mining.

25. The need for rehabilitation due to the destructive nature of mining activities is exemplified in the following extract from the forward to a report by Hunter Renewal which sets out a community blueprint to restore the Hunter:[33]

"Once-grand landscapes are gone, replaced by vast areas of featureless ridges and mountainous piles of spoil, interrupted by man-made drainage lines and huge holes in the ground. Streams above and below ground are broken and contaminated. Threatened and endangered species of plants and animals are steadily, sometimes catastrophically, reduced. Unique, ecologically endangered communities are being destroyed or reduced to unsustainable sizes. These, too, must be fixed as must the effects on human and community health and well-being. The effects of poor air quality cannot be denied, but less recognised are the consequences of, for example, excessive noise and night-lighting, the loss of home and sense of place, and the disturbance of families and communities by long shifts. And it must not be forgotten that the Wanaruah/Wonnorua people have long been alienated from their traditional lands.

Reconstruction of the Hunter cannot be successful unless councils and governments realise that a single-minded focus on the economic domain, to the exclusion of the environmental and social domains, is the very thing that brought the Hunter to the mess it is now in. Reconstruction can only be effective if it is accepted that these are all interdependent and must be addressed concurrently."

26. In the Hunter Valley, where a significant number of mine sites are located, modelling has predicted that the voids left following mining will take hundreds, even thousands of years to reach hydrological equilibrium, with each destined to become a contaminated super-saline lake.[34] Experts and local authorities warn that the those voids will become perpetual hazards to human and environmental health, needing active management long after the mining companies have gone.[35] Any discussion or disclaimer about the role of the mining companies in causing the

damage, in respect of which rehabilitation is required, is absent from NSW Mining's advertisement.

27. As noted above, the Code Practice Note specifically states, in relation to section 2(b) of the Code, that "consideration should be given to whether there is sufficient disclosure of any negative impacts".[36]

28. For these reasons, the Sustainable Mining Claim may contravene the Code, including:

(a) s 1(a): it is misleading or deceptive or likely to mislead or deceive;

(b) s 1(b): it does not display important disclaimers that are essential to understand the meaning of the claim;

(c) s 2(a): it fails to be specific and clear in the scope and significance of the claim;
and

(d) s 2(b): it overstates, expressly or by implication, the rehabilitation efforts, initiative and values of by NSW Mining and/or NSW Mining's members.

ENDNOTES

1. NSW Mining, "Meet this team of environmental specialists working on mine rehabilitation in NSW" (YouTube video, 25 October 2023) <https://www.youtube.com/watch?v=1CIC5q02hlg>.
2. NSW Mining, <https://www.responsiblemining.com.au/> (accessed 6 December 2023).
3. NSW Mining, "Our Mission" <https://www.nswmining.com.au/our-mission> (accessed 6 December 2023).
4. NSW Mining, "Our Members" <https://www.nswmining.com.au/our-members> (accessed 6 December 2023).
5. For example, the miners depicted in the video are wearing Yancoal hardhats, and the land depicted is in the Hunter Valley where there is a significant concentration of coal mines.
6. United Nations' High-Level Expert Group on the Net Zero Commitments of Non-State Entities, "Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions" (8 November 2022) https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf.
7. See, for example, IEA, "Net Zero by 2050" (May 2021) <https://www.iea.org/reports/net-zero-by-2050>; United Nations' High-Level Expert Group on the Net Zero Commitments of Non-State Entities, "Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions" (8 November 2022) https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf.
8. Climate Council, "Passing Gas: Why Renewables are the Future" (2020) <https://www.climatecouncil.org.au/resources/passing-gas-renewables-are-future/> p 11.

9. United Nations Environment Programme, *Broken Record: Temperatures hit new highs, yet world fails to cut emissions (again)* (2023) <https://wedocs.unep.org/bitstream/handle/20.500.11822/43922/EGR2023.pdf?sequence=3&isAllowed=y>.
10. *Ibid*, p 23
11. IEA, “Net Zero by 2050” (May 2021) <https://www.iea.org/reports/net-zero-by-2050>.
12. IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6): Longer Report* (2023) https://report.ipcc.ch/ar6syrr/pdf/IPCC_AR6_SYR_LongerReport.pdf p 46.
13. *Ibid*.
14. *Climate Change Act 2022 (Cth)*.
15. Yancoal, “Fact Sheet” (2023) <https://www.yancoal.com.au/content/Document/Yancoal%202023%20Factsheet.pdf>.
16. Whitehaven Coal, “Whitehaven Coal to acquire BMA’s Daunia and Blackwater coal mines” (18 October 2023) <https://whitehavencoal.com.au/whitehaven-coal-to-acquire-bmas-daunia-and-blackwater-coal-mines/>.
17. AANA, “Environmental Claims Code – Practice Note” (May 2018) <https://aana.com.au/content/uploads/2018/03/180316-Environmental-Claims-Code-Practice-Note.pdf> p2.
18. AANA, “Environmental Claims Code – Practice Note” (May 2018) <https://aana.com.au/content/uploads/2018/03/180316-Environmental-Claims-Code-Practice-Note.pdf> p2.
19. ACCC, “Environmental and sustainability claims: Draft guidance for business” (July 2023) https://www.accc.gov.au/system/files/Environmental%20and%20sustainability%20claims%20-%20draft%20guidance%20for%20business_web.pdf pp 12-13.
20. *Mining Amendment (Standard Conditions of Mining Leases—Rehabilitation) Regulation 2021 (NSW)*
21. NSW Resources Regulator, “New standard rehabilitation conditions on mining leases” <https://www.resourcesregulator.nsw.gov.au/rehabilitation/mine-rehabilitation/new-standard-rehabilitation-conditions-on-mining-leases#Footnote%201> (accessed 7 December 2023).
22. *Mining Regulation 2016 (NSW)*, sch 8A, cls 5-6.
23. NSW Resources Regulator, “Compliance Blitz: High Visibility Operation” (June 2019) <https://www.resourcesregulator.nsw.gov.au/sites/default/files/documents/state-wide-compliance-operation-report-2019.pdf>.
24. Yancoal’s Mt Thorley Warkworth, Idemitsu’s Muswellbrook Coal mine, The Bloomfield Group’s Rix’s Creek North Coal Mine and The Bloomfield Group’s Rix’s Creek South Coal Mine.
25. Audit Office of NSW, “Mining Rehabilitation Security Deposits” (11 May 2017) <https://www.audit.nsw.gov.au/our-work/reports/mining-rehabilitation-security-deposits>.

26. *The Australia Institute, Mind the Gaps: Unused capacity and unfunded rehabilitation in Upper Hunter coal mines (May 2021)*
<https://australiainstitute.org.au/report/mind-the-gaps/>.
27. *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd [2019] NSWCA 216*, available at
<https://www.caselaw.nsw.gov.au/decision/5d6c6234e4b0c3247d7117e7>.
28. See NSW Resources Regulator, “Fact sheet: Rehabilitation of exploration, mining and petroleum operations” (November 2022)
<https://www.resourcesregulator.nsw.gov.au/sites/default/files/2022-11/fact-sheet-exploration-and-mining-rehabilitation.pdf>.
29. NSW Mining, “Mining Sustainably”
<https://www.responsiblemining.com.au/pages/sustainability#:~:text=Beginning%20with%20a%20plan%20to,from%20one%20area%20to%20another> (accessed 6 December 2023).
30. NSW Department of Planning, *Major Project Assessment: Anvil Hill Coal Project (June 2007)*
https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=MP06_0014%2120190619T060115.872%20GMT.
31. *Consent for development application by Liddell Coal Operations Pty Limited*
<https://www.glencore.com.au/.rest/api/v1/documents/51e34bbe00e8ba8c2637a9650cdacb37/Consolidated+Consent+Mod8.pdf>.
32. *Project approval for application by Aston Coal 2 Pty Limited*
https://whitehavencoal.com.au/Documentations/Maules%20Creek%20Mine/Approvals/Authorisations%20Under%20the%20EP%20and%20A%20Act/MCC-project%20Approval%20-%20PA%2010_0138%20consolidated.pdf.
33. *Hunter Renewal, After the coal rush, the clean up: A community blueprint to restore the Hunter (2023)*
https://assets.nationbuilder.com/lockthegate/pages/8176/attachments/original/1690764718/Blueprint_final_1.pdf?1690764718.
34. Adam Walters (Energy & Resource Insights, commissioned by The Hunter Communities Network) *The Hole Truth: The mess coal companies plan to leave in NSW (June 2016)*
35. *Ibid.*
36. AANA, “Environmental Claims Code – Practice Note” (May 2018)
<https://aana.com.au/content/uploads/2018/03/180316-Environmental-Claims-Code-Practice-Note.pdf> p2.

THE ADVERTISER’S RESPONSE

Comments which the advertiser made in response to the complainant/s regarding this advertisement include the following:

It is the understanding of the NSW Minerals Council (NSW Mining), i.e. the advertiser, that the complainant is primarily concerned with the AANA Environmental Claims Code. Their primary complaint appears to be that the advertisement (i) contains an

Environmental Claim as defined by the Environmental Claims Code and (ii) that it breaches the Environmental Claims Code, specifically sections 1(a), 1(b), 2(a) and 2(b).

The crux of the complainant's argument appears to be twofold: (1) that the advertisement implies that mining is a sustainable practice; and (2) that the rehabilitation efforts highlighted by the advertisement are solely or predominately undertaken by mining companies to comply with their legal obligations; and further, that these specific legal obligations are not known to viewers and are not disclosed in the advertisement when they should be, so that failure to do so to the complainant's satisfaction renders the advertisement in breach of the above-mentioned sections of the Environmental Claims Code.

The advertiser rejects these assertions outright. The complainant is miscategorising the content of the advertisement as both claiming mining is sustainable (a claim that is never made) by incorrectly conflating two separate messages within the advertisement, and further, is misinterpreting the advertisement as focusing on efforts which are legal obligations, when in fact, the focus of the advertisement is on the teams of people themselves who undertake these actions, and the positive work they do. Our detailed response to these arguments is set out further below:

Environmental Claims

Firstly, in respect of the complainant's assertion that the advertisement contains an Environmental Claim as defined by the Environmental Claims Code, the advertiser finds this assertion itself questionable.

The definition of "Environmental Claim", as expressed in the Environmental Claims Code, sets out that such a claim is "any express or implied representation that an aspect of a product or service as a whole, or a component or packaging of, or a quality relating to, a product or service, interacts with or influences (or has the capacity to interact with or influence) the Environment". The advertiser is of the view that mining operations and subsequent restoration efforts should neither be considered products nor services, as ordinary consumers cannot purchase the same. In short, Mining NSW's member organisations are mining companies. The claims being made in the advertisements clearly relate to the subsequent activities carried out on mine sites after mining concludes. Mining operations are undertaken by mining companies in order to obtain various resources they then on-sell to customers, and then after that the restoration efforts are also undertaken by the mining companies, however these restoration efforts are not products or services. As such, as the claims in the advertisement do not relate to any specific product or service, they are not claims which would fall within the scope of the definition of an Environmental Claim.

If however the advertiser were to accept that the claims do fall within the scope of the Environmental Code, the advertiser does not consider any aspect of the advertisement to be in breach of the same as discussed further below.

Sustainable Mining Claims

The complainant asserts that the expressions “We make plans before mining even starts, so there’s a productive and sustainable use for the land afterwards as well” and “In NSW, we mine responsibly for today and tomorrow” constitute claims that mining is sustainable. This is a fundamental mischaracterisation of the content of the advertisement.

Nowhere in the advertisement is it stated that mining is a sustainable practice. The reference to sustainability as made in the relevant expression clearly relates to the usage of the land after mining concludes. Conversely, the advertisement is saying that Mining NSW’s member companies work to ensure that there is a productive and sustainable use for the mined land after the mining activities cease. They do this by improving their operations and practices all the time to minimise their impact on the environment. That includes how and when they do rehabilitation, including using new techniques that improve the quality of the soil, the concentration and diversity of native species on our rehabilitated lands, and the variety of post-mining land uses, including, for example, the planned pumped hydro power for a former coal mine in Muswellbrook in the Hunter Valley, as referenced by the complainant themselves.

This is factually correct and substantiable, and does not imply that all mining activity is “sustainable”.

Further, the above expressions clearly state that NSW Mining member intentions are to mine responsibly. This is inferred by the efforts undertaken to restore land formerly used for mining, and whilst such efforts aim to make the land sustainable for future use, there is no express or implied claim that mining itself is inherently sustainable nor has any direct benefit to the environment. The only environmental benefit discussed in the advertisement is that posed by the restoration efforts, and the environmental benefits of such restoration efforts are factually correct. There is no legal or other obligation that obligates the advertiser to discuss the character or otherwise of mining as a practice in general; firstly, the benefits and impacts of mining in general are very well understood and are not mischaracterised in the advertisement, and secondly it is self-evident that mining activities require post-activity restoration to take place, hence the content in the advertisement.

Accordingly, the advertiser considers that the claims identified erroneously as “Sustainable Mining Claims” are not misleading nor deceptive, and do not breach Section 1(a) of the Environmental Claims Code.

In respect of Section 1(b) of the Environmental Claims Code, the advertiser does not consider that a disclaimer outlining the negative impacts of mining are necessary or reasonable in the context of this advertisement. This is a standard that is not applied to any other advertiser in this space, or in any other industry like apparel or automotive. If such a standard was applied to such industries, it would be a fundamental shift in the advertising industry and the communications industry in

general. Under Australian law, and indeed consistent with each of the applicable advertising Codes, disclaimers may be used to clarify or qualify other messaging in the main copy or supers, and they cannot be used to correct misleading messaging. In the context of the advertisement, there is no need for further disclaimers and so none are used.

The mining industry (including through the advertiser) is within its rights to communicate to the public what it does in the restoration of mine sites, how that process works and what is involved. This is largely a public education exercise of course, and it is largely to ensure that the public is aware that this sort of restoration does take place. The advertisement highlights the responsible approach taken by Mining NSW mining companies towards land restoration post-mining, and given the well-known need for such restoration, it is fundamentally unnecessary to provide any more detail about the impact of mining generally given it would be known to most viewers already.

Regarding Sections 2(a) and 2(b) of the Environmental Claims Code, the advertiser does not consider that the claims specified above infringe either section as they are very clear in their meaning when presented in the context of the advertisement, and plainly do not overstate any environmental benefits. Referring specifically to the complainant's emotive arguments pertaining to environmental issues and the other energy generation options, the advertiser notes that these issues are not in question, the issue in question is whether the advertisement complies with the relevant advertising Codes, which it does.

Restoration Efforts Claim

The complainant identifies the expressions "There are teams like us all over NSW restoring the land being used for mining", "We make plans before mining even starts, so there's a productive and sustainable use for the land afterwards as well" and "Like here in the Hunter Valley, where 40% of the land used for mining is already under rehabilitation" and defines them as "Restoration Efforts Claims".

The complainant claims that the Restoration Efforts Claims are misleading because they do not identify that the restoration efforts are undertaken to comply with legal obligations.

Firstly, the advertiser notes that while the advertisement does include information about rehabilitation work at NSW mines, which is required by law in NSW, a major focus of the advertisement is on the teams of experts that member companies have at mines all over NSW, highlighting their expertise and their commitment to meeting and exceeding the regulatory requirements required for post-mining land use. The engineers, environmental scientists, water experts, drone pilots and surveyors and more, working at mines all over NSW is something that many people in NSW would not be aware of and something that the advertiser believes is worth sharing to help

educate the community about the effort undertaken to meet and exceed its commitments on mine site rehabilitation.

Further, the advertiser notes that disclosing that some of the restoration is undertaken pursuant to its legal obligations is not necessary nor relevant to the important and factual messaging presented by the advertisement, and that the advertiser is allowed to explain to the viewer that it is undertaking restoration efforts. The teams of people highlighted by the advertisement are undertaking works that are having a positive impact on the environment and the fact that they are undertaken as a matter of legal compliance does not undermine their significance or relevance, and the advertiser has every right to advertise this positive message.

In regards to Section 1(a) of the Environmental Claims Code, the Practice Notes state that main consideration is if the average viewer is likely to be misled by the Restoration Efforts Claims. Firstly, as detailed above, the claims in question are not Environmental Claims, as the restoration efforts in question are not products or services. Secondly, the advertiser submits that the Restoration Efforts Claims are not misleading and deceptive and the average viewer is unlikely to be misled by the advertisement. The subject matter of the advertisement is extremely clear, as are the messages therein.

In regards to Section 1(b) of the Environmental Claims Code, as noted above the advertiser does not consider it necessary nor relevant to include any disclaimers in respect of the very clear messages being communicated here. The advertisement does not hide the fact that mining is contributing to the need for the restoration. That is clearly implied in the message of the advertisement itself, a disclaimer outlining this is not required and the absence of one does not mean the advertisement is misleading. The advertisement is factually correct and the messages therein speak for themselves.

In regards to Section 2(a) of the Environmental Claims Code, we note the complainant has highlighted a Practice Note in relation to this section that “Environmental benefits should not be advertised if they are irrelevant, insignificant or simply advertise the observance of existing law.” We note that the restoration efforts depicted in the advertisement are extremely significant and relevant to Australians generally. Some of the restoration may be undertaken in observance of legal obligations but the mere fact such obligations exist does not undermine their significance or importance or the significance or importance of all restoration efforts broadly. Conversely, in the advertiser’s view, the commitment of its members to such important obligations as demonstrated by the advertisement would be of significant interest to the average viewer. Indeed, the sheer scale and cost of these restoration efforts would be largely unknown to the average viewer, which of course the advertisement seeks in part to address through education.

In regards to Section 2(b) of the Environmental Claims Code, the claims are very clearly stated and are not overstated nor exaggerated. At no point does the advertisement claim that the restoration efforts completely undo all impacts of mining. The message

is very clear that Mining NSW member companies take steps to restore land after mining activities cease to ensure an ongoing and sustainable use of the land. Such claims are correct and compliant with all relevant Codes.

In respect of the specific claim pertaining to the Hunter Valley, the advertiser submitted the following information to ClearAds, which was accepted by the same in establishing that the claim was true and not overstated:

- Since 2012, the Upper Hunter Mining Dialogue has been collecting and reporting on annual rehabilitation data from Upper Hunter mining operations, providing information to the community and improving transparency regarding the amount of progressive rehabilitation across the region.*
- The mining industry has agreed to a set of common rehabilitation principles and commitments to drive improvements to rehabilitation. More information regarding these principles and commitments can be found on the Upper Hunter Mining Dialogue website.*
- A progress table is updated yearly with new results, providing an overview of the newly rehabilitated land and newly disturbed land during each calendar year for the past five years, as well as a selection of long-term averages.*
- In 2022, a further 529 hectares of land was newly rehabilitated, taking the total amount of land under rehabilitation to 14,987 hectares, which equates to just under*
- 39 percent of all land disturbed by mining in the Upper Hunter. During the same period, 676 hectares of new disturbance was recorded.*
- You can view a full breakdown of more than 10 years of data that has been collected and published on the Upper Hunter Mining Dialogue website.*

In conclusion, for the above reasons, the advertiser submits that the advertisement does not breach Sections 1(a), 1(b), 2(a) or 2(b) of the Environmental Claims Code, nor any other provision of the same.

Finally, for completeness, the advertiser is of the view that the advertisement contains no content that is in breach of any section of the AANA Code of Ethics. We note that no complaints in respect of the Code of Ethics have been raised by the complainant in this respect.

Given the above, the advertiser requests that the complaint be dismissed.

Additional comments in relation to the complaint

The NSW mining industry is considered a world-class industry with some of the best miners of the world. The industry is heavily regulated and works to very high standards under approvals provided to mine by the NSW Independent Planning Commission and NSW regulators including the NSW Resources Regulator and the NSW Environment Protection Authority.

The mining industry in NSW is a major industry that directly employs more than 40,000 people in a wide variety of professions and locations across the state. And while some people are connected to our industry, we also seek to communicate with and educate people that are not directly connected to mining about the relevance and benefits of our industry to them.

The mining industry in NSW has been conducting similar advertising campaigns on TV, radio, print and digital channels for more than 10 years.

Our high-quality coal in NSW is needed for energy and for making steel in countries including India, Korea, Japan, Taiwan, China and more. And the metals and minerals being explored for or mined in NSW are essential to so many of the things we all need. There is further information about the end-uses for metals and minerals in the comprehensive guide published by the Minerals Council of Australia - '30 Things' [<https://www.minerals.org.au/sites/default/files/30%20Things.pdf>].

Here in NSW, mining companies make every effort to minimise their impacts on the environment and to restore the land after mining for stable and sustainable uses such as farmland for grazing cattle and bushland for native plants and animals.

Further information about how mining companies are minimising their environmental impacts will be made available in the coming weeks on the website responsiblemining.com.au.

In relation to the AANA Environmental Claims Code, we don't believe any claims are being made in the advertising that are contrary to the standards set out in the Code. We would be happy to provide the panel any further information that may be required to address the concerns raised.

THE DECISION

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches the AANA Environmental Claims in Advertising and Marketing Code (the Environmental Code).

The Panel noted the complainant's concerns that the advertisement is misleading.

The Panel viewed the advertisement and noted the advertiser's response.

Is an environmental claim being made?

The Panel considered whether the advertisement made an Environmental Claim.

The Environment Code applies to 'Environmental Claims' in advertising and marketing communications.

The Code defines Environmental Claims as *“any express or implied representation that an aspect of a product or service as a whole, or a component or packaging of, or a quality relating to, a product or service, interacts with or influences (or has the capacity to interact with or influence) the Environment”*.

The Panel noted the advertiser’s response that the definition of Environmental Claim in the Environmental Code is related to products or services, and as the claims being made in the advertisements relate to restoration efforts undertaken by mining companies and do not relate to products or services these would not constitute environmental claims as defined by the Code.

The Panel considered that while mining companies and the advertiser may not provide products and services directly to the public, they do provide products and services to other businesses. The Panel also noted that the definition of advertising in the Environmental Code is broad and includes the promotion of organisations and lines of conduct.

The Panel therefore considered that the promotion of or representation of any aspect or activity of the advertiser or its members would fall within the definition of Environmental Claims under the Environmental Code, if those activities interact with or influence, or have the capacity to interact with or influence, the environment.

The Panel noted that the complainant had raised concerns relating to two potential environmental claims:

1. Sustainable mining claim – that activities undertaken by the advertiser’s members are sustainable.
2. Restoration efforts claim – that the advertiser’s members are engaging in extensive restoration and rehabilitation efforts.

The Panel noted the first potential claim. The Panel considered that the wording in the advertisement is *“There are teams like us all over NSW, restoring the land being used for mining. We make plans before mining even starts, so there’s a productive and sustainable use for the land afterwards as well. Like this bushland and farmland for cattle grazing. And it’s happening all the time. Like here in the Hunter Valley where 40% of the land used for mining is already under rehabilitation. Because in NSW we mine responsibly. For today and tomorrow”*.

The Panel considered that the advertisement makes the claim that work is being undertaken to restore land being used for mining so that it can be used in a productive and sustainable way after mining (Claim 1). The Panel considered however that the advertisement did not make the claim that mining itself is sustainable, or that all activities undertaken by its members are sustainable.

The Panel considered that the advertisement also makes the claim that the advertiser's members were making a special effort to provide an environmental benefit by undertaking restoration and rehabilitation activities (Claim 2).

The Panel therefore proceeded to consider Claim 1 and Claim 2 (as set out above) against the relevant sections of the Environmental Code.

1 a) Environmental Claims in Advertising or Marketing Communication shall not be misleading or deceptive or be likely to mislead or deceive

The Panel noted that the Practice Note for this section of the Environmental Code includes:

"It is not intended that legal tests be applied to determine whether advertisements are misleading or deceptive, or likely to mislead or deceive, in the areas of concern to this Code.

Instead, consideration will be given as to whether the average consumer in the target market would be likely to be misled or deceived by the material.

Factors to consider include:

An advertisement may be misleading or deceptive directly or by implication or through emphasis, comparisons, contrasts or omissions. It does not matter whether the advertisement actually misled anyone, or whether the advertiser intended to mislead – if the advertisement is likely to mislead or deceive there will be a breach of the Code.

Any comparative claim should be specific and make clear the basis for the comparison. Points of comparison, where appropriate, should reflect a body of evidence including recognised benchmarks or standards where appropriate.

The target market or likely audience of the advertising or marketing communication should be carefully considered when making environmental claims. Therefore all advertising should be clear, unambiguous and balanced, and the use of technical or scientific jargon carefully considered."

Regarding Claim 1, the Panel considered that the use of the term 'sustainable' in the advertisement was unlikely to give the average consumer the impression that mining, as a whole, is a sustainable activity, or that all actions undertaken by the advertiser's members are sustainable. The Panel considered it would be clear and unambiguous to the average consumer that the use of that word within the context of the statement, "We make plans before mining even starts, so there's a productive and sustainable use for the land afterwards as well", was a reference to the use of the land post-mining.

The Panel therefore considered that the reference to sustainable in the advertisement was not misleading or deceptive, or likely to mislead or deceive.

Regarding Claim 2, the Panel noted the complainant's submission that in NSW all exploration licences, mining leases and production leases contain specific conditions requiring rehabilitation, as well as compliance with various laws requiring rehabilitation criteria. The Panel also noted the advertiser's response that it was not necessary nor relevant to the messaging presented by the advertisement to disclose in the advertisement that some of the restoration and rehabilitation work is being undertaken pursuant to legal obligations.

The Panel considered that while it may not be mandatory to disclose that their activities are legally required, failing to share this information in the advertisement may create a misleading impression that the restoration and rehabilitation efforts were solely the initiative of the advertiser's members, suggesting that they were exceeding their obligatory duties.

The Panel considered that most members of the public would not know that such practices are required by law. The Panel considered that although restoration and rehabilitation activities may be undertaken, the overall impression of the advertisement was that the advertiser's members were making a special effort or taking voluntary steps to provide an environmental benefit.

The Panel therefore considered that the advertisement was misleading and deceptive or likely to mislead or deceive the average consumer.

1 a) conclusion

The Panel determined that Claim 2 was misleading or deceptive or likely to mislead or deceive and the advertisement did breach Section 1 a) of the Environmental Code.

1 b) Environmental Claims in Advertising or Marketing Communication shall display any disclaimers or important limitations and qualifications prominently, in clear, plain and specific language;

The Panel noted that the Practice Note for this section of the Environmental Code includes:

"A disclaimer can clarify, expand or reasonably qualify a representation but should not contradict, diminish or retract it. As a general guideline, the main body of the advertisement, apart from the disclaimer, should be capable of standing alone without being misleading."

For the reasons discussed in Section 1 a) the Panel considered that the advertisement did not display important information or qualifications to make it clear to the average consumer that the restoration and rehabilitation activities were not as a result of the special or voluntary efforts of the advertiser's members, but were required by law,.

1 b) conclusion

The Panel determined that the advertisement did breach Section 1 b) of the Environmental Code.

2 a) Environmental Claims must... be relevant, specific and clearly explain the significance of the claim

The Panel noted that the Practice Note for this Section includes:

“Environmental claims should only be made where there is a genuine benefit or advantage. Environmental benefits should not be advertised if they are irrelevant, insignificant or simply advertise the observance of existing law. Advertising and marketing communication should adequately explain the environmental benefits of the advertised product or service to its target audience. It is not the intent of the advertiser making the claim that will determine whether it is considered misleading; it is the overall impression given to the consumer that is important. Advertising therefore should not inadvertently mislead consumers through vague or ambiguous wording. Providing only partial information to consumers risks misleading them. Generally a claim should refer to a specific part of a product or its production process such as extraction, transportation, manufacture, use, packaging or disposal.”

The Panel noted the complainant’s concern that the advertisement fails to be specific and clear in the scope and significance of the claims made.

For the reasons discussed in Section 1 a), the Panel considered that the advertisement did not make it clear to the average consumer that the restoration and rehabilitation activities undertaken were required by law, and not through voluntary efforts to provide a special environmental benefit.

Section 2 a) conclusion

The Panel determined that the advertisement did breach Section 2 a) of the Environmental Code.

2 b) Environmental Claims must not overstate the claim expressly or by implication

The Panel noted that the Practice Note for this section of the Environmental Code includes:

Advertisers and marketers should avoid making claims that expressly or impliedly overstate an environmental benefit. Consideration should be given to whether there is sufficient disclosure of any negative impacts. For example, whether negative impacts have been withheld which, if known, would diminish the positive attribute.

For the reasons discussed in Section 1 a), the Panel considered that the advertisement overstated the efforts of the advertiser's members through their restoration and rehabilitation activities, by not disclosing that the activities undertaken were required by law.

2 b) conclusion

The Panel determined that the advertisement did breach Section 2 b) of the Environmental Code.

Conclusion

Finding that the advertisement breached Sections 1 a), 1 b), 2 a), and 2b) of the Environmental Code the Panel upheld the complaint.

THE ADVERTISER'S RESPONSE TO DECISION

We note the Panel's decision and have unpublished the advertisement from YouTube.