

Form NCF1

**Concise Statement**

No. VID of 2024

Federal Court of Australia

District Registry: Victoria

Commercial and Corporations National Practice Area (Regulator and Consumer Protection)

**Australian Competition and Consumer Commission**

Applicant

**Clorox Australia Pty Limited (ACN 077 194 935)**

Respondent

**INTRODUCTION**

- 1 This proceeding concerns the Respondent's false and misleading description of certain of its GLAD-branded kitchen tidy and garbage bags as comprising '50% ocean plastic'. The bags were not comprised of 50% recycled plastic waste collected from the ocean or sea, or from an ocean or a sea (including up to the shoreline). Rather, each product was comprised of resin up to approximately 50% of which was derived from recycled plastic that had been collected from communities up to 50 kilometres of the ocean or sea, and the remainder was comprised of non-plastic waste resin, processing aid and dye/ink.

**IMPORTANT FACTS GIVING RISE TO THE CLAIM****Products**

- 2 The Respondent supplies (to retailers including supermarkets and online retailers) and markets food care and waste disposal products, which are available to consumers in Australia. Clorox supplied the following GLAD-branded products (each a **Product** and collectively the **Products**):

(a) between about June 2021 and July 2023:

- (i) small kitchen tidy bags;
- (ii) medium kitchen tidy bags;

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Filed on behalf of (name & role of party) Australian Competition and Consumer Commission, Applicant

Prepared by (name of person/lawyer) Andrew Riordan

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- (iii) large kitchen tidy bags;
- (b) between about May 2022 and July 2023:

- (i) large garbage bags; and
- (ii) extra large garbage bags.

**Annexures A and B** relate to each kitchen tidy bag Product referred to in sub-paragraph (a). **Annexure C** relates to each garbage bag Product referred to in sub-paragraph (b). The Annexures include example images of the front, side and back of the sleeve (**Packaging**) of the relevant Products.

### ***Kitchen Tidy Bag Products - Original Product Packaging***

3 Between about June 2021 and a date in 2022 (respectively, about 13 November 2022 for the small kitchen tidy bags, 29 May 2022 for the medium kitchen tidy bags, and 6 March 2022 for the large kitchen tidy bags), each of the kitchen tidy bag Products was supplied by the Respondent in Packaging which –

- (a) displayed on its front:
  - (i) at the top, “GLAD to be GREEN” text in large font, with a green coloured background underlying the words ‘to be GREEN’;
  - (ii) in the centre, “**50% OCEAN PLASTIC RECYCLED BAGS**” text in large blue font;
  - (iii) at the bottom, in smaller font, “MADE USING 50% Ocean Plastic\*\*” text around an image of a wave, overlaid on an image of a blue coloured waste disposal bag;
- (b) displayed, on its side, text and design elements mirroring the front of the Packaging described at sub-paragraph (a) above, all oriented sideways relative to the front. The design elements described at sub-paragraph (a)(iii) were, on the side of the Packaging, located to the right of, rather than underneath, the text described at sub-paragraph (a)(ii), which in turn was in larger font than the text on the front of the Packaging;

- (c) displayed on its back (in much smaller font and oriented sideways relative to the front):
- (i) “These bags are made from 50% ocean recycled plastic, and have the trusted strength of Glad® to hold household waste on its way to landfill. Recycling ocean bound plastic reduces plastic pollution before it enters the ocean, helping to reduce pollution in waterways, save marine life and put an end to irresponsible waste.”;
  - (ii) “\*Made using 50% ocean bound plastic that is collected from communities with no formal waste management system within 50 km of the shore line.”; and
- (d) revealed the actual Product, which was a blue colour.

***Kitchen Tidy Bag Products - Updated Product Packaging***

- 4 Between the respective date in 2022 (as set out in paragraph 3 above) and about July 2023, each of the kitchen tidy bag Products was supplied by the Respondent in updated Packaging where the only differences from paragraph 3 above were that –
- (a) the text at the bottom of the front and side, set out at sub-paragraph 3(a)(iii) and referred to in sub-paragraph 3(b), was changed to “MADE USING 50% Ocean Bound Plastic\*”;
  - (b) the text displayed on the back (still in much smaller font and oriented sideways relative to the front of the sleeve),
    - (i) set out at sub-paragraph 3(c)(i), was changed to: “These bags are made from 50% ocean bound recycled plastic, and have the trusted strength of Glad® to hold household waste on its way to landfill. Recycling ocean bound plastic reduces plastic pollution before it enters the ocean, helping to reduce pollution in waterways, making the seas safer for marine life, and helping to put an end to irresponsible waste.”; and
    - (ii) set out at sub-paragraph 3(c)(ii), was changed to: “Made using 50% ocean bound recycled plastic that is collected from communities with no formal waste management system within 50 km of the shore line.”

### **Garbage Bag Products**

- 5 Between about May 2022 and July 2023, each of the garbage bag Products was supplied by the Respondent in Packaging which –
- (a) displayed on its front:
    - (i) at the top, “GLAD to be GREEN” text in large font, with a green coloured background underlying the words ‘to be GREEN’;
    - (ii) below that text, “50% OCEAN PLASTIC RECYCLED GARBAGE BAGS” text in large blue font;
    - (iii) to the right of that text, in smaller font, “MADE USING 50% Ocean Bound Plastic\*” around an image of a wave, overlaid on an image of a blue coloured waste disposal bag;
  - (b) displayed, on its side, text and design elements mirroring the front of the Packaging as described at sub-paragraph (a) above;
  - (c) displayed on its back (in much smaller font):
    - (i) “\*Made using 50% ocean bound recycled plastic that is collected from communities with no formal waste management system within 50 km of the shore line.”;
    - (ii) “These strong garbage bags are made from 50% ocean bound recycled plastic, and have the trusted strength of Glad® to hold waste on its way to landfill. Recycling ocean bound plastic reduces plastic pollution before it enters the ocean, helping to reduce pollution in waterways, making the seas safer for marine life, and helping to put an end to irresponsible waste.”; and
  - (d) revealed the actual Product, which was a blue colour.

### **Ocean Plastic Representation**

- 6 By reason of the matters set out in paragraphs 3, 4 and 5 above, the Respondent represented that each Product was comprised of 50% recycled plastic waste collected from the ocean or sea; further or alternatively, from an ocean or a sea (including up to the shoreline) (**Ocean Plastic Representation**).
- 7 A separate Ocean Plastic Representation was made each time a Product was supplied, presented for sale or viewed. The Ocean Plastic Representation was the dominant

message conveyed by the Packaging, notwithstanding the references to 'ocean bound plastic' (set out in subparagraphs 3(c), 4(a) and (b) and 5(a)(iii), (b) and (c)).

***Falsity***

8 In fact, the Products were not comprised of 50% recycled plastic waste collected from the ocean or sea, or from an ocean or a sea (including up to the shoreline). Rather, each Product was comprised of resin:

- (a) up to approximately 50% of which was derived from recycled plastic that had been collected from communities situated up to 50 kilometres from a shoreline; and
- (b) the remainder was comprised of non-plastic waste resin, processing aid and dye/ink.

**RELIEF SOUGHT FROM THE COURT**

9 The Applicant claims the relief set out in the accompanying Originating Application.

**PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

10 By reason of the matters referred to in paragraphs 2 to 8 above, each time it made the Ocean Plastic Representation, the Respondent, in trade or commerce –

- (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the *Australian Consumer Law (ACL)* contained in Schedule 2 to the *Competition and Consumer Act 2010 (Cth)*;
- (b) in connection with the supply, possible supply, and promotion of the supply of the Products, made false or misleading representations as to:
  - (i) the composition of each Product, in contravention of section 29(1)(a) of the ACL;
  - (ii) the environmental benefits of each Product, in contravention of section 29(1)(g) of the ACL; and
- (c) engaged in conduct that was liable to mislead the public as to the nature, the manufacturing process, and the characteristics of each Product, in contravention of section 33 of the ACL.

**ALLEGED HARM SUFFERED BY CONSUMERS, AND BENEFIT TO THE RESPONDENT**

- 11 The Respondent's conduct took advantage of consumers' concerns about environmental pollution, particularly plastic waste in the oceans. By engaging in the conduct, the Respondent deprived consumers of the opportunity to make informed purchasing decisions, which might have resulted in the purchase of alternative products. Consumers may have purchased and paid for goods represented as conferring an environmental benefit (the removal of plastic waste from the ocean or sea; further or alternatively, from an ocean or a sea (including up to the shoreline)), where either there was no such environmental benefit, or such benefit was overstated.
- 12 Moreover, the Respondent's conduct also undermined competition. The Respondent sought to promote its products as being more environmentally beneficial than those of its competitors. It also sought to promote its products as having a particular environmental benefit, making its products appear more attractive than alternative offerings.

**OTHER**

- 13 The Applicant does not consider the issues in this Concise Statement are suitable for a report by a referee under section 54A of the *Federal Court Act 1976* (Cth).

Date: 18 April 2024



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Signed by Andrew Riordan

Lawyer for the Applicant

This concise statement was prepared by Oren Bigos KC and Laura Schuijers of counsel.

**Certificate of lawyer**

I, Andrew Riordan, certify to the Court that, in relation to the Concise Statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 18 April 2024

A handwritten signature in black ink, appearing to read 'AR', is positioned above a horizontal dotted line.

Signed by Andrew Riordan

Lawyer for the Applicant

**ANNEXURE A: EXAMPLE IMAGE OF KITCHEN TIDY BAGS PRODUCT WITH ORIGINAL PRODUCT PACKAGING**

Applicable between about June 2021 and a date in 2022 (respectively, about 13 November 2022 for the small kitchen tidy bags, 29 May 2022 for the medium kitchen tidy bags, and 6 March 2022 for the large kitchen tidy bags)

*Front*



*Side*





Back



These images show the Original Product Packaging for the small kitchen tidy bags Product. The Original Product Packaging for the medium and large kitchen tidy bags Products was comparable, save for the displayed size and dimensions.

**ANNEXURE B: EXAMPLE IMAGE OF KITCHEN TIDY BAGS PRODUCT WITH UPDATED PRODUCT PACKAGING**

Applicable between a date in 2022 (respectively, about 13 November 2022 for the small kitchen tidy bags, about 29 May 2022 for the medium kitchen tidy bags, and about 6 March 2022 for the large kitchen tidy bags) and about July 2023

*Front*



*Side*



Back



These images show the Updated Product Packaging for the small kitchen tidy bags Product. The Updated Product Packaging for the medium and large kitchen tidy bags Products was comparable, save for the displayed size and dimensions.

**ANNEXURE C: EXAMPLE IMAGE OF GARBAGE BAGS PRODUCT**

Applicable between about May 2022 and July 2023

*Front*



*Side*



Back



These images show the Packaging for the large garbage bags Product. The Packaging for the extra large garbage bags Product was comparable, save for the displayed size and dimensions.