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ACPNS Legal Case Notes Series: 2021-41 AGL Energy Limited v Greenpeace Australia Pacific Limited.

[Working Paper]

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<http://www.austlii.edu.au/au/cases/cth/FCA/2021/625.html>

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



AGL ENERGY LIMITED V GREENPEACE AUSTRALIA PACIFIC LIMITED [2021] FCA 625

Federal Court of Australia, Burley J, 8 June 2021

Whether the use by a charity of a logo resembling that of an energy company was an infringement of copyright and trademark

Key words: Charity, Commonwealth, Copyright Infringement, Parody or Satire Exception to Copyright Infringement, Fair Dealing, Fair Dealing for the Purpose of Criticism or Review, Trademark Infringement

1. Greenpeace Australia Pacific Ltd (Greenpeace) is a charity registered with the Australian Charities and Not-for-profits Commission. Greenpeace describes itself as an environmental campaigning organisation.
2. AGL Energy Ltd (AGL) provides a range of gas, electricity and telecommunications services to customers in Australia. As part of its branding, AGL uses Australian registered trademark no. 1843098 (AGL logo), as follows:



3. On 5 May 2021, Greenpeace launched a campaign concerning AGL across a variety of media platforms using headlines such as “Still Australia’s Biggest Climate Polluter” and “Generating Pollution For Generations”. An example of an online banner used in the campaign is as follows:



4. In this example, the tagline “Australia’s Greatest Liability” appears in close proximity to the AGL logo. The Court referred to the combined logo and tagline as the modified AGL logo.
5. Whilst AGL did not oppose the Greenpeace campaign, it took issue with the use of its logo in the campaign. AGL contended that the modified AGL logo was substantially identical (but not deceptively similar) to the AGL logo and thus infringed AGL’s registered trademark. AGL also claimed that the modified AGL logo infringed copyright in the AGL logo. AGL sought declarations of infringement, injunctions to restrain Greenpeace’s use of the modified AGL logo, and damages, including additional damages, in respect of the infringements.

6. In response, Greenpeace did not dispute that AGL owned copyright in the AGL logo, or that it was validly registered as a trademark. However, it denied infringing copyright on the basis that its use of the modified AGL logo amounted to fair dealing for the purpose of criticism or review, or alternatively as a form of parody or satire within the terms of sections 41 or 41A of the [Copyright Act 1968](#) (Cth). Greenpeace denied trademark infringement, on the basis that it had not used the modified AGL logo as a trademark in the sense required by [s 120\(1\)](#) of the [Trade Marks Act 1995](#) (Cth), or otherwise used the AGL logo within the scope of its trademark registration.
7. AGL uses the AGL logo as a central aspect of its marketing strategy. Together with rigorously enforced brand guidelines, which provide identifiable “visual identity elements” used in its promotional materials, AGL uses the AGL logo to communicate its corporate message to consumers. In addition, many of AGL’s promotional materials seek to emphasise its “green” credentials.
8. Greenpeace was concerned about “greenwashing” in the context of such promotional material, which Greenpeace contended had successfully persuaded consumers in Australia that AGL is an environmentally responsible energy provider when Greenpeace did not consider this to be the case. It commissioned the Exposing AGL report in February 2021 to target AGL consumers. The impugned campaign was then aimed at seven media– online banner advertisements, street posters, mock-up street posters, a parody website, social media posts, a protest poster image and placards.
9. On the issues of copyright infringement, the Court held that most of the impugned uses of the copyrighted logo by Greenpeace fall within the meaning of “parody or satire” in [s 41A](#) of the *Copyright Act* (at [63]):

The modified AGL logo is immediately juxtaposed by a play on the company’s initials “AGL” with the parodic or satirical words “Australia’s Greatest Liability”, accompanied by words decrying AGL’s environmental practices, such as “Still Australia’s Biggest Climate Polluter” or “Generating Pollution for Generations” or the like. The setting mimics elements used in AGL’s Brand Guidelines, thereby creating a “corporate look” about the Greenpeace images that also juxtaposes the AGL corporate branding style with an obviously non-corporate message, creating an incongruity that is striking to the viewer. The ridicule potent in the message is likely to be immediately perceived. It is stronger in the image of the young person with the goggles and mask, for example in the street posters. Many would see these uses of the modified AGL logo as darkly humorous, because the combined effect is ridiculous. AGL is exposed to ridicule by the use of its corporate imagery including by use of the modified AGL logo to convey a message that AGL would not wish to send. Furthermore, the words “Presented by Greenpeace” are positioned closely proximate to the modified AGL logo. Anyone reading the message would understand that the company held up for criticism as Australia’s Greatest Liability is not the author of the message. The viewer would understand that the message came from Greenpeace.

10. The Court found that this perception was attached to the online banner advertisements, the street posters and the parody website. However, the Court found that three of the four protest posters had no element of humour, ridicule or satire, but that one did, concluding that (at [65]):

The image in (c), however, provides a humorous juxtaposition of the AGL logo in a black cloud, held above its Loy Yang A power station in a manner that suggests the cloud is emanating from the power station, and is, in my view, sufficiently parodic or satirical.

11. The social media posts on Instagram, Facebook and LinkedIn were more problematical. They did not have the characteristics of parody or satire. By contrast, the relevant Facebook and Twitter posts, each using the modified AGL logo, did fall within the Courts' findings of parody and satire.
12. The Court rejected AGL's contention that parody or satire was not the main purpose of the impugned campaign, which AGL contended to raise funds for Greenpeace. The Court said that a campaign could have more than one purpose.
13. On the issue of fair dealing in general, the Court held that there had been fair dealing by Greenpeace within section 41A of the *Copyright Act* (at [84]):

Furthermore, one looks at the objective effect, or likely effect of the use of the modified AGL logo. It is also significant to note that the work consists of little more than the letters "AGL", which is of course immediately recognisable as the applicant's corporate name. The Greenpeace media campaign is directed toward the corporate behaviour of AGL. Any damage caused to AGL by the campaign is caused by criticism of AGL as a corporate entity, on environmental grounds. It is not the use of the AGL logo in the campaign that causes damage, but rather the informational message that is communicated in the campaign, in particular by referring viewers to the Exposing AGL report about the corporate entity. AGL does not object to the use of the three letters of its name. The use of the artistic work adds to the parodic or satirical effect of the campaign overall, particularly when used in combination with other look-alike AGL corporate branding, but in my view it is not likely to otherwise be causative of harm to AGL. Rather it is the use of the letters AGL, not of themselves capable of being an artistic work, as part of the campaign that might cause harm, but again such harm would stem from the information supplied by Greenpeace, rather than the use of the letters.

14. Since the Court had found that some of the uses of the modified AGL logo did not have elements of parody or satire, did they fall within fair dealing for the purpose of criticism or review? The Court again found that the Instagram, Facebook and LinkedIn posts did not meet this defence. Nor did the protest posters, or some of the protest placards. These were subject to an injunction by the Court.
15. On trademark infringement, the Court held that AGL had not established its case for trademark infringement. The use of the logo was not for the promotion of goods and services by Greenpeace, but rather referred to the services provided by AGL (at [102]).
16. Therefore, there was no trademark infringement. In relation to copyright infringement, AGL also failed in respect of its copyright infringement claim in relation to all impugned uses of the modified AGL logo with the exception of some of the social media posts and some photographs of placards. AGL also failed in respect of its claim for additional damages. The consequence is that injunctive relief was granted in respect of the uses that infringed copyright, but the proceedings were otherwise dismissed.

IMPLICATIONS



Greenpeace characterised this action as a "strategic lawsuit against public participation" (a SLAPP suit). SLAPPs are designed to overburden charities, NGOs, activists and community groups in an attempt to censor criticism. This

characterisation is arguable. But however this action is characterised, AGL was clearly unsuccessful in its claims. The claim of infringement of trademark had no basis in law. The claim of infringement of copyright was stronger, since the AGL logo was used by Greenpeace in its complete form, but the court rejected the claim on the basis that its use would, apart from the exceptions identified by the Court, plainly be seen as a parody by those viewing the modified logo.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/cth/FCA/2021/625.html>

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