Melbourne Climate Futures

THE UNIVERSITY OF MELBOURNE

Thursday, 8 June 2023

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Submission to the Senate inquiry into greenwashing

This submission brings together expertise from researchers from the University of Melbourne, as part of the Melbourne Climate Futures (MCF) initiative to respond to the call for submissions to the Senate's inquiry into greenwashing. MCF brings together academics from across all disciplines at the University, to develop evidence-based and practical solutions to climate related challenges.

The inquiry has particular reference to: (a) the environmental and sustainability claims made by companies…; (b) the impact of misleading environmental and sustainability claims on consumers; (c) domestic and international examples of regulating companies' environmental and sustainability claims; (d) advertising standards in relation to environmental and sustainability claims; (e) legislative options to protect consumers from green washing in Australia; and (f) any other related matters.

The submission highlights some of our key areas research that may be relevant to the inquiry. Below we include a summary of those topics of research, the terms of reference to which they relate and our key recommendations related to each.

Summary

1. **Legal frameworks used to regulate greenwashing including in the financial sector**
   - *TOR to which it relates:* (c), (d) and (e)
   - *Key observations:* There is growing regulatory interest in greenwashing both in Australia and internationally, with climate-related greenwashing being a key area of attention. Legal frameworks addressing greenwashing may focus on claims made in relation to specific products or services or in relation to claims or practices by an entity more generally. Such frameworks include high level principles to guide law and practice in this area, practical checklists to help entities ensure they are not engaging in greenwashing, and legal frameworks to provide assurance and accountability in relation to environmental claims and practices.
   - *Key recommendations:* Regulators and policymakers should continue their approach of developing checklists and taxonomies to objective assess the substantive content and procedures by which green claims are made. However, given the complexity and longer term nature of some sustainability claims, regulators need to draw on objective expertise in ongoing regulatory action in this area. The government should also develop economy wide Net Zero modelling to support regulatory and supervisory action.

2. **Greenwashing being pursued in the courts in the absence of regulation**
   - *TOR to which it relates*: (a), (c) and (f)
   - *Key observations:* Greenwashing litigation and legal interventions have grown in recent years and might be expected to grow into the future to test the limits of regulation in this area. These form two 'waves' of greenwashing litigation in Australia: targeting claims relating to particular products or services and targeting claims by entities more generally. These cases are pushing the boundaries of what constitutes a 'reasonable' green claim.

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- *Key recommendations*: Regulators and policymakers might assess whether Australia's legal provisions on misleading and deceptive conduct are sufficient to protect individuals, groups and society from greenwashing and to ensure that entities' commitments to climate change goals are fulfilled. Further analysis might be conducted into the types of claims that are being challenged by concerned groups and others, for example, net zero claims, to assess the impact of these cases on entities and others, and to provide guidance on what constitutes a reasonable green claim.

3. Incidence and prevalence of greenwashing on social media advertising

- *TOR to which it relates*: (a)

- *Key observations:* Greenwashing through advertisements on social media is one particular forum in which misleading, harmful or unlawful claims are being made. Green claims are ubiquitous in social media advertising and widely used by a range of industries including the energy industry, household (kitchen and cleaning) products, clothing and footwear, personal care, travel and food and food packaging.

- *Key recommendations*: The study of green claims in social media advertising highlights the need to scrutinise the use of broad, vague and potentially misleading terms and to seek greater accountability and definition of what these terms mean.

What is greenwashing?

Greenwashing has been defined in various ways.

For example, the Australian Competition and Consumer Commission (ACCC) has defined greenwashing as environmental and sustainability claims that may be false, misleading or have no reasonable basis (ACCC 2023, p.3). In relation to investments, the Australian Securities and Investments Commission (ASIC) defines greenwashing as "the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical" (Information Sheet 271).

Internationally, the European Supervisory Authorities have presented a common understanding of greenwashing as "a practice where sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial services. This practice may be misleading to consumers, investors, or other market participants" (EBA 2023).

Climate-related greenwashing has been a particular focus, including amongst corporate and consumer regulators in Australia and overseas.

For example, the ACCC announced that "[c]onsumer and fair trading issues in relation to environmental claims and sustainability" would be one of its compliance and enforcement priorities for 2022-23. This was updated in 2023-24 to include "[c]onsumer, product safety, fair trading and competition concerns in relation to environmental claims and sustainability". In June 2022, ASIC released Information Sheet 271 with information about "misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical". ASIC has also commenced their first court action over greenwashing in 2023.

Internationally, there has been growing concern about greenwashing, specifically 'climate-washing', focused on fossil fuel and energy companies, institutional investors and listed companies' disclosures to share markets. For example, in November 2022 at COP27, the UN Secretary General spoke of a 'Zero Tolerance for Net-Zero Greenwashing' by non-state actors with the release of a report condemning greenwashing and providing a roadmap to bring integrity to net-zero commitments by industry, financial institutions, cities and regions. The Competition and Market Authority has released guidance for businesses in making environmental claims in the United Kingdom. The European Union has proposed a new law on green claims.

Targets and goals are a legitimate, formative part of businesses' strategic planning. Setting such targets and goals are crucial to change resource allocation and enrol stakeholders in the new direction. In this way, targets can inspire and direct strategic change. However, there is a need to ask whether there is a reasonable basis for those targets or goals in relation to whether they amount to greenwashing.

Regulating companies' and investors' environmental and sustainability claims

Regulators in Australia and the United Kingdom have provided checklist questions/statements to investment entities and businesses when making environmental claims in relation to particular goods, services or products: CMA's Guidance on making environmental claims on goods and services and ASIC's Information Sheet 271. Key principles emphasised in these guidance documents are:

- Truth and accuracy.
- Clarity and unambiguity.

- No omission or concealing of important relevant information.
- Fair and meaningful comparisons.
- Consideration of the full life cycle of the product or service.
- Substantiation of claims.

The European Union has adopting a broader approach (although noting this applies to 'traders' not necessarily investment entities) by proposing a Directive on Green Claims that includes: (a) criteria on how companies should prove their environmental claims and labels; (b) requirements for these claims and labels to be independently verified; and (c) new rules governing environmental labelling schemes.

In relation to assessment of environmental claims, traders are required to, inter-alia:

- Specify whether the claim relates to part or all of a product or to part or all of the activities;
- "Rely on widely recognised scientific evidence, use accurate information and take into account relevant international standards";
- Demonstrate the environmental impacts, aspects or performance that are part of the claim (significant from a life-cycle perspective);
- Consider all environmental aspects/impacts significant to assessing environmental performance;
- Show that the claim is "not equivalent to requirements imposed by law on products within the product group, or traders within the sector";
- Provide information on whether the product or trader performs significantly better than others.
- Identify whether the improvements relate to significant harms in relation to environmental impacts on climate change, resource consumption and circularity, sustainable use and protection of water and marine resources, pollution, biodiversity, animal welfare and ecosystems;
- Separate greenhouse gas offsets from emissions and describe the integrity of these;
- "Include primary information available to the trader for environmental impacts, environmental aspects or environmental performance";
- "Include relevant secondary information for environmental impacts, environmental aspects, or environmental performance which is representative of the specific value chain of the product or the trader on which a claim is made".

Labelling schemes should comply with the following requirements, inter-alia:

- Transparent, accessible, clear and detailed information about the ownership and decision-making bodies of environmental labelling schemes.
- Information about the objectives of the environmental labelling scheme and requirements and procedures to monitor compliance.
- Proportionate conditions for joining the labelling scheme so as small and medium enterprises are not excluded.
- Requirements for the scheme to be verified by scientific experts.
- A complaint and dispute resolution mechanism.
- A procedure for dealing with non-compliance and withdrawal/suspension from the scheme.

From the above, it appears important that regulators take a broad view of greenwashing i.e. how it relates to particular products and services but also how it relates to entity-wide claims. Moreover, regulators might not only look at regulating the substantive content of claims but also create procedural mechanisms to provide quality assurance and ensure compliance and enforcement. In the financial sector, the ongoing development of a Sustainable Finance Taxonomy, will help regulators to evaluate the veracity of green claims as they relate to financial products.

While process based and taxonomy approaches will assist regulators to assess green claims, it is important to note that many claims are subjective, based on changing scientific and economic conditions, and on predictions over long time horizons. This is particularly relevant in the financial sector.

Investors use a multitude of different tools to incorporate sustainability into their investment practice. Some of these tools are easier to assess objectively than others. For instance, a listed equities investor might make a claim to have a 'sustainable' portfolio on the basis that they 'screen' out high emitting firms from their portfolio. These types of products are easier to assess using existing regulatory tools. Other investment tools are harder to objectively evaluate. For instance, an investor might claim to be 'Net Zero' aligned or pursuing 'Net Zero' alignment. Indeed, many Australian financial institutions have signed up to international voluntary frameworks – such as the Net Zero Asset Owners Initiative – in which they make such claims. Because there are multiple different scenarios by which Australia and other countries might reach 'net zero' emissions, such an investor might continue to invest in high emitting assets in the short term or over longer time horizons and still claim to have a 'reasonable' basis for making a net zero claim to the market. In these cases, it is harder for consumers, regulators and others to objectively assess the 'reasonableness' of the investor's investment practice relative to their claim, as often these claims will be based on internal modelling and complex economic and environmental assumptions about net zero pathways. Australian regulators will need to develop new tools to assess these latter types of claims.

Similarly, it is important to note that some of the mechanisms which investors and corporations use to make sustainability claims are contested. For instance, a company might make a 'green' claim on the basis that it uses biodiversity offsets or carbon offsets. However, as we discuss further below, these mechanisms are themselves contested, with expert and market participants highlighting that some of these tools lack environmental credibility.

Given these complexities in green claims, it is important for Australia's financial regulators and policymakers to increase their engagement with objective experts in this area. For instance, it may be useful to bolster ASIC's existing expert panels with a Sustainability Panel who can support the regulator on issues like those above. It may also be useful for regulators to offer sustainability opinions on complex or longer term sustainability claims. The Government should also continue to develop its economy wide net zero modelling. It may be useful to house this work in the newly announced Net Zero Authority and making it publicly available, so that it might be used by consumers, advocates and others.

Greenwashing litigation and legal interventions in Australia

Australia has seen litigation on greenwashing in the past and this trend has strengthened in the past year with a focus on companies' claims about climate action.

30 greenwashing cases are documented in the Australian and Pacific Climate Litigation Database maintained by MCF. The database includes climate cases commenced in Australia, New Zealand and the Pacific. It includes examples of not only litigation (i.e. cases brought in judicial forums) but also legal interventions beyond the courtroom such as legal letters or regulator interventions. The rise of and growth of greenwashing cases in particular in Australia portends a number of lessons for claimants, regulators and defendants. These include the following:

- Greenwashing cases are likely to increase in number over time. While the majority of cases thus far have involved legal interventions beyond the courtroom, more claims might be brought in judicial forums in the future.
- Greenwashing cases not only aim to protect the individuals and groups directly involved in the case. They also serve an important social protection function, for example, ensuring that entities' commitments to climate change goals are fulfilled.
- Irrespective of the ultimate remedy imposed or outcome achieved in the case, greenwashing cases can create reputational and/or business risks for entities. These risks could have serious and ongoing consequences for an entity, potentially more significant than any pecuniary penalty imposed.
- Entities should exercise caution in their claims to be aligned and committed to net zero greenhouse gas emissions, including their use of offsets to meet these targets. Such claims have been the focus of recent greenwashing litigation. Entities therefore need to have a credible transition plan to reach net zero.
- Greenwashing cases have thus far largely focused on climate change mitigation, for example, claims that an entity will support the transition to a low carbon economy. However, more greenwashing cases relating to climate change adaptation could be brought in the future.
- While greenwashing cases focus on entities making misleading or inaccurate climate change commitments, other climate change cases can target those entities failing to make any commitment to climate action. A diverse 'portfolio' of climate litigation might therefore not only include greenwashing cases but also cases brought under a range of other laws, for example, private law, contract law, environment protection law, and corporate and financial law.

The below sections provide analysis of the greenwashing cases in the database that provide the context for the above lessons.

Overview

In recent years, Australia has seen a significant uptick in the number of greenwashing cases commenced. More cases have been commenced in the last two years (19 cases) than in all previous years. These cases have been primarily brought by regulators (13 cases) and not-for-profit groups (12 cases) against defendants in a range of sectors especially energy and mining, superannuation, and transport.

While claimants have commenced proceedings in judicial forums (13 cases), claimants have also brought legal interventions beyond the courtroom (17 cases). These legal interventions are legal letters to regulators asking for an investigation into an entity's conduct (8 cases), infringement notices issued by corporate regulators (5 cases) and complaints to non-judicial bodies (4 cases).

In terms of the substantive legal provisions raised in these cases, claimants have relied largely on a discrete number of provisions in Australia's corporate regulator legislation (the ASIC Act), corporate law legislation (Corporations Act) and consumer protection law (Australian Consumer Law). The main provisions that have been relied upon are:

***Australian Securities and Investments Commission Act 2001* (Cth)**

Section 12DA Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

Section 12DB False or misleading representations

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:

(a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

[…]

(c) make a false or misleading representation that purports to be a testimonial by any person relating to services;

Section 12DF Certain misleading conduct in relation to financial services

(1) A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services.

***Corporations Act 2001* (Cth)**

Section 1041H Misleading or deceptive conduct

(1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Australian Consumer Law (Cth)

Section 18 Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 29 False or misleading representations about goods or services

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or

(b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

[…]

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits;

Section 33 Misleading conduct as to the nature etc. of goods

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

Analysis

Turning to the impugned conduct targeted by claimants in greenwashing cases, two main types of case have been brought in Australia: (1) product or project-related claims, targeting a specific action undertaken by an entity, and (2) entity-wide claims, targeted the entity's activities more generally. However, these overarching types can be broken down further into a number of sub-categories. These are:

- Product or project-related claims that relate to misleading or inaccurate representations about (a) products, (b) projects, (c) accreditation schemes and (d) logos and symbols.
- Entity-wide claims that relate to misleading or inaccurate representations about (a) a company's overall climate credentials or (b) the climate-related impact of an entity's investments.

These two broad types of greenwashing cases have formed two waves of greenwashing litigation and legal interventions brought in Australia. The graph below shows these two waves of greenwashing cases (Figure *1*).

To elaborate, Australia's first wave of greenwashing litigation involved primarily product or service-related claims (15 cases). These cases included, for example, Australian Competition and Consumer Commission v GM Holden Ltd (ACN 006 893 232) (2008), Australian Competition and Consumer Commission v Goodyear Tyres (2008) and Australian Competition and Consumer Commission v DuluxGroup (Australia) Pty Limited (2012) where entities made misrepresentations about the green credentials of motor vehicles, tyres and paint products respectively.

Other early cases involved misrepresentations about the green accreditation of products or services such as Australian Competition and Consumer Commission v Prime Carbon Pty Ltd (2009), Australian Competition and Consumer Commission v Global Green Plan Ltd (2010) and Clean Energy Regulator v MT Solar Pty Ltd (2012).

As can be seen from the graph below, these 'first generation' greenwashing cases have continued to be a feature of Australia's greenwashing case landscape. For example, complainants have written legal letters to regulators about alleged misrepresentations by the Climate Active trademark program (2023) and the impact of litigation on Santos' Barossa Project (2022).

However, more recently, from 2021 onwards, a next generation wave of greenwashing litigation has emerged (15 cases). These cases involve claimants challenging entities for representations about their business or investing activities more generally.

For example, in Australasian Centre for Corporate Responsibility v Santos Ltd (2021), litigants are challenging Santos' claims that it has a credible path to net zero emissions by 2040 and in relation to natural gas and blue hydrogen. Not-for-profit organisations have also asked regulators to investigate the business activities of corporate entities, their use of offsets and whether they have a credible path to net zero in, for example, Complaint lodged on potentially misleading statements by Tamboran (2023), Complaint lodged on potentially misleading and deceptive conduct by Etihad Airways (2023) and Complaint lodged on potentially misleading and deceptive conduct by Toyota (2023).

Beyond claimants challenging misrepresentations about a company's business activities, other claimants have challenged representations made about an entity's investments. For example, Australia's corporate regulator has filed proceedings against Mercer Superannuation in relation to misleading statements about the sustainable nature and characteristics of its superannuation investment options: Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited (2023).

Other examples include infringement notices imposed by ASIC on Future Super (2023), Diversa (2022) and Vanguard (2022), as well as a legal letter written to HESTA over its investments in Santos and Woodside (2022). Trustee shareholders have also sought documents in relation to statements by the Commonwealth Bank of Australia that, inter-alia, their "lending policies support the responsible transition to a net zero emissions economy by 2050": Abrahams v Commonwealth Bank of Australia (2021).

Two of these investment claims might in fact represent a hybrid of the two waves of greenwashing cases, combining product and entity-wide claims: Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited (2023) and Vanguard (2022). These potential third wave cases do concern investing activities and business strategy, but specifically relate to a set of claims packaged up to sell a particular investment product i.e. a superannuation product or other investment product. These cases therefore potentially combine the salient and effective aspects of both waves of greenwashing case.

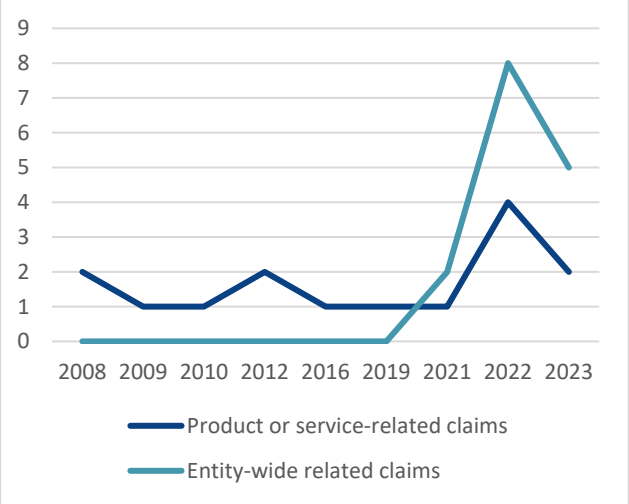

Figure 1: Waves of greenwashing cases in Australia

Representations made by entities in greenwashing cases have been made in various places. Entities' claims have appeared in disclosure documents or annual meetings, websites, social media and advertisements or have been made on or in the product or service itself.

While a number of Australia's greenwashing cases are ongoing, remedies sought and imposed in these cases have included regulator investigations, document disclosure, pecuniary penalties, declarations, injunctions and enforceable undertakings.

Australian and international cases are pushing the boundaries of what constitutes a 'reasonable' green claim. For example, internationally, cases against KLM and Delta are testing whether companies in hard to abate sectors (such as airlines) can use carbon offsets as part of their carbon neutrality claims. It is important that regulators are aware of these changing expectations as to what constitutes a reasonable claim.

ADM+S Ad Observatory – Study of Green Claims in Social Media Advertising

The ARC Centre of Excellence for Automated Decision Making and Society's Australian Ad Observatory is a novel data donation infrastructure aimed at improving the observability of platform-based advertising. The Ad Observatory works with citizen scientists to collect social

media ads that would not otherwise be seen by anyone else.

Researchers are investigating whether Facebook users are seeing ads that are misleading, harmful or unlawful and whether they are targeted at particular segments of the population. This is important because many advertisers might predominately or exclusively advertise online and, in this context, it is possible that they engage in less responsible advertising practices on social media where they are less likely to face regulatory scrutiny. Social media advertising may also be a reflection of wider trends in green claims and greenwashing in advertising.

ADM+S researchers associated with Melbourne Law School and Melbourne Climate Futures are investigating green claims in online ads and the potential for greenwashing in these ads. Their findings to date echo those found by other studies of green claims by the ACCC and the Consumer Policy Research Centre in relation to the frequency and vague-ness of green claims. In particular, the Ad Observatory green claims research is finding that green claims are ubiquitous in social media advertising and widely used by a range of industries including the energy industry, household (kitchen and cleaning) products, clothing and footwear, personal care, travel and food and food packaging.

Many of these green claims are vague, unsubstantiated and may well be misleading. Common terms used include 'environmental' or 'environmentally', 'sustainable', 'green', 'eco'. Claims about compostability and claims about plastic, including using recycled or recyclable plastic or saving plastic from ending up in the ocean are also very common. Many of these terms are being used in ways that are undefined and potentially misleading.

The study of green claims in social media advertising highlights the need to scrutinise the use of broad, vague and potentially misleading terms and to seek greater accountability and definition of what these terms mean.

For further information on this project, please contact Professor Christine Parker: christine.parker@unimelb.edu.au.