



THE LAW SOCIETY
OF NEW SOUTH WALES

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1 June 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: matthew.wood@lawcouncil.asn.au

Dear Dr Popple,

Greenwashing

The Law Society appreciates the opportunity to contribute to the Law Council of Australia's submission to the Senate Standing Committee on Environment and Communications Inquiry on Greenwashing. The Law Society's Climate Change Working Group contributed to this submission.

Our comments focus on paragraphs (b), (c), and (e) of the terms of reference.

Greenwashing

'Greenwashing' broadly describes the practice of misrepresenting the extent to which a company's products or initiatives are environmentally friendly, sustainable or ethical.

By falsifying the information that investors or purchasers need to make informed decisions, greenwashing is anti-competitive and undermines the market transparency and integrity that are essential to fair, informed and efficient markets.

Environmental and sustainability claims

The Australian Securities and Investments Commission's (ASIC) analysis of what is described as the 'greenwashing imperative', suggests that tackling climate change through decarbonisation is arguably the single biggest driver of global capital developments and allocation for the foreseeable future. Fair and efficient markets are essential for the efficient deployment of this transition capital.¹

ASIC's analysis also finds that over 400 companies referenced the term 'carbon neutral' or 'net zero' on price sensitive ASX announcements in 2022 (an eightfold increase in three years).²

¹ Karen Chester, 'ASIC and greenwashing antidotes', (Speech at RI Australia, 10 May 2023), 1. <https://asic.gov.au/about-asic/news-centre/speeches/asic-and-greenwashing-antidotes/>.

² Ibid.

Noting the enactment of the *Climate Change Act 2022* (Cth), setting in legislation the Federal Government's target to reach net zero by 2050, and Federal Budget investment in renewable energy, policies supporting further decarbonisation initiatives appear set to continue.

Existing legal frameworks

Currently, legislation expressly prohibits conduct that is misleading and deceptive, including greenwashing. The *Australian Consumer Law* prohibits misleading or deceptive conduct 'in trade or commerce'.³ The *Corporations Act 2001* (Cth) (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) contain general prohibitions against a person making statements (or disseminating information) that are false or misleading, or engaging in dishonest, misleading or deceptive conduct in relation to a financial product or financial service (e.g. sections 1041E, 1041G and 1041H of the Corporations Act, and sections 12DA and 12DB of the ASIC Act).⁴

While there are existing comprehensive legal frameworks to manage misleading and deceptive conduct, including 'greenwashing', greater regulator guidance would be helpful. This could include:

- updated materials from the Australian Competition and Consumer Commission (ACCC) and ASIC for sectors not already covered. We note that initial ASIC guidance has focussed on financial product offerings.⁵
- guidance on key sustainability terms/claims such as 'net zero', 'carbon neutral' and 'nature positive', which should, as far as possible, be consistent with similar international guidance.⁶

Regulatory priorities

Investigations and proceedings by regulators are now clearly focused on enforcement when it comes to greenwashing, as well as education.

As part of its [Enforcement Priorities for 2023](#), ASIC is prioritising both consumer and fair-trading issues in relation to environmental and sustainability claims, noting:

ASIC is also acutely aware of the rise of sustainable finance, with \$128 billion net flows into ETFs with an ESG focus and a 157% cent increase in advisers who claim to provide ESG advice since 2016. ASIC will closely monitor for misleading conduct and claims of greenwashing that cannot be sustained, and take enforcement action where necessary.⁷

³ Section 18 of [Schedule 2 of the Competition and Consumer Act 2010 \(Cth\)](#).

⁴ The Australian Law Reform Commission recently recommended simplifying existing misleading or deceptive conduct laws by consolidating the existing provisions to reduce overlap, amending s 12DA to make it a civil penalty provision, and introducing a new offence provision, otherwise identical to s 12DA, but applying only where the conduct is dishonest, intentional, or reckless (so as to justify criminal liability). See: <https://www.alrc.gov.au/news/all-roads-lead-to-rome/>.

⁵ ASIC Information Sheet 271: How to avoid greenwashing when offering or promoting sustainability-related products: <https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>.

⁶ Examples of guidance include the Science Based Target Initiative's [Corporate Net Zero Standard](#) and the [recommendations](#) of the UN High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities (and, once it is finalised, the Science Based Target Network's guidance on nature-related targets).

⁷ ASIC 'ASIC announces Enforcement Priorities for 2023' (Media Release 22-302MR, 3 November 2022): <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/>.

ASIC has recently issued an update on its greenwashing actions, describing 35 interventions.⁸

The [ACCC's compliance and enforcement priorities for 2023-2024](#) also include greenwashing, noting that, in choosing its priorities, the ACCC focuses on conduct that is of significant public interest or concern, and conduct involving a significant new or emerging market issue or where its action is likely to have an educative or deterrent effect.

In October 2022, the ACCC launched⁹ internet sweeps to identify misleading environmental and sustainability marketing claims. Over 200 company websites were reviewed for misleading environmental claims across a range of targeted sectors including energy, vehicles, household products and appliances, food and drink packaging, cosmetics, clothing and footwear. In March 2023, the ACCC announced an investigation following the internet sweeps, reporting that more than half of the businesses reviewed made concerning claims about their environmental or sustainability practices.¹⁰

International initiatives

Greenwashing has also been identified as an area of concern and priority for many securities regulators globally.¹¹ The European Commission has proposed a directive on regulating so-called 'Green Claims' that lays down detailed rules on the substantiation, communication and verification of voluntary environmental claims and environmental labels used by traders that market products to EU consumers.¹² One option may be to explore whether such prescriptive guidance or regulation may be appropriate in Australia.

'Antidotes' to greenwashing

The Deputy Chair of ASIC recently proposed three 'antidotes' to greenwashing:

- transparency, through disclosures that comply with today's law and ultimately a quality, global baseline for sustainability-related disclosure standards,
- policy-installed 'bright lines' to support that disclosure, and
- regulators doing their job and working together in doing so.¹³

We agree that all these actions are required to combat greenwashing. While continued regulatory activity is important, it cannot be an effective remedy on its own.

There have been a number of recent policy initiatives, which, working collectively, will assist to provide the transparency and 'bright lines' needed to support regulatory action.

These initiatives include the Government consultation on the introduction of a proposed mandatory climate change-related financial risk reporting framework for large businesses and financial institutions, aligned with international best practice, under standards being developed by the International Sustainability Standards Board.

⁸ ASIC 'Update on ASIC's recent greenwashing actions' (Media Release 23-121 MR 10 May 2023): <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-121mr-update-on-asic-recent-greenwashing-actions/>.

⁹ ACCC 'ACCC internet sweeps target 'greenwashing', fake online reviews' (Media Release 141/22, 4 October 2022): <https://www.accc.gov.au/media-release/accc-internet-sweeps-target-greenwashing-fake-online-reviews>.

¹⁰ ACCC 'ACCC 'greenwashing' internet sweep unearths widespread concerning claims' (Media Release 17/23, 2 March 2023): <https://www.accc.gov.au/media-release/accc-greenwashing-internet-sweep-unearths-widespread-concerning-claims>.

¹¹ See, for example, Chester (n 1), 2, and action by the UK Financial Conduct Authority: <https://www.fca.org.uk/news/press-releases/fca-proposes-new-rules-tackle-greenwashing>

¹² [Proposal for a Directive on Green Claims](#)

¹³ Chester (n 1), 1.

In addition, the Treasurer announced late last year that the Government has tasked Treasury with developing a comprehensive sustainable finance strategy, which will include the development of new standards or taxonomies for sustainable development and further initiatives to reduce greenwashing.

We suggest that scrutiny of companies' sustainability and climate-related claims should remain a focus for policy development and regulator activity for the foreseeable future.

Please do not hesitate to contact Liza Booth, Head of Commercial and Advisory Law Reform on 02 99260202 or liza.booth@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'CBanks', written in a cursive style.

Cassandra Banks
President