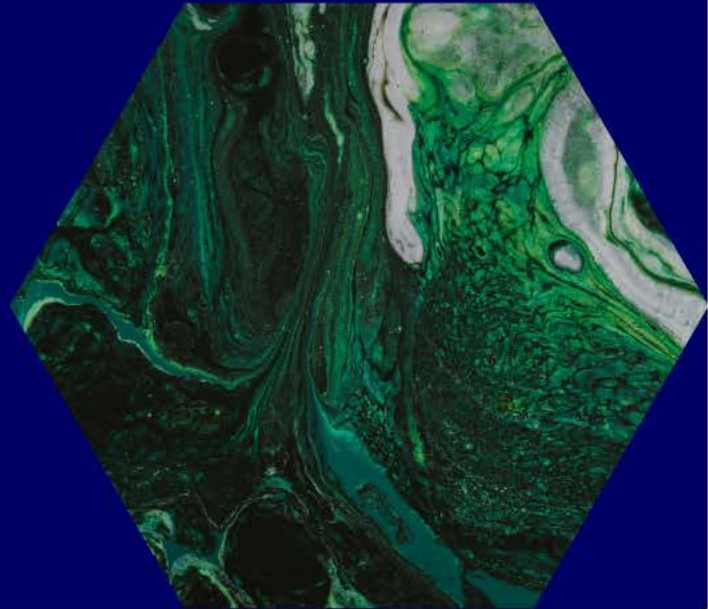


Submission to the Australian Senate Standing Committees on Environment and Communications: An Inquiry into Greenwashing

June 2023



Executive Summary

This report is submitted in response to the request of the Australian Senate Standing Committees on Environment and Communications for support with their inquiry into greenwashing.[1] In this report, submitted by the Greenwashing Research Project and Ben McQuhae & Co, we will focus on the third and fifth elements of the request, namely 'domestic and international examples of regulating companies' environmental and sustainability claims' and 'legislative options to protect consumers from greenwashing in Australia'. We focus on these elements because, as we will propose, Australia is already emerging as a global spearhead against the scourge of greenwashing across sectors so seeking to further embolden that effort is a delicate task that needs consideration. To help us do this, we shall first briefly review efforts from around the globe to understand the nature of approaches, which will provide us with a basis to opine on potential pathways forward for Australia.

In order to be as concise as possible for the Committee, we will not be providing overly-theoretical understandings on the concepts related to greenwashing but can do so by request. Rather, we are choosing to focus on the potential consequences of action given the current framework that already exists in Australia. To articulate this, we will present the concept of 'greenhushing' and why it occurs, as we believe it is pertinent for the Senatorial inquiry taking place at the moment. We then conclude with some brief legislative ideas, although eventually we do caution against further legislative intervention at this time.

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The Global Direction of Travel in the Fight Against Greenwashing

The consequences of greenwashing are becoming clearer by the day and, in response, regulators and legislators around the globe are taking action to prohibit a variety of practices that distort the truth for end-users, whether they are retail consumers, investors, or market competitors. It is difficult to neatly capture all the developments taking place because, given the multidisciplinary nature of greenwashing as a concept and usage across varied sectors, there are different approaches being taken relative to the industry in question. For example, marketing communications are a natural juncture for regulatory or legislative intervention because of them being the interface between originator and end-user, but there is also a key focus on underlying practices that form corporate procedures. So, in this section, we will review just some of the key developments in order to try and understand any trends or patterns that emerge.

The European Union has, for quite some time, been focused on its Green Agenda and integrating sustainability into its political and economic fibre. It is unsurprising then that fighting greenwashing is becoming a key fight for the Union. Focusing on consumer law specifically, the European Commission proposed, in 2022, an update to consumer law across the bloc that would both provide specific rules and also complement the 'Unfair Commercial Practices Directive' more generally. Initially, the aim is to integrate the core tenets of greenwashing into the language of the Directive by, for example, altering particular Articles (6[1]) to now include such terms as 'environmental or social impact', 'durability', and 'reparability'. The amendments also include such clear statements as 'the list of actions to be considered misleading if they cause or are likely to cause the average consumer to take a transaction decision that they would not have otherwise taken' and this has been updated to include 'making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and an independent monitoring system'.^[2] These are just some examples of the proposed amendments' aim of making it fundamentally clear that greenwashing is to be considered a direct breach, with no room for interpretation.

Interestingly, the proposals go further and detail what constitutes greenwashing practice. They detail the four following elements:

- Displaying a sustainability label which is not based on a certification scheme or not established by public authorities;
- Making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim;
- Making an environmental claim about the entire product when it concerns only a certain aspect of the product; and
- Presenting requirements imposed by law on all products in the relevant product category on the Union market as a distinctive feature of the trader's offer.

The proposal concludes by suggesting what intricacies the proposed Directive will focus on, with a lot of focus on the supporting of claims to be made publicly visible. However, the focus on information provided to the end-user is an overarching concept that the Union is then using to take a considered approach to various industries. As the Commission states, 'there is an existing EU legislative framework that deals with the provision of environmental information, sets methodological requirements on measuring and calculating environmental impacts' as well as a host of other efforts. The sentiment being pushed by the Commission here is clearly one of integration, supplementation, and evolution.

UK

In the UK, the focus has been on championing the country as it progresses on from its decision to part company with the European Union. In that guise, the UK is now seeking to build effective regulatory and legislative frameworks that encourage business whilst maintaining standards. Whilst there is currently no specific anti-greenwashing legislation in the UK, there exists the overarching connection between the efforts of the competition-focused regulator, and the advertising standards-focused regulator, which is a common occurrence. In the UK, these entities are the Competition and Markets Authority (CMA), and the Advertising Standards Authority (ASA) who have been, between them, very active in combatting greenwashing within their individual remits. The ASA have been garnering media attention through its recent actions against the likes of Hyundai, Shell, Etihad, Coca-Cola, and HSBC. They also launched in 2022 their 'Advertising Guidance on Misleading Environmental Claims and Social Responsibility'[3] which included elements such as the proximity of the supporting evidence to a claim made in an advertisement, rules on the language that can be used, and guidance on the relativity of time horizons to environmental claims. The CMA have equally been as active, taking greenwashing-related action against the likes of fast fashion, supermarkets, banks, and others. In 2021, the CMA published its 'Green Claims Code'.[4] They did this because of

research that they undertook which found four out of every ten ‘green claims’ online were misleading consumers.[5] The Code sets out six specific principles for making green claims, including:

1. Be truthful and accurate;
2. Be clear and unambiguous;
3. Do not omit or hide material information;
4. Only make fair and meaningful comparisons;
5. Consider the full lifecycle of the product or their service; and
6. Be substantiated.

To give this ‘Code’ some force, the CMA is on the verge of adopting a new programme of penalty, including fines for breaching the Code of up to 10% of global turnover, which has drawn headlines. However, the reality is that such fines are capped at a total of £300,000.[6] This option is being developed via legislation and it is expected that the UK will be following the EU’s lead (with its Green Claims Directive) as the UK’s ‘Digital Markets, Competition and Consumer Bill’ is currently ascending through the British political and legal framework. To accentuate this, the UK’s financial consumer regulator, the Financial Conduct Authority (FCA) is currently proposing new rules that will restrict how financial products can be labelled with respect to green, sustainable, or ESG-related characteristics; this would bring the UK in line with developments in the EU on the same front.

China

China, like many other countries, currently does not have specific greenwashing legislation. Action against greenwashing practices is mostly derived from the powers afforded to regulators who oversee advertising and trademark-related issues. China’s current advertising-related laws dictate that advertisements shall not contain false content, not deceive or mislead, and this is all roughly replicated within the country’s competition law. Within China’s trademark laws, there is no clear definition of ‘greenwashing’. However, the law’s focus on certification of ecological concerns and elements relating to environmental protection do serve to capture a lot of how greenwashing reveals itself in the fields of labelling and ‘claims’.[7]

Additionally, whilst not yet developing specific anti-greenwashing control in the financial sector, China has effectively outlawed greenwashing in the development of green-related financial products via its establishment of guidance in 2022 under the People’s Bank of China’s 14th Five-Year Plan for the Development of Financial Standardisation. This essentially enforces minimum standards so that financial products containing green claims need to be verified and have their credentials assured before going to market.

USA

In the USA, the trend towards considering greenwashing has been relatively slow. The country, at the moment, is still divided on whether ESG principles should even be considered with a number of states outlawing its adoption in key financial practices. However, despite this, the Federal Trade Commission (FTC) did, in 2022, update its 'Green Guides' which currently is the predominant American effort against greenwashing. The FTC has mandated that the Guides apply to 'claims made about the environmental attributes of a product, package or service in connection with the marketing, offering for sale, or sale of such item or service to individuals'. The Guides mandate a host of other rules, and all of the rules are given the force of the Federal Trade Commission Act; penalties can range from the tens of thousands of dollars per violation, though it has been suggested penalties could be more substantial.[8]

Around the World

In Canada, there are variety of Acts which capture greenwashing practices, including: The Competition Act, The Textile Labelling Act, and The Consumer Packaging and Labelling Act. All of these Acts contain prohibitions on false or misleading claims, but the Competition Act specifically prohibits misrepresentations on performance, efficacy, and the life of a product that are not based on adequate and proper testing. In parallel to this, the Canadian Code of Advertising Standards also contains relevant prohibitions, including prohibiting advertisements that contain 'inaccurate, deceptive, or otherwise misleading claims, statements, illustrations or representations, and all representations must be supported by competent and reliable evidence'.[9] To give these laws context, the Competition Bureau has published extensive guidance for how these laws will be applied.

Singapore has a similar set up consisting of the Consumer Protection (Fair Trading) Act and the Misrepresentation Act, as well as the Singapore Code of Advertising Practice which all have similar rules and guidance as the other jurisdictions covered in this report. However, it has been noted that because the laws and guidance do not explicitly reference greenwashing, there is a burden on consumers to determine whether a practice is to be considered greenwashing, which is hampering efforts to push forward the fight against greenwashing in Singapore.

There are a variety of other jurisdictions currently starting their journey in the fight against greenwashing, like India, Japan, and others, but the story is relatively the same. No country has, as of yet, formally integrated the fight against greenwashing into its legislative infrastructure with the predominant vehicle so far being reference to greenwashing in existing consumer, competition, or trademark-related laws, guidance from advertising regulators, or non-binding Codes of Conduct.

Legislative Options for Australia

Australia was purposively omitted from the analysis above because for this report, and the consultation in general, one of the key objectives is to assess potential legislative options for Australia in the fight against greenwashing. For us, it is worthwhile reviewing Australia's current response separately here, as it forms the foundation of what we suggest below. Thankfully, Australia is not starting from a standstill. The country has been extremely active recently, with a marked uptick on activity in specific fields, including advertising and financial regulation. This is all based on the development of the Australian Consumer Law, and specifically sections 134 to 137A, which relate to 'information standards' as well as Section 18 and Section 29. The Australian Competition and Consumer Commission have also discussed for the market how that law is being integrated and interpreted with guidance making clear, more than a decade ago, that the law is to prevent business from misleading or deceiving in any way. The guidance then outlines responsibilities, as well as providing a checklist for marketers to ensure compliance.[10]

More recently, the Australian Securities and Investment Commission (ASIC) has released distinct guidance (INFO 271) for those entities offering sustainability-related financial products, and the guidance and renewed focus on this burgeoning area has resulted in headline-grabbing actions by ASIC, specifically in relation to pension funds. Generally, Australia has the same infrastructural coverage for fighting greenwashing that everybody else does i.e. proportional, based on industry. It is for this reason alone that the following 'options' are all tempered with a distinct warning, or perhaps a lesser 'cautionary note', that intervening in the construction of the anti-greenwashing infrastructure will have an effect, so the Senate ought to really consider whether intervention is even necessary.

One option that the Senate might consider is mandating for the development of an overarching body. Such a regulatory body could provide a spearhead for the fight against greenwashing and coordinate between the consumer focused-bodies, the advertising-focused bodies, the investment-related bodies, and others. One of the key issues affecting the fight against greenwashing is the (currently) necessary division in response. However, an overarching regulatory body has not been tried anywhere else. A body that has ultimate responsibility for driving the jurisdiction's fight against greenwashing, who develops strategies for others to follow, and who stays ahead of trends and filters it into respective regulatory spheres in good time is, simply, no small feat. However, in unifying the fight against greenwashing, there exists the potential to increase the efficiency of such a fight so that consumers have a clearer picture, market entities are less burdened by being exposed to multiple regulators, and the State can mandate particular movement in the field much easier, quicker, and effectively.

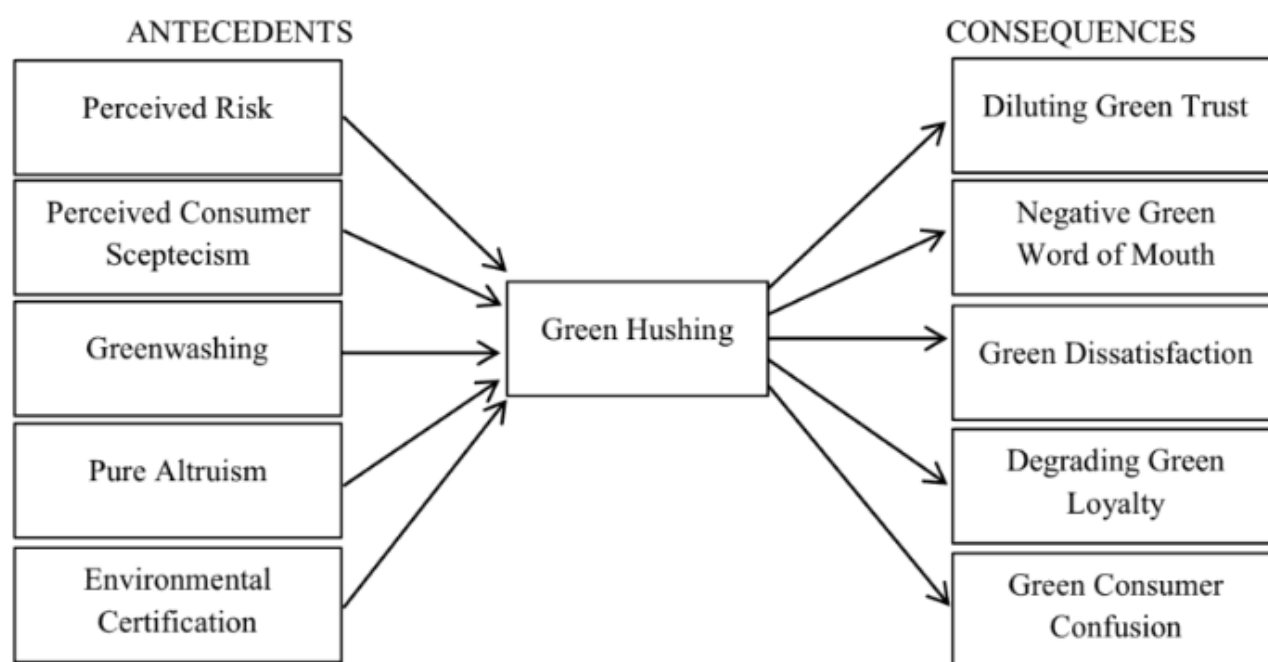
Another legislative option, if the Senate so wished, would be to provide the current regulatory framework with more 'bite'. The level of penalty at the moment, across the globe, for greenwashing is pitifully low and completely out of sync with the severity of the offence. The reward that can be had from, say, running a wide advertising campaign about how Airline X is greener than Airline Y can be much more beneficial than a modest fine of only a few hundred thousand pounds, dollars, euro, or yen. However, increasing the punitive menu for regulators fundamentally increases the risk of 'green-hushing', which is something we shall address below. Ultimately, the point here is that every action will have a reaction and the Senate ought to really study such prospective reactions before taking actions because it could well be the case that inaction at this stage is a positive action .

Aspects to Consider: Green-hushing

'Green-hushing', a concept that describes the instance of a company choosing not to publicise details of climate targets, green objectives or actions, or anything else sustainability-related for fear of falling foul of regulation or in seeking to avoid scrutiny, is apparently on the rise across the board and across jurisdictions.[11] It is widely understood that this is a somewhat natural response to an increase in regulation and legislation, and particularly given the multi-agency approach to tackling the same problem. However, whilst a natural response, the effect is still tremendously damaging.

The research on the concept provides for a range of understandings. Font et al. state that green-hushing can be an obvious consequence of fear (of failing to comply, or of being 'outed' as a greenwasher), but that it can also be a purposeful strategy that firms employ to 'reduce any dissonance that exists between the values of sustainability held by a business and its customers'.[12] This is interesting, as it reveals the intricacies of the problem in front of us. The reality is a complex one, in that not all consumers have the same level of care regarding sustainability, and in certain sectors being sustainable or environmentally friendly is not the leading requirement of the consumer base. In addition to this, it is certainly not the case that caring about sustainability is universal, and efforts to enforce sustainable practices are connected to other political agendas, which can be destructive for brands that have traditionally aligned with particular sectors of a given society. This position of the consumer is, in addition, equally as complex because one person may not care about sustainability, whilst another simply may not have had the necessary education to understand the complexities of climate-related concerns, as just one example.

Ettinger et al. also position that there are more fundamental human elements at play with regards to the simple concept of 'greenwashing', such as consumer guilt for example. The researchers utilise research from the hospitality industry that found hotel managers are actively green-hushing so as not to make their customers feel guilty for travelling and utilising additional services in luxury accommodations that could be deemed to be wasteful.[13] A simple and current example to contextualise this point, of related effect, is also in the hospitality industry whereby new procedures of encouraging guests not to have their rooms serviced everyday is leading to job cuts of marginalised groups. To help understand this concept more, Thakur et al. provide a useful illustration as to the mechanics of green-hushing:[14]



It is our view that the Senate Committee really needs to consider this concept of green-hushing as it will be a natural consequence of enforcing more action in the fight against greenwashing in Australia, given the relative strength of the current framework that exists today.

Conclusion

Ultimately, our message to the investigation is one of caution. Whilst we genuinely applaud the effort to understand more and potentially take action, which is positive and a good representation of how seriously Australia takes this critical problem, it is our view that significant action from the legislature at this moment in time could be damaging for the fight against greenwashing. One option that we have put forward is to develop an overarching body that could coordinate the Australian fight against greenwashing and we believe this could be a. a viable option for Australia and b. a potential 'game-changer' that sees Australia take the global lead in the fight against greenwashing.

However, there are risks. The current framework that exists to counter greenwashing is extensive and effective, and covers the key areas. There will be new areas emerging given the relative growth of the sustainability movement worldwide, with particular focus on the supportive infrastructure of the movement like ESG rating agencies which the Senate ought to consider separately (and relatively quickly as other jurisdictions are currently doing around the world) but, other than that, taking significant action now could lead to an imbalance in the marketplace. There is a distinct need to bring the market along in a collaborative manner in the fight against greenwashing, not 'kicking and screaming' and all based upon fear. This is why, counterintuitively, the issue of raising the penalty ceiling is one that needs careful consideration. The Senate, therefore, should pursue more investigation into the prospective consequence of green-hushing to prevent its effects from taking hold in what is a critical time in the fight against greenwashing.

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