Melbourne Climate Futures

THE UNIVERSITY OF MELBOURNE

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Ms Rebekkah Markey-Towler

Supplementary submission to the Senate inquiry into greenwashing

This is a supplementary submission to the Senate inquiry into greenwashing. It particularly responds to the following item in the Senate's Terms of Reference: (e) legislative options to protect consumers from greenwashing in Australia.

The author is a Research Fellow with Melbourne Climate Futures (MCF)'s Sustainable Finance Hub at the University of Melbourne. She has a particular interest in law and regulation relating to sustainable finance. She is also a PhD candidate at the Melbourne Law School focusing on the role of law and regulation in connecting climate change and mortgage lending.

Her comments are based on a forthcoming journal article titled 'All that glitters is not green: Greenwashing as the enforcement arm of sustainable finance regulation'. A copy of this article can be supplied upon request.

Harm focus of greenwashing legal interventions

The central rationale arguably underpinning greenwashing regulation is to provide protection against behaviour or practices that actually cause, or have the potential to cause, harm to market participants and/or the market system.

First, market participants who may be harmed by greenwashing are consumers, businesses and investors. Some examples of actual or potential harms include:

- Consumers paying more for products that misleadingly claim to have an environmental benefit.
- Distortion of consumer choice by creating confusion, mistrust and negatively impacting their view of environment businesses and products.
- Unfairly disadvantaging businesses investing in sustainable practices and causing them to lose customers.
- Distortion of information that is available to investors to make decisions about where to invest their money.

Second, greenwashing can also harm, or has the potential to harm, the market system in at least two ways. It can:

- Undermine effective competition in the marketplace.
- Undermine the market for green products and services more specifically.

Typology of greenwashing cases

Several empirical trends can be identified by analysing greenwashing claims in the Australian and Pacific Climate Litigation Database. There have been at least 38 legal interventions addressing greenwashing in Australia as at November 2023.

These cases can be categorised as falling into five main types, distinguished by the type of activity that is said to have constituted greenwashing. Greenwashing cases related to:

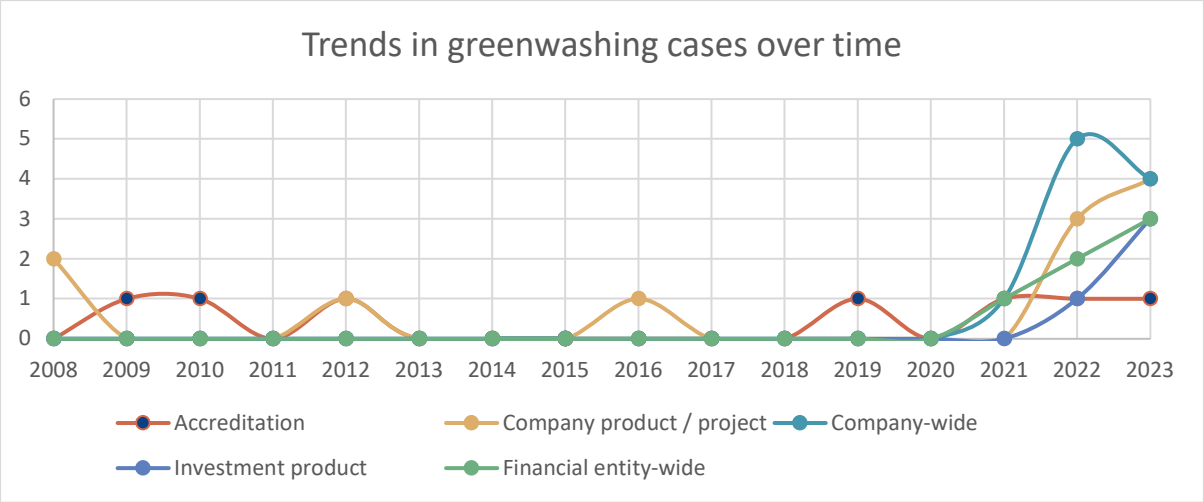
Postal address:
Melbourne Climate Futures (MCF)
The University of Melbourne VIC 3010
Australia

Email:
melbourne-climate-futures@unimelb.edu.au

- Company products/projects.
- Company-wide claims.
- Financial products.
- Financial entity-wide claims.
- Accreditation schemes/logos and symbols.

Two generations of greenwashing cases have been filed in Australia. First generation greenwashing cases only fell into two of the types identified above, namely, cases related to company products/projects or accreditation schemes. Such cases have continued to be filed. In addition, next generation greenwashing cases have now also related to financial products, company-wide and financial entity-wide claims.

The below graph shows trends in these first and next generation greenwashing cases over time:



Legal definition of greenwashing

Based interventions in the Australian and Pacific Climate Litigation database, the following might be proposed as a legal definition of greenwashing: greenwashing is conduct (acts or omissions) that has some connection to sustainability and that conduct is actually or likely to be misleading or deceptive, or otherwise false, as to its impact on sustainability matters.

An additional characteristic to help regulators to prioritise enforcement action could be a requirement for mental elements, for example, intention, recklessness, negligence and/or knowledge or the existence of actual harm, but these are not essential to prove a greenwashing claim.