Melbourne Climate Futures

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Greenwashing legal cases in Australia

This Policy Brief provides analysis of the 30 greenwashing cases documented in the Australian and Pacific Climate Litigation Database. 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:

Key findings

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.

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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, targeting 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.

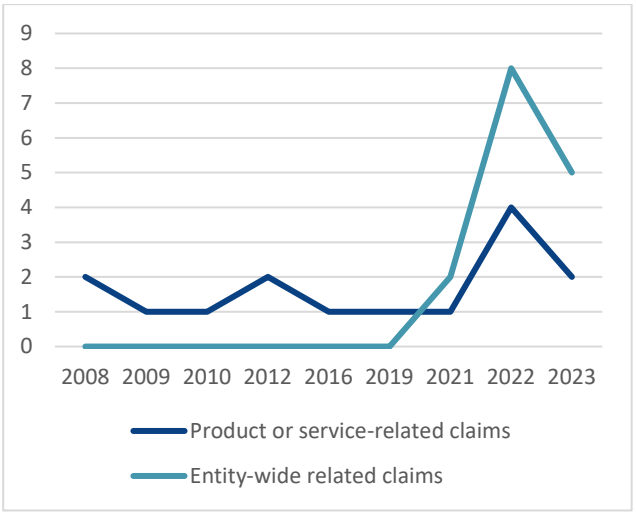

Figure 1: Waves of greenwashing cases in Australia

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.