

22 June 2023

Committee Secretary
Senate Environment and Communications References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

[Via online portal](#)

Dear Committee Secretary,

Submission to the Greenwashing Inquiry

Thank you for the opportunity to make a submission to the Senate Environment and Communications References Committee on its inquiry into greenwashing (**Inquiry**).

The Australian Institute of Company Directors (AICD)'s mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 50,000 includes directors and governance leaders of not-for-profits, large and small businesses and the public sector.

In our role as host of the Climate Governance Initiative Australia, we are committed to lifting directors' climate capability through educational resources, webinars and events.

The AICD supports the making of high quality and comparable climate disclosures which are free from the market-distorting impacts of greenwashing. To facilitate this policy goal, we support proactive regulatory action to address intentional and egregious 'greenwashing' practices.

1. Executive summary

Our submission will focus on Terms of Reference (TOR) (c), domestic and international examples of regulating companies' environmental and sustainability claims; and (e), legislative options to protect consumers from greenwashing in Australia. We also make some overarching comments.

In summary, our key points are as follows:

- a. There is no legislative gap with respect to greenwashing, and, as far as we are aware, no other jurisdiction has implemented a greenwashing specific provision or offence. Australia has a particularly strict set of liability settings, having neither a safeharbour for forward looking statements where cautionary language is applied (as in the US), nor a requirement to establish intention or recklessness for private misleading or deceptive conduct claims (as in the UK). As such, Australian organisations already have a higher liability exposure for greenwashing than key international counterparts.

- b. To assist organisations to understand what is required of them when making sustainability representations as to future matters (such as 'net zero' targets), we strongly support the legislative clarification of how the 'reasonable grounds' test applies in a climate or sustainability context.
- c. The AICD supports strong enforcement action against intentional and egregious greenwashing practices. A positive policy outcome is one in which responsible market participants which disclose on a best endeavours basis are not subject to undue litigation risk, while those that fail to take their obligations seriously face legal and reputational costs.
- d. The introduction of a sustainable finance taxonomy, proposed by the Government, which would define the use of key terms such as 'carbon neutral,' 'net zero' or 'carbon positive,' would be an important step in curbing greenwashing in financial markets.

2. The role of good corporate governance in mitigating the risk of greenwashing

Australian organisations face increasing pressure to provide greater transparency related to their environment, social and governance (ESG) practices, including identifying and responding to climate change risks and opportunities. This requires active board oversight and integrating climate change into organisations' corporate strategy and risk management frameworks.

Organisations are often exposed to allegations of greenwashing when making representations on topics which have a high degree of uncertainty, or where data gaps exist, such as transition plans or climate targets, which are more frequently being demanded by consumers, shareholders and activists.

It is important that appropriate governance structures and processes are in place to address greenwashing risk. To this end, as host of the [Australian chapter](#) of the Climate Governance Initiative (a [global initiative](#) seeking to mobilise directors to address climate change in their businesses, based on the World Economic Forum's Principles for Effective Climate Governance), the AICD has been a leader in lifting director capability on climate change. We have done so through webinars attended by just over 4,600 attendees, practice guides and reports on topics including managing climate risk and sustainability governance structures which have had cumulative unique downloads of around 9,000 as at 16 June 2023, monthly climate newsletters sent to over 12,000 recipients,¹ and two major climate governance conferences with over 1,300 attendees in 2022, and over 1000 people registered, thus far, for the upcoming August 2023 event.

3. Existing Australian legislative and regulatory frameworks and responses from market stakeholders

In Australia, misleading or deceptive conduct constitutes a breach of the Australian Consumer Law, Corporations Act 2001 (Cth) (Corporations Act) and ASIC Act 2001 (Cth) (ASIC Act). Representations will be misleading or deceptive if they induce, or are capable of inducing, the target audience into 'error', even where there is no intention to mislead or deceive. The legal standard is an objective test of whether an 'ordinary and reasonable' member of the relevant target market would be led into error, having regard to the context in which the claims were made.

In the climate context, any future statements, such as emissions targets or net zero commitments, will be deemed misleading unless they are made on "reasonable grounds". How companies satisfy this test in a climate context is currently unclear, with differing views existing in the market, and an absence of legislative or judicial guidance (see Herbert Smith Freehills legal advice commissioned by AICD in the context of Treasury's mandatory climate reporting consultation [here](#)).

¹ As of 18 May 2023.

Recently ASIC has been taking a more active surveillance and enforcement approach towards alleged greenwashing activities. On 10 May 2023, ASIC released a report summarising its greenwashing surveillance and enforcement activity from 1 July 2022 to 31 March 2023. This report revealed that ASIC had undertaken 35 enforcement actions (including issuing 11 infringement notices against 5 entities since October 2022), including the commencement of its first legal proceedings.

The AICD supports this prioritisation by ASIC as an important market signal that poor conduct will not be tolerated. As such, a mixture of enforcement action should be considered, including instigation of civil penalty proceedings where appropriate. Appropriate enforcement will support transparency and accurate information being provided to consumers and investors, which is in the interest of the broader Australian market.

From a consumer perspective, in October 2022 the ACCC undertook an internet sweep of 247 business across eight sectors, finding that more than half (57%) made potentially greenwashing claims, with the most concerning sectors being cosmetic and personal care, textiles, garments and shoes, and food and beverages. As far as we are aware, the ACCC is yet to commence legal proceedings related to greenwashing.

4. Key elements of international regulatory regimes and enforcement of greenwashing

We have summarised below key elements of international jurisdictional regimes that have application to the Australian regulatory environment and proposed law reforms:

- As far as we are aware, none of the comparative jurisdictions have introduced a specific legislative offence for greenwashing. Greenwashing is currently enforced and penalised under the general prohibition on misleading or deceptive conduct.
- Australia has a particularly strict set of liability settings, having neither a safeharbour for forward looking statements where cautionary language is applied (as in the US), nor a requirement to establish intention or recklessness for private misleading or deceptive conduct claims (as in the UK).
- Regulators in other jurisdictions (particularly the UK and NZ) have more detailed regulatory guidance on standards related to sustainability claims than in Australia. In July 2022, ASIC issued guidance on avoiding greenwashing when promoting and offering financial products and services (INFO271), although it is relatively limited in detail. On the consumer front, the ACCC's "Green Guide" was first published in 2011 and requires updating to reflect the increasing public interest and corresponding business uptake of ESG responsibility. To this end, the ACCC could consider drawing on the UK's 'Green Claims Code'² which sets out six principles to apply when making environmental representations in the consumer context.
- Enforcement by regulators in respect of claims made to consumers (such as via advertisements, packaging, on social media or websites) appears to be more comprehensive in comparative jurisdictions relative to Australia, with (as far as we are aware), the ACCC yet to issue greenwashing infringement notices or commence any greenwashing proceedings. By way of comparison, in the UK, the Competition and Markets Authority (CMA) (the UK's equivalent to the ACCC), has undertaken a number of high-profile greenwashing investigations against fast-fashion companies ASOS, Boohoo and Asda,³ as well as announcing

² See <https://greenclaims.campaign.gov.uk/>

³ <https://www.gov.uk/government/news/asos-boohoo-and-asda-investigated-over-fashion-green-claims>

a review into the Fast-Moving Consumer Goods (FMCG) sector.⁴ Similarly, in Canada, the Competition Bureau has launched inquiries into the Canadian Gas Association and Keurig Canada, with the latter being found to have made false or misleading claims about the recyclability of its single use coffee pods.⁵

- The introduction of a sustainable finance taxonomy which will define the use of terms such as 'carbon neutral,' 'net zero' or 'carbon positive' in the context of financial products and services will be an important step in curbing greenwashing. Further, it would better align Australia with international markets such as the EU and most recently, Canada. We are encouraged that there has been \$14.2 million allocated in the most recent Federal Budget for a sustainable finance strategy including the finalisation of Australia's sustainable finance taxonomy.

5. Proposed reforms to address greenwashing conduct

In the AICD's view, there is no legislative gap in the current law on misleading or deceptive conduct as it applies to greenwashing. Legislating a specific greenwashing offence would be duplicative, and create unnecessary legal complexity given existing misleading and deceptive conduct laws. Such an approach would run contrary to sound policy making which encourages reducing legislative complexity – see for example, attempts by the Australian Law Reform Commission to simplify financial services laws in Australia, including the laws on misleading or deceptive conduct.⁶

Rather, a better course of action, would be a legislative amendment of the "reasonable grounds" test for forward looking statements to clarify what is expected in the climate and sustainability context. This is especially important given increasingly complex representations will be required by the International Sustainability Standards Board's standards, which are likely to form the basis of mandatory climate reporting in Australia.

The AICD also supports improved regulatory guidance on how to avoid greenwashing, similar to the Green Claims Code developed in the UK. We consider there is a considerable gap in such resources, particularly in relation to claims made to consumers.

The AICD also supports the work currently being done to develop a sustainable finance taxonomy and recommends that this project should be afforded a high priority. Once finalised, the taxonomy will help support greater market transparency and combat greenwashing by addressing the current lack of consensus on terminology.

Lastly, it is important that government ensures liability settings are proportionate. Rather than penalising good faith disclosures made on a best endeavours basis, we consider government's focus should be on addressing data and methodology gaps to improve the accuracy and quality of disclosures. In parallel, the AICD supports strong regulator action against those engaging in intentional and egregious greenwashing conduct as critical to protecting consumers and investors, and encouraging clear and transparent practices across the economy.

⁴ <https://www.gov.uk/government/news/cma-to-scrutinise-green-claims-in-sales-of-household-essentials>

⁵ See <https://www.canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureau-concerns-over-coffee-pod-recycling-claims.html>

⁶ See the ALRC's background [paper](#) on simplifying unconscionable and misleading or deceptive conduct laws.

6. Next steps

We hope our submission will be of assistance to you. If you would like to discuss these matters further, please contact Christian Gergis, Head of Policy at cgergis@aicd.com.au or Anna Gudkov, Senior Policy Adviser at agudkov@aicd.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Louise', with a long horizontal flourish extending to the right.

Louise Petschler GAICD

General Manager, Education & Policy Leadership