

The background of the slide is an aerial photograph of a dense, vibrant green forest. A dark blue river or stream meanders through the trees on the right side of the image. The left side of the image is partially obscured by a dark teal, semi-transparent overlay that contains the text.

DENTONS

Legal Framework Applicable to Greenwashing

Country Focus: Australia

Grow | Protect | Operate | Finance

Australia	
Legal definition of greenwashing	✗
Targeted greenwashing legislation	✗
Direct regulation of greenwashing (through consumer protection, advertising standards, unfair competition or environmental law frameworks)	✓
Soft law guidance or standards on greenwashing	✓
Applicability of existing national legal frameworks to greenwashing (depending on facts)	✓

Summary of relevant laws and provisions

In Australia, greenwashing, or the use of misleading or deceptive environmental claims, is regulated by various legal frameworks, including the Australian Consumer Law within Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**ACL**), the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and the *Corporations Act 2001* (Cth).

1. The ACL prohibits misleading or deceptive conduct and false or misleading representations. The law applies to all forms of marketing, including claims on packaging, labelling and in advertising and promotion across all mediums. Representations about future matters, such as predictions or promises that a company will have net zero carbon emissions may be taken to be misleading if the company does not have reasonable grounds for making the representation. The law requires that the overall impression given by environmental claims is accurate.
2. The ASIC Act applies to financial products, investments and advisers. Notably, the prohibitions on misleading or deceptive conduct as provided in sections 12DA and 12DB of the ASIC Act must be complied with by businesses offering or promoting sustainability-related financial products.
3. The Corporations Act applies in the context of financial products. Section 1041 of the Act stipulates that a person must not make a statement or disseminate information that is false in material particular or is materially misleading. This law may be applied to greenwashing that induces people to apply, dispose of, or acquire financial products.
4. Criminal law does not expressly refer to greenwashing practices. The ACL contains criminal offences, including for false or misleading misrepresentations, which could be applied to greenwashing practices, and result in conviction and penalties. Similarly, the ASIC Act contains offence provisions that could apply to greenwashing.

Summary of guidance and soft law

In addition to the legal frameworks mentioned above, regulators have published guidance that assists businesses to make trustworthy environmental claims and to understand how the law is enforced.

1. In December 2023, the Australian Competition and Consumer Commission (**ACCC**) published *Making environmental claims: A guide for business*, which helps businesses comply with their obligations under the ACL and to make trustworthy environmental claims by reference to principles and case studies.
2. In June 2022, the Australian Securities and Investments Commission (**ASIC**) published *How to avoid greenwashing when offering or promoting sustainability-related products*, which provides concise guidance to businesses advertising sustainability-related financial products.

Claims & enforcement

Greenwashing claims can be brought by various actors and bodies, depending on the legal framework and the type of remedy sought. These include:

1. The ACCC is an independent statutory authority that is empowered to bring claims on behalf of consumers and issue enforceable undertakings to enforce the law applicable to greenwashing in the ACL.
2. ASIC is an independent statutory authority that has similar powers to the ACCC when enforcing the laws in the ASIC Act applicable to the greenwashing of sustainability-related financial products.
3. Consumers and other private entities may bring civil court proceedings for greenwashing under the ACL, ASIC Act and Corporations Act, if they have standing, or alternatively, may refer conduct to the regulators. Depending on the circumstances, consumers may also initiate class actions.

Sanctions & remedies

The sanctions and remedies for greenwashing vary according to the legal framework and the nature and gravity of the infringement. They can include (among other things):

1. Penalties up to \$2,500,000 for individuals and for corporations, the greater of:
 - \$50,000,000;
 - if the Court can determine the value of the 'reasonably attributable' benefit obtained, 3 times that value; or
 - if the Court cannot determine the value of the 'reasonably attributable' benefit, 30% of the corporation's adjusted turnover during the breach turnover period for the contravention.
2. Injunctions, which can be ordered by judicial authorities, to stop or prevent the continuation of greenwashing practice.
3. Court enforceable undertakings.
4. Disqualification orders, disqualifying a person from managing corporations.
5. Non-punitive orders by the regulators, such as orders for corrective advertising.
6. Criminal conviction.
7. Infringement notices.

Evidence & substantiation

The evidence and substantiation requirements for greenwashing claims depend on the legal framework

and the burden of proof. In general, the following principles apply:

1. The applicant must prove that the conduct is objectively false, misleading or deceptive or likely to mislead or deceive.
 2. There will not be reasonable grounds for making a representation if the person who made it did not have facts sufficient to induce in the mind of a reasonable person a basis for making the representation.
 3. Where civil remedies such as fines are sought, the onus is on the applicant to prove the allegations to the civil standard of the balance of probabilities.
 4. Where penalties are sought, the onus is on the applicant to prove the allegations beyond reasonable doubt.
 5. The ACCC and ASIC have investigative powers, including the power to issue a substantiation notice requiring a person to give information and/or produce documents that could be capable of supporting an environmental claim.
2. *Australian Securities & Investments Commission v Vanguard Investments Australia Ltd* ACN 072 881 086 (filed 24 July 2023, Federal Court of Australia) VID563/2023 (in progress) – alleged misleading or deceptive conduct regarding ESG exclusionary screens applied to investments in a Vanguard fund.
 3. *Greenpeace Australia Pacific Limited ACN 002 643 852 v Woodside Energy Group Ltd* ACN 004 898 962 (filed 13 December 2023, Federal Court of Australia) NSD1520/2023 (in progress) – alleged misleading climate performance and plans.

Recent litigation

There are several proceedings currently being litigated in the Federal Court of Australia.

1. *Australian Securities & Investments Commission v Mercer Superannuation (Australia) Limited* ACN 004 717 533 (filed 27 February 2023, Federal Court of Australia) VID117/2023 (adjourned – judgment reserved) – alleged misleading or deceptive conduct in relation to the sustainability characteristics of superannuation investment options. Mercer is expected to pay an \$11.3 million penalty under a proposed settlement with ASIC (as at 7 December 2023).

Key contact



Vanessa Gore
Partner, Adelaide
D +61882330641
vanessa.gore@dentons.com



Ben Allen
Partner, Sydney
D +61290357257
ben.allen@dentons.com



Elise Ivory
Partner, Sydney
D +61299314810
elise.ivory@dentons.com