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Submission - Greenwashing Inquiry

Australasian Centre for Corporate Responsibility

Attn:
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Senate Standing Committees on Environment and Communications
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On behalf of the Australasian Centre for Corporate Responsibility

Introduction

The Australasian Centre for Corporate Responsibility (ACCR) is pleased to participate in the Senate inquiry into greenwashing.

ACCR is a philanthropically-funded, not-for-profit, research and shareholder advocacy organisation, focused on the investment risks and opportunities brought about by the global energy transition. We closely monitor how climate-related risks are being managed by a selection of heavy-emitting companies, and we enable institutional investors to engage effectively with these companies.

Recently, we have paid particular attention to climate disclosure and auditing standards. In our submission to this government's inquiry into climate-related financial disclosure, we stressed the importance of 'rigorous, comparable and consistent' climate-related disclosures by companies.[1] Currently, material climate-related risks are not being adequately considered in financial reporting, despite recent urging by global accounting and auditing standard-setters, and often against investor expectations. This can lead to 'overstated profits and asset values, and understated liabilities'.[2]

Investor, regulatory and consumer scrutiny around corporate claims relating to climate change, emissions reduction, and the environment has increased dramatically. As the Committee would be well aware, the Australian Securities & Investments Commission (ASIC) has explicitly increased its focus on greenwashing-type misconduct, which it considers to be a 'corrosive agent to market integrity and thus to fair, efficient and informed markets'.[3] ACCR welcomes this increased focus from the regulator. Having previously engaged with ASIC on a number of occasions in relation to its interpretation of listed companies' reporting duties under the *Corporations Act* and Regulations, our view is that a cultural reorientation towards a more robust interpretation of reporting duties is needed.

ACCR also made a submission to the Australian Association of National Advertisers (AANA) recent review of the Environmental Claims Code, recommending changes to the Code's definitions and scope, and increased access by the AANA to independent expertise, to help the AANA better guard against misleading and/or deceptive advertising.[4]

We are also directly engaged in "greenwashing" litigation. On 25 August 2021, ACCR commenced proceedings in the Federal Court of Australia against gas company Santos Ltd. ACCR alleges that in its 2020 Annual Report and other documents Santos engaged in conduct that is misleading or deceptive or likely to mislead or deceive, arising from Santos' statements to the effect that the natural gas it produces is a "clean fuel" and provides "clean energy"; and in relation to Santos' claim that it has a "clear and credible pathway" to Net Zero by 2040. The court case is ongoing.

It is clear that there is a strong desire among Australian consumers for corporations, pension funds, asset owners and other financial actors to support the global decarbonisation effort. Australian consumers, including superfund members, are strongly motivated to engage in 'responsible investing', and have established that there is a clear market demand for it.[5]

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[1] ACCR, 2023, 'Submission - Climate-Related Financial Disclosure', https://www.accr.org.au/research/submission-climate-related-financial-disclosure/
[2] Carbon Tracker, 2021, 'Flying Blind: The Glaring Absence of Climate Risks in Financial Reporting', https://www.unpri.org/download?ac=14597, p. 53.
[3] ASIC, May 2023, 'ASIC and greenwashing antidotes', https://asic.gov.au/about-asic/news-centre/speeches/asic-and-greenwashing-antidotes/
[4] ACCR, February 2023, 'Submission - Environmental Claims Code', https://www.accr.org.au/research/submission-environmental-claims-code/
[5] AFR, 2022, 'Value vs values battle raging despite ESG investing boom', https://www.afr.com/companies/financial-services/value-vs-values-battle-raging-despite-esg-investing-boom-20220926-p5bl30

Greenwashing is a major issue across many industries, but particularly in the energy, mining, oil and gas sectors. Many companies in these industries are struggling to maintain a social licence to operate, and are facing serious and sustained pressure from investors. It is in this operating environment that many companies adopt communications and marketing strategies designed to promote their activities and products as environmentally sound and/or critical for the energy transition underway.

Companies in these industries are regularly making bold claims about the climate or sustainability credentials of their products and operations. However, and as research and regulatory investigations have shown, many of these claims are vague, exaggerated, unsubstantiated, and/or aspirational only. In the context of an accelerating global energy transition, this has the potential to lead to misaligned capital expenditure, an increased risk of future stranded assets and suppressed opportunities for investment in the transition.

While investor, media and public scrutiny can help deter companies from engaging in 'greenwashing', a strong legislative and regulatory framework is also critical. A robust mandatory disclosure regime will also help to combat the emerging trend of 'greenhushing' which, as ASIC observes, involves companies reducing or ceasing their voluntary climate-related disclosures, in response to increased regulatory scrutiny.[6] The emergence of this practice suggests that the current climate-related disclosure regime in Australia is too discretionary.

[6] ASIC, 2023, 'ASIC Chair's AFR ESG Summit speech', https://asic.gov.au/about-asic/news-centre/speeches/asic-chair-s-afr-esg-summit-speech/

Recommendations

1. Develop legally enforceable standards for environmental and sustainability claims. These should:
    a. Provide substantiation requirements for all claims;
    b. State the requirements that particular claims - like 'net zero' - must satisfy in order to not be misleading or deceptive. Such requirements should reflect current climate science and international best practice, and respond to recent reports from the UN's High-Level Expert Working Group on Net Zero Emissions Commitments of Non-State Entities; and
    c. Provide additional substantiation, communication and verification requirements for the use of environmental and sustainability labels.

2. Adopt mandatory disclosure requirements. These must be clear, comparable, and robust. The draft ISSB climate disclosure standard should form the basis of these new requirements. The requirements should include a 'double materiality' assessment, in line with the standards being introduced in the EU. They should also stipulate that:
    a. Disclosures cover all of the emissions associated with a company's operations and value chains, i.e. scopes 1, 2 and 3;
    b. Transition risk assessments include information to allow users to assess a company's alignment with a 1.5℃ scenario;
    c. Transition plans consider lifecycle emissions;
    d. Companies clearly quantify the contribution which different strategies make to their transition plans, such as a reliance on offsets, divestment, or CCS;
    e. There is a high degree of consistency between financial statements and climate disclosures, and that public climate commitments made by companies are fairly reflected in financial accounts; and
    f. Companies are required to nominate a director who is responsible for climate matters and transition planning.

3. Update the Environmental Claims Code and Code Practice Notes, including by:
    a. Expanding the current definition of 'environmental claims', to capture claims made about how products are manufactured, as well as claims relating to a particular industry or sector;
    b. Requiring claims made about carbon emission reductions to specify to what extent this is achieved by use of carbon offsetting;
    c. Adopting the 'whole of life cycle' method for assessing claims;
    d. Updating the Practice Notes to include guidance regarding the threshold for making an honest claim to 'net zero', which reflects recent recommendations of the UN High Level Expert Group on Net Zero Emissions Commitments of Non-State Entities; and
    e. Updating the Practice Notes to reflect important legal principles regarding misleading/deceptive conduct, under Australian Consumer Law, including regarding the use of disclaimers/fine print and headline statements.

4. Grant ASIC and ACCC additional resources to pursue anti-greenwashing activities.

5. Incorporate an assumption that applicants who bring court proceedings in the public interest are entitled to protective or maximum costs orders.

Response

a. the environmental and sustainability claims made by companies in industries including energy, vehicles, household products and appliances, food and drink packaging, cosmetics, clothing and footwear

The Australian Competition and Consumer Commission (ACCC) recently reviewed claims made online by 247 businesses operating in Australia, including 25 in the energy sector.[7] Of the 25 companies studied in the energy sector, 64% 'raised concerns' for the ACCC. The ACCC noted its concern that 'businesses may be exaggerating the sustainability benefits of their products or omitting negative attributes that might be relevant to a consumers' purchasing decision'. Examples given include: businesses promoting their investments in renewable energy, while the majority of its products are sourced from fossil-fuel based industries; businesses claiming that its efforts to offset positively impact the environment, when the business has not made efforts to reduce its emissions overall.

Recent research conducted by independent research think tank InfluenceMap into the public communications of five oil supermajors found that 60% of public communications made by these companies included one or more 'green claims'.[8] The most common category of 'green claim' used by these companies were those which '(highlighted) the companies' support of, or involvement with, efforts to transition the energy mix'. InfluenceMap has estimated that these companies are spending roughly $750 million each year, cumulatively, on such climate-related communication activities. Another study by InfluenceMap, using a sample of 25,147 advertisements made by 25 US oil and gas companies, found that many of these advertisements 'either contained misleading content or present(ed) information that was misaligned [with climate science]'.[9]

'Net zero' and 'Paris-aligned' claims

As the ACCC recently found, many businesses in Australia are making claims about 'net zero' targets, and in many cases it is unclear how these goals were being implemented, and how the claims would be measured or assessed.[10] More broadly, we are concerned that many companies' climate plans give an incomplete view of the company's actual position, making it impossible to evaluate company targets or ambitions.

ACCR has noted a number of environmental and sustainability claims to 'net zero' or 'Paris alignment', made by large companies operating in the Australian energy, mining and oil and gas sectors, that appear inconsistent with their ongoing activities. As we have previously submitted to the UN's High-Level Expert Group (UN HLEG) on Net-Zero Emissions Commitments of Non-State Entities, net zero commitments are entirely incompatible with continued investment in fossil fuels.

Our recent research on Glencore plc's climate strategy showed that the company's forecast cumulative emissions from coal production do not appear to be Paris-aligned, despite the company's public commitment to support the Paris Agreement.[11] We described Origin's 2022 Climate Transition Plan as 'potential greenwash',

[7] ACCC, 2023, 'Greenwashing by businesses in Australia - Findings of the ACCC's internet sweep of environmental claims', https://www.accc.gov.au/system/files/Greenwashing%20by%20businesses%20in%20Australia.pdf
[8] InfluenceMap, 2022, 'Big Oil's Real Agenda on Climate Change 2022', https://influencemap.org/EN/report/Big-Oil-s-Agenda-on-Climate-Change-2022-19585
[9] InfluenceMap, 2021, 'Climate Change and Digital Advertising - The Oil and Gas Industry's Digital Advertising Strategy', https://influencemap.org/report/Climate-Change-and-Digital-Advertising-a40c8116160668aa2d865da2f5abe91b#5
[10] ACCC, 2023, 'Greenwashing by businesses in Australia - Findings of the ACCC's internet sweep of environmental claims', https://www.accc.gov.au/system/files/Greenwashing%20by%20businesses%20in%20Australia.pdf
[11] ACCR, 2023, 'New research raises doubts about Paris-alignment of mining giant Glencore - increasing pressure as the company faces a shareholder resolution on thermal coal', https://www.accr.org.au/news/new-research-raises-doubts-about-paris-alignment-of-mining-giant-glencore-increasing-pressure-as-the-company-faces-a-shareholder-resolution-on-thermal-coal/

and contradictory to Origin's claimed support of the Paris Agreement goals.[12] In 2022, our analysis of BP's climate transition plan found that, despite BP's stated ambitions of 'net zero,' its 'absolute emission reduction targets' did not apply to a significant portion of its emissions, the plan was 'unlikely to drive real world emissions reduction' and that BP 'did not disclose a material part of its emissions'.[13] Likewise, BHP's 2021 Climate Transition Action Plan was not 'even close to what [was] required' to prevent the worst effects of climate change, and would see the company mine coal beyond 2050, the date it committed to achieve net zero emissions.[14]

ACCR is also concerned that companies continue to claim they are limiting emissions-intensive activities without actually doing so. For example, ACCR calculated that, inconsistent with Woodside Energy's claims to be reducing emissions, emissions from Woodside's planned Pluto LNG expansion, as announced in 2021, would have doubled from 2019-2020 to 2026.[15] Santos' 2021 merger with Oil Search indicated that despite Santos' stated aim of 'net zero by 2040', it would continue to pursue expansion plans and rely 'almost exclusively on unproven carbon capture and storage' to meet its targets.[16] Origin's divestment of its interest in the Beetaloo could be considered a form of greenwashing for similar reasons, as outlined further below.[17]

<u>Industry association lobbying</u>
Many companies in Australia are either engaging in lobbying, or are indirectly supporting lobbying (as members of industry associations), which is inconsistent with their own climate commitments. In 2019, ACCR noted that BHP positioned itself as 'climate-aware' but 'continue[d] to fund aggressive and effective lobbying to block climate policy, including via the Minerals Council of Australia and Coal21 [now Low Emissions Technology Australia]'.[18] In 2020, ACCR called BHP and Origin Energy's commitments to net zero emissions 'meaningless while they continue to wreck the policy landscape in Australia' through their industry associations.[19] Similarly, South32's climate target and its commitment to provide shareholders with a 'Say on Climate' in 2022 were in 'stark contrast' to what its industry associations advocated for.[20]

<u>Gas industry claims</u>
In December 2022, InfluenceMap published an analysis of internal strategy documents prepared by The International Gas Union (IGU), a global gas industry association, claiming to represent over 90% of the global gas market. The analysis found that the IGU 'has developed a global playbook of regionally specific communication strategies to promote fossil gas based on the "environmental-consciousness" of the market'.[21] Regionally specific messages developed by the IGU for Australian gas operators relate to the importance of gas

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[12] ACCR, 2022, 'Origin's climate cognitive dissonance: failure to factor in emissions from much hyped new gas basins', https://www.accr.org.au/news/origin%E2%80%99s-climate-cognitive-dissonance-failure-to-factor-in-emissions-from-much-hyped-new-gas-basins/
[13] ACCR, 2022, 'BP GHG emissions', https://www.accr.org.au/research/part-1-bp-ghg-emissions/
[14] ACCR, 2021, 'BHP climate plan a greenwash', https://www.accr.org.au/news/bhp-climate-plan-a-greenwash/
[15] ACCR, 2021, 'Woodside claims to be reducing emissions by increasing emissions', https://www.accr.org.au/news/woodside-claims-to-be-reducing-emissions-by-increasing-emissions/
[16] ACCR, 2021, 'Santos' bid for Oil Search proves net zero target is just greenwashing', https://www.accr.org.au/news/santos%E2%80%99-bid-for-oil-search-proves-net-zero-target-is-just-greenwashing/; ACCR, 2021, 'Santos and Oil Search merger climate vandalism of the highest order', https://www.accr.org.au/news/santos-and-oil-search-merger-climate-vandalism-of-the-highest-order/
[17] ACCR, 2022, 'Beetaloo divestment will not reduce emissions', https://www.accr.org.au/news/beetaloo-divestment-will-not-reduce-emissions/
[18] ACCR, 2019, 'BHP under pressure on climate lobbying', https://www.accr.org.au/news/bhp-under-pressure-on-climate-lobbying/
[19] ACCR, 2020, 'BHP, Origin Energy, Santos & Woodside aiming to destroy the Clean Energy Finance Corporation', https://www.accr.org.au/news/bhp-origin-energy-santos-woodside-aiming-to-destroy-the-clean-energy-finance-corporation/; ACCR, 2020, 'Renewable energy good for BHP but not for everyone else', https://www.accr.org.au/news/renewable-energy-good-for-bhp-but-not-for-everyone-else/.
[20] ACCR, 2021, 'South32 must end pro-coal lobbying to align with its own standards', https://www.accr.org.au/news/south32-must-end-pro-coal-lobbying-to-align-with-its-own-targets/.
[21] InfluenceMap, 2022, 'The International Gas Union's Climate Strategy', https://influencemap.org/landing/-a794566767a94a5d71052b63a05e825f-20189

for the renewable energy sector, the gas industry's investment in hydrogen, the 'major role' played by gas in reducing coal dependency in power generation, and the damaging effect that government regulation of new gas development would have on the energy transition.[22]

Some of these messages are reflected in current communications by Australian gas industry companies and associations. In June 2023, the Australian Petroleum Production and Exploration Association (APPEA) launched an advertising campaign titled 'Australian Natural Gas: Keeping the Country Running'.[23] The campaign's core claims include that: 'as Australia shuts down coal, gas is picking up the load'; that gas is 'around 50% cleaner than coal for generation electricity'; and (therefore) that gas products are 'supporting renewables and reducing the overall emissions in energy generation', helping '[accelerate] Australia toward net-zero'.[24] Claims such as these obscure important contextual information about the production and use of gas, including its 'cleanliness'. For example, the UN Environment Programme suggests that gas is more emissions-intensive than industry estimates due to large, unrecorded leaks.[25]

Gas companies in Australia have also claimed blue hydrogen investments are positive for the climate, despite significant questions as to whether blue hydrogen is sustainable or economically viable.[26] Relatedly, a range of gas companies in Australia have promoted their investments in Carbon Capture Utilisation and Storage (CCUS) and other low(er)-carbon technologies.[27] Despite these investments often having a limited impact on emissions and being many times smaller than fossil fuel investments, they feature strongly in many companies' public communications. This can create a misleading impression of how sustainable companies' investment strategies are.[28]

b. the impact of misleading environmental and sustainability claims on consumers

As noted above, greenwashing can 'erode investor confidence in the market for sustainability-related products',[29] 'result in investors buying the wrong products' and lead to 'misallocation of capital intended for sustainable investments'.[30]

Greenwashing can frustrate consumer choice and erode consumer trust. Since some consumers may knowingly make 'green', 'sustainable' or otherwise 'ethical' investment decisions, knowing that they may be taking on

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[22] Peter Milne, 2022, ''This could be existential': Behind gas' desperate global game plan', Sydney Morning Herald, https://www.smh.com.au/business/companies/this-could-be-existential-behind-gas-desperate-global-game-plan-20221213-p5c60p.html

[23]Australian Petroleum Production & Exploration Association Limited, 'Australian Natural Gas: Keeping the Country Running ', https://futureofgas.com.au/

[24] APPEA, 'Fact 1 ', https://futureofgas.com.au/fact-1/

[25] UNEP, 'Is natural gas really the bridge fuel the world needs?', https://www.unep.org/news-and-stories/story/natural-gas-really-bridge-fuel-world-needs

[26] Nikkei Asia, 24 July 2021, 'Australia's hydrogen dreams colored by 'blue' vs. 'green' divide', https://asia.nikkei.com/Business/Energy/Australia-s-hydrogen-dreams-colored-by-blue-vs.-green-divide. AFR, 'Blue hydrogen may be a white elephant: ISS', https://www.afr.com/companies/energy/blue-hydrogen-may-be-a-white-elephant-iss-20220715-p5b1xf

[27] For example: Woodside, 'Pursuing lower-carbon energy sources', https://www.woodside.com/what-we-do/new-energy/lower-carbon-services; Exxon, 'The South East Australia Carbon Capture Hub', https://www.exxonmobil.com.au/energy-and-environment/energy-resources/upstream-operations/the-south-east-australia-carbon-capture-hub

[28] ClientEarth, 19 April 2021, 'Fossil fuel advertising misleading on climate: lawyers', https://www.clientearth.org/latest/press-office/press/fossil-fuel-advertising-misleading-on-climate-lawyers/; DeSmog, 3 October 2021, 'Revealed: Two Thirds of Online Posts from Six Major European Fossil Fuel Companies 'Greenwashing'', https://www.desmog.com/2021/10/03/european-energy-companies-greenwashing/

[29] ASIC, 2022, 'Information Sheet 271 - How to avoid greenwashing when offering or promoting sustainability-based products' https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/

[30] Deloitte, 2022, 'Greenwashing risks in asset management: Staying one step ahead', https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/greenwashing-risks-in-asset-management.pdf p.6

greater financial risks, greenwashing may facilitate a loss of income for ordinary people, trying to do the 'right thing'.

A substantial number of consumers have increasing expectations around environmental sustainability in relation to their investments. The Responsible Investment Association of Australia (RIAA) estimates that in Australia, the total value of investments which are managed by investment managers that 'self-declare as practicing responsible investment' is over $2 billion. RIAA judges that $1.54 billion of that figure is managed by 'responsible investment leaders',[31] which represents about 3 per cent of the global market for ESG investing - meaning Australians are overrepresented in the global ESG market.[32] This trend may be due partly to consumers' frustration with successive governments' failure to take decisive climate action.

<u>Superannuation fund members</u>

The privatisation of Australia's retirement system through the creation of superannuation funds, which now manage $3.4 trillion in assets[33], has 'opened up responsible investment as a form of political action' for ordinary people.[34] Those Australians who are invested in at least one superannuation fund - approximately 16 million in June 2022[35] - are now routinely invited to make financial decisions on the basis of questions of ethics, and the impact their investments may ultimately have upon the world.

Clearly, a large proportion of fund members in Australia are motivated to do this, and many are making investment decisions on the basis of their judgements about funds' environmental and sustainability credentials. In response to a 2022 RIAA survey, 83% of respondents expected their 'bank account and their super to be invested responsibly and ethically,' and 80% expected their 'savings to have a positive impact on the world'.[36] RIAA found that 74% of consumers 'would consider moving to another provider if they found out their current fund was investing in companies engaged in activities that were inconsistent with their values'. This figure rises to over 80% for Generation Z and millennials.

At the same time, consumers (including fund members) are rightly sceptical about some sustainability-related claims being made. 72% of respondents to RIAA's survey were concerned that 'responsible investors' engage in greenwashing. Top barriers identified as preventing a majority of respondents from switching to 'ethical' banks and super funds included lack of independent information, a lack of credible options, and (for banks) a 'lack of trust that such banks deliver on their promises'.

Australian superannuation funds are legally obliged to act in the best financial interests of their members. Since these funds have an interest in the long-term health of the financial system as a whole, upholding this fiduciary duty will often necessitate activities to mitigate real-world climate-related risks to their portfolios. A clearer, stronger regulatory framework governing climate-related disclosures will assist fund managers to make informed decisions about their investments, in turn leading to better information being made available to members.

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[31] RIAA, 2022, 'Responsible Investment Benchmark Report - Australia 2022', https://responsibleinvestment.org/wp-content/uploads/2022/09/Responsible-Investment-Benchmark-Report-Australia-2022-1.pdf
[32] AFR, 2022, 'Value vs values battle raging despite ESG investing boom', https://www.afr.com/companies/financial-services/value-vs-values-battle-raging-despite-esg-investing-boom-20220926-p5bl30
[33] ATO, 2023, 'Trend towards single accounts', https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/super-statistics/super-accounts-data/multiple-super-accounts-data/?page=5
[34] Parfitt, 2019, 'ESG Integration Treats Ethics as Risk, but Whose Ethics and Whose Risk? Responsible Investment in the Context of Precarity and Risk-Shifting', *Critical Sociology,* 1-15.
[35] APRA, 2023, 'Quarterly superannuation performance statistics highlights December 2022', https://www.apra.gov.au/sites/default/files/2023-02/Quarterly%20superannuation%20performance%20statistics%20highlights%20December%202022.pdf
[36] RIAA, 2022, 'From Values to Riches 2022: Charting consumer demand for responsible investing in Australia', https://responsibleinvestment.org/wp-content/uploads/2022/03/From-Values-to-Riches-2022_RIAA.pdf

Investors
Institutional investors increasingly consider environmental claims by companies when making investment decisions. According to RIAA's 2022 Responsible Investment Benchmark Report for Australia,[37] 'sustainability-themed investing' – investment in themes or assets that specifically aim to improve social or environmental sustainability – will be the 'next big trend in Australian responsible investment practice'.[38] Management of climate-related financial risks remains an important theme for investors.[39]

This increased focus matches consumer expectations; per RIAA, the top areas of consumer interest for investor products are renewable energy and efficiency, sustainable land and agricultural management, and sustainable water. Further, the 'number one expectation' Australian consumers had of financial advisers was 'to be knowledgeable about responsible investment', and this has overtaken 'the prioritisation of investment returns' since 2020.[40]

As RIAA notes, nearly two thirds of Australia's total managed funds are currently managed by investment managers that self-declare as practising responsible investment, and almost 75% of investment managers apply ESG integration to at least 85% of assets.[41] Despite this, in practice, by RIAA's metric less than half of Australia's total managed funds (43%) are being managed by investors 'applying a leading approach to responsible investment'. This suggests that there is a gap between investors' beliefs or representations regarding their investments and their actual investment approach.

Similarly, 13% of Australian financial advisers have indicated they 'do not intend to include ESG investing as part of their investment portfolios', compared to 7.5% of global peers, and 52% said 'their clients were not incorporating ESG strategies into their portfolios'.[42] There is therefore a risk that advisers and investment managers will greenwash their investments despite having no intention to truly incorporate ESG in investment decisions.

The misalignment of consumer expectations, investors' representations and approaches, and the intentions of advisers indicates a need for clearer guidance and scrutiny surrounding the environmental representations made by investment funds and financial advisers, so that consumers who are motivated to invest in sustainable funds are not misled.

c. domestic and international examples of regulating companies' environmental and sustainability claims;

At present in Australia, sustainability, environmental and 'green' claims are subject to provisions against misleading and deceptive conduct, including under the *Corporations Act 2001* (Cth), the *ASIC Act 2001* (Cth), and the *Competition and Consumer Act 2010* (Cth). The Australian Law Reform Commission (ALRC) has judged that the provisions on misleading and deceptive conduct in corporations and financial services law are 'too diffuse to efficiently administer', and '[impose] an undue burden on regulated entities, consumers, lawyers,

[37] RIAA, 2022, 'Responsible Investment Benchmark Report 2022 Australia', https://responsibleinvestment.org/wp-content/uploads/2022/09/Responsible-Investment-Benchmark-Report-Australia-2022-1.pdf
[38] RIAA, 2022, 'Responsible Investment Benchmark Report 2022 Australia', https://responsibleinvestment.org/wp-content/uploads/2022/09/Responsible-Investment-Benchmark-Report-Australia-2022-1.pdf, p. 20
[39] RIAA, 2022, 'Responsible Investment Benchmark Report 2022 Australia', https://responsibleinvestment.org/wp-content/uploads/2022/09/Responsible-Investment-Benchmark-Report-Australia-2022-1.pdf, p.6
[40] RIAA, 2022, 'From Values to Riches 2022: Charting consumer demand for responsible investing in Australia', https://responsibleinvestment.org/wp-content/uploads/2022/03/From-Values-to-Riches-2022_RIAA.pdf
[41] RIAA, 2022, 'From Values to Riches 2022: Charting consumer demand for responsible investing in Australia', https://responsibleinvestment.org/wp-content/uploads/2022/03/From-Values-to-Riches-2022_RIAA.pdf, pp. 4, 17.
[42] AFR, 2022, 'Value vs values battle raging despite ESG investing boom', https://www.afr.com/companies/financial-services/value-vs-values-battle-raging-despite-esg-investing-boom-20220926-p5bl30

regulators, and the courts'.[43] ACCR supports a review of these provisions, with the aim of consolidating and simplifying them.

Regulatory guidance on environmental and sustainability claims is developed and published by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investment Commission (ASIC). Regulatory guidance would be improved by: more specificity about permissible and impermissible environmental claims; more regular updates, to keep pace with the proliferation of claims being made; and greater consistency between regulators about the environmental and sustainability obligations of entities. All guidance should be underpinned by current climate science.

As mentioned above, ASIC has recently increased its focus on greenwashing activities. ASIC notes that between 1 July 2022 and 31 March 2023, it made 23 total corrective disclosure outcomes, issued 11 infringement notices, and commenced one civil penalty proceeding.[44] It is positive to see these actions taken, and companies and consumers will benefit from these enforcement activities. However, overall ASIC is limited in its ability to monitor the vast number of climate and sustainability claims being made on an increasing basis by entities operating in Australia, let alone to investigate and take action.

Regulators in Europe and the US have significantly increased their scrutiny of companies' ESG claims in recent years. The US Securities Exchange Commission (SEC) has established a Climate and ESG Task Force for the purpose of identifying greenwashing misrepresentations. In 2022, the Task Force pursued seven high-profile enforcement actions against companies who had made misleading statements or disclosures about ESG impact and risk,[45] an increase from only one or two ESG actions in previous years.

Regulatory enforcement of financial sector greenwashing is also set to increase in the EU. The EU's Sustainable Finance Disclosure Regulation (SFDR), being phased in from March 2021, seeks to improve transparency about the ESG impacts of financial products and services. SFDR requirements are linked to the EU's taxonomy for sustainable activities and help standardise impact disclosures, though some uncertainty remains about their exact scope and definitions.[46] These will be specified in future regulatory standards but will likely also be informed by the outcomes of enforcement actions.

d. advertising standards in relation to environmental and sustainability claims;

ACCR believes that advertising standards have a crucial role to play in preventing greenwashing, but that the current standards in the Environmental Claims Code are inadequate.

Words and phrases such as 'green', 'clean', 'eco', 'carbon neutral', 'environmentally friendly', and 'net zero,' should be required to be substantiated with credible information to prevent companies greenwashing their environmental claims. Considering that the integrity of offsetting schemes has been questioned, and the lack of equivalence between biological carbon (which is stored for most offsets) and fossil carbon, 'net zero' claims should not be allowed to be based on offsetting. Companies should also be required to disclose details of offsets they are using where claims of carbon emission reductions are made.

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[43] ALRC, 2022, Background Paper FSL9 Legislative Framework for Corporations and Financial Services Regulation, 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law', https://www.alrc.gov.au/wp-content/uploads/2022/12/FSL9-All-roads-lead-to-Rome.pdf
[44] ASIC, 2023, 'ASIC's recent greenwashing interventions', https://download.asic.gov.au/media/ao0lz0id/rep763-published-10-may-2023.pdf
[45] US SEC, 2023, 'Enforcement Task Force Focused on Climate and ESG Issues', https://www.sec.gov/securities-topics/enforcement-task-force-focused-climate-esg-issues
[46] European Commission, 2023, 'Sustainability-related disclosure in the financial services sector', https://finance.ec.europa.eu/sustainable-finance/disclosures/sustainability-related-disclosure-financial-services-sector_en

ACCR is not only concerned about claims relating to company products and operators, but also about efforts by the energy, mining, oil and gas sectors to greenwash in a more general way, which may sometimes be termed 'climate branding'. For example, BP's successful 'Beyond Petroleum' campaign promoted the company as green relative to its competitors, developing a preference among consumers for BP's gasoline in particular.[47] BP's 'Keep Advancing' and 'Possibilities Everywhere' campaigns were successfully challenged by ClientEarth for misleading the public, in a manner which '(presented) BP’s low-carbon energy activities, including their relative scale to its fossil fuel extraction activities, the role of gas, as well as the global energy system and climate change'.[48] ClientEarth submitted that these campaigns violated OECD guidelines, which 'require clear, honest, accurate and informative communication between enterprises and the public.[49] BP withdrew its advertising campaign. Similarly, in 2022 Shell was required by a Dutch advertising watchdog to withdraw misleading advertising for offsets-backed ‘carbon neutral petrol’.[50] In Australia, in late 2022, the Environmental Defenders’ Office lodged a complaint on behalf of civil society organisation CommsDeclare with the ACCC and Ad Standards on grounds that “statements Shell Australia makes in marketing materials that give investors and consumers the false impression that the company has a plan to become a net-zero business by 2050”.[51] Early in 2023, advocacy group Global Witness lodged a complaint against Shell with the US SEC, claiming that the company’s classification of gas as part of “Renewables and Energy Solutions” in its annual filings is misleading and inflates the amount of investment allocated to renewable energy.[52]

For this reason, ACCR recently submitted to the AANA that the definition of 'environmental claims', under the Environmental Claims Code, should be expanded, to capture communications relating to a particular industry or sector.[53]

Advertising standards must also be aligned with other areas of consumer law, such as misleading and deceptive conduct under the Australian Consumer Law. The rules should note that omission can be potentially misleading as this is a powerful and frequent form of greenwashing. Standards must be drafted to ensure claims for the manufacturing of products, in addition to aspects of the products themselves, and relating to particular industries or sectors (e.g. the mining industry), can be scrutinised for greenwashing.

When assessing whether claims constitute greenwashing, regulators should refer to external scientific knowledge and expertise – for example, by considering the guidance of the UN’s High Level Expert Group on net zero pledges, rather than industry standards. Further, the overall environmental footprint of a company should be taken into account in assessments. For example, companies with net-negative environmental impacts – for example, fossil fuels and mining companies which are misaligned with the scientific climate consensus and international frameworks – should not be allowed to make claims suggesting they have a positive environmental impact.

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[47] Cherry, Miriam & Sneirson, Judd. (2011). Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster. Tulane law review. 85. 983. 10.2139/ssrn.1670149.
[48] ClientEarth, 2019, 'ClientEarth launches complaint against BP’s climate greenwashing adverts', https://www.clientearth.org/latest/latest-updates/news/clientearth-launches-complaint-against-bp-s-climate-greenwashing-adverts/
[49] ClientEarth, 2019, 'Complaint against BP in respect of violations of the OECD Guidelines', https://www.clientearth.org/media/4npme1i1/ncp-complaint-clientearth-v-bp-complaint-submission-and-annex-a-ce-en.pdf.
[50] Bloomberg, 21 October 2022, ‘Shell Loses Dutch Appeal Over Misleading Carbon Emission Ads‘, https://www.bloomberg.com/news/articles/2022-10-21/shell-loses-appeal-over-misleading-carbon-emission-ads
[51] EDO, 4 November 2022, ‘Shell greenwashing complaint lodged with ACCC and Ad Standards’, https://www.edo.org.au/2022/11/04/shell-greenwashing-complaint-lodged-with-accc-and-ad-standards-australia/; SMH, 4 November 2022, ‘Shell Australia targeted in growing global greenwashing backlash’, https://www.smh.com.au/environment/climate-change/pressure-mounting-on-318b-energy-giant-that-says-it-cares-about-climate-20221101-p5bup7.html
[52] Washington Post, 1 February 2023, ‘Oil giant Shell accused of 'greenwashing' and misleading investors’, https://www.washingtonpost.com/politics/2023/02/01/oil-giant-shell-accused-greenwashing-misleading-investors/
[53] ACCR, 2023, ‘Submission: Environmental Claims Code’, https://www.accr.org.au/research/submission-environmental-claims-code/

The AANA must also align with other regulators, such as the ACCC and ASIC, to enforce regulations and apply more scrutiny to greenwashing claims.

e. legislative options to protect consumers from green washing in Australia

Clearer legislative standards
ACCR supports the adoption of clearer standards covering environmental claims. These need to be legally enforceable, like the accounting and auditing standards made under the *Corporations Act* (sections 334-338).

Recommendation: Develop legally enforceable standards for environmental and sustainability claims, which:
- *Provide substantiation requirements for all claims;*
- *State the requirements that particular claims - like 'net zero' - must satisfy in order to not be misleading or deceptive. Such requirements should reflect current climate science and international best practice, and respond to recent reports from the UN's High-Level Expert Working Group on Net Zero Emissions Commitments of Non-State Entities; and*
- *Provide additional substantiation, communication and verification requirements for the use of environmental and sustainability labels.*

Changes to the Environmental Claims Code
More forceful enforcement of anti-greenwashing measures is required, and this could be partly achieved via changes to the Environmental Claims Code. ACCR refers the Committee to our previous submission for detailed comments and recommendations on this question.[54]

Recommendation: Update the Environmental Claims Code and Code Practice Notes, including by:
- *Expanding the current definition of 'environmental claims', to capture claims made about how products are manufactured, as well as claims relating to a particular industry or sector;*
- *Requiring claims made about carbon emission reductions to specify to what extent this is achieved by use of carbon offsetting;*
- *Adopting the 'whole of life cycle' method for assessing claims;*
- *Updating the Practice Notes to include guidance regarding the threshold for making an honest claim to 'net zero', which reflects recent recommendations of the UN High Level Expert Group on Net Zero Emissions Commitments of Non-State Entities; and*
- *Updating the Practice Notes to reflect important legal principles regarding misleading/deceptive conduct, under Australian Consumer Law, including regarding the use of disclaimers/fine print and headline statements.*

Establishment of mandatory disclosure requirements
ACCR refers the committee to our previous submission on Climate-Related Financial Disclosure, for detailed comments and recommendations on this question.[55] As noted in that submission, Australia must implement mandatory, international best-practice standards regarding climate-related financial risk disclosure. Without such disclosure standards, it is impossible for investors to make meaningful, informed assessments of company activities.

Recommendation: Adopt mandatory disclosure requirements. These must be clear, comparable, and robust. The draft ISSB climate disclosure standard should form the basis of these new requirements. The requirements should include a 'double materiality' assessment, in line with the standards being introduced in the EU. They should also stipulate that:

[54] ACCR, 2023, ‘Submission: Environmental Claims Code’, https://www.accr.org.au/research/submission-environmental-claims-code/
[55] ACCR, 2023, 'Submission: Climate-Related Financial Disclosure', https://www.accr.org.au/research/submission-climate-related-financial-disclosure/

- *Disclosures cover all of the emissions associated with a company's operations and value chains, i.e. scopes 1, 2 and 3;*
- *Transition risk assessments include information to allow users to assess a company's alignment with a 1.5℃ scenario;*
- *Transition plans consider lifecycle emissions;*
- *Companies clearly quantify the contribution which different strategies make to their transition plans, such as a reliance on offsets, divestment, or CCS;*
- *There is a high degree of consistency between financial statements and climate disclosures, and that public climate commitments made by companies are fairly reflected in financial accounts; and*
- *Companies are required to nominate a director who is responsible for climate matters and transition planning.*

Where climate-related disclosures are made outside of the audited financial statements, they should be subject to the same governance and assurance as the financial report including board certification, auditing, etc. There should be consistency across all reporting.

ACCR encourages the implementation of a double materiality assessment in line with the standards being introduced in the EU. This would ensure that disclosures would capture both: (a) the financial impact of climate risks and opportunities; and (b) the impact of companies on climate and environment. In turn, this would give investors a better view of how (a) is affected by (b).[56]

<u>Further support for ACCC and ASIC</u>
ACCR is encouraged by recent actions by ASIC and the ACCC to investigate and act against greenwashing, and believes that they could be resourced further to continue this work.

Recommendation: Grant ASIC and ACCC additional resources to pursue anti-greenwashing activities.

<u>Stronger levels of assurance for climate disclosures</u>
With reference once again to ACCR's past submission on Climate-Related Financial Disclosure,[57] ACCR has concerns about the existing financial audit independence arrangements. For example, Carbon Tracker has found, in a 2021 study of 107 companies' reporting practices, that 80% of auditors did not appear to have conducted an assessment of climate risk, and that 63% failed to identify inconsistencies regarding climate risks/targets across company reporting.[58]

As previously noted: "Audits should provide reasonable assurance of all mandatory metrics, limited assurance of the remainder of the report and explicitly consider information which may be omitted from reports. Assurance providers must be subject to high independence and quality management standards. The current model where an entity appoints and pays its own auditor creates a tension with genuine independence".[59]

<u>The role of litigation</u>
Litigation plays an essential role in guarding against greenwashing.

Recommendation: Incorporate an assumption that applicants who bring court proceedings in the public interest are entitled to protective or maximum costs orders.

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[56] As explained by EFRAG in the Draft European Sustainability Reporting Standards, "Impact materiality and financial materiality assessments are interrelated and the interdependencies between these two dimensions shall be considered." 2022, *ESRS 1 General Requirements*, p. 11.
[57] https://www.accr.org.au/research/submission-climate-related-financial-disclosure/
[58] PRI & Carbon Tracker, 2021, Flying Blind: The glaring absence of climate risks in financial reporting.
[59] https://www.accr.org.au/research/submission-climate-related-financial-disclosure/, p6