

GREENWASHING IN THE MEAT AND SEAFOOD INDUSTRY

ISABEL DEVITT*

Amidst a rapid social change towards greater environmental awareness, organisations have increasingly sought to exaggerate the environmental characteristics of their product, as a strategy in meeting consumer demand. Regardless of a minority's pure intention to offer their consumers an 'eco-friendly option,' many organisations have exploited this consumption shift for their own benefit, adopting the practice of 'greenwashing' within their business models. Sparked by the establishment of a Senate Inquiry into greenwashing, this article will explore how exaggerated environmental claims within Australia's meat and seafood industries impact consumers. Subsequently, drawing on consumer behaviours and theories to identify the polarising relationship between industry and shoppers when a gap in product information is formed. Further, through the perspective of consumer protection, this article draws on the misleading and deceptive conduct of our modern organisations, prompting an analysis of the success of our regulatory bodies in preventing the effects of greenwashing. Whilst greenwashing has long existed, the growing presence of false or misleading environmental claims demands the attention of our policymakers now. This article suggests we already have the necessary tools within our existing legal mechanisms, we must now put them into action to promote stronger deterrence against greenwashing.

CONTENTS

| | | |
|-----|--|----|
| I | Introduction | 56 |
| II | Role of the Consumer | 57 |
| | A Non-Standard v Standard Consumer | 57 |
| | B Political Consumerism | 61 |
| III | Third Party Certification Schemes | 63 |
| | A Purpose of Third-Party Certification Schemes | 63 |
| | B Industry Involvement | 65 |
| IV | Misleading or Deceptive Conduct | 66 |
| | A Australian Consumer Law | 67 |
| | B EU Directives | 69 |
| | C The Corporations Act 2001 (Cth) | 70 |
| | D Critical Analysis of the ACCC and ASIC | 72 |
| V | Recommendations | 74 |

* LLB Student, School of Law, University of South Australia; BA Student, School of Justice & Society, University of South Australia

| | | |
|----|--|----|
| A | Prioritise the Powers of Australian Regulatory Bodies | 74 |
| B | Invoke Section 1317E of the Corporations Act 2001 (Cth)..... | 74 |
| C | Amend Section 29 of the Australian Consumer Law to Include 'Vague or Unsubstantiated Environmental Claim' | 74 |
| VI | Conclusion..... | 75 |

I INTRODUCTION

The growing presence of environmentally conscious consumers in recent times has prompted organisations to adopt 'an environmentally responsible public image' to meet consumer demand. Despite a perception of broader environmental consideration, many organisations' "green" initiatives are often underpinned by vague claims and misleading statements. From your bank's investment choices to your supermarket grocery labels, consumers are inundated with claims of a products "ethics" and "green" characteristics, and usually without the evidence to substantiate its claims. This process of "greenwashing" is defined as the exaggeration of the positive environmental impacts of products or services.¹ While the term was recognised by the Australian Competition and Consumer Commission ("ACCC") in the early 1990s, the topic of greenwashing has garnered momentum in recent years, prominently featuring in various academic debates.² Subsequently, this article draws on the growing presence of greenwashing, to discuss the shortcomings of our current approach in protecting consumers and exploring legislative alternatives.

The Senate Inquiry into greenwashing, introduced by Senator Sarah Hanson-Young, has provided the foundations for this article.³ This inquiry drew attention to the threat of greenwashing on consumers and the necessity for preventative measures.⁴

This paper explores the influence of consumer behaviour on industry marketing, with a spotlight on the meat and seafood industry, wherein the 'simplification of divergent ecological claims' exacerbates consumer

¹ Nicholas Tebbey, 'Consumer law: greenwashing and other environmental scams' (2011) 63 (9) *Keeping Good Companies* 554, 555.

² *Ibid.*

³ Senate Standing Committees on Environment and Communications, Parliament of Australia, *Inquiry into Greenwashing* (Terms of Reference, 29 March 2023) ('*Senate Inquiry*').

⁴ *Ibid.*

vulnerability.⁵ Moreover, it is argued that the establishment of third-party certification schemes is found to be a weak “soft law approach”, often contributing to consumers’ confusion within greenwashing claims.⁶ Additionally, an analysis of our legal framework reveals the distinct limitations of our judicial functions in sanctioning greenwashing. Ultimately, this article draws upon current literature to demonstrate the contingent nature of greenwashing on the industry and retailer relationship. This paper intends to highlight the limitations of our current mechanisms in sanctioning greenwashing, encouraging our policy makers to enhance our statutory mechanisms and place consumer protection at the forefront of decision making. The consequence of consumer protection through greenwashing can no longer go unnoticed. Direct accountability of organisations is vital in paving the way for a healthier and safer environment.

II ROLE OF THE CONSUMER

Whilst consumers today are more inclined to take into consideration the impact of their consumption choices, the gap in information between the shopper and retailer presents the foundations for greenwashing. As discussed by Nicholas Tebbey in his analysis of the Australian Consumer law, ‘clever operators often take advantage of an area where consumer knowledge is lacking’.⁷ Subsequently, an analysis of consumer behaviour explores the common notions of the average and ‘environmentally conscious consumers’,⁸ revealing the foundational flaws of our industry process.

A *Non-Standard v Standard Consumer*

The evolving nature of the consumer has been regarded as the driving force behind greenwash claims, with the consumption shift towards sustainability, prompting industry exploitation of retailed products. Throughout his study, Christopher Decker emphasised the role of consumers in ‘shaping government

⁵ Mikael Klintman and Magnus Boström, ‘Framings of science and ideology: Organic food labelling in the US and Sweden’ (2004) 13 (3) 612, 613.

⁶ Ibid.

⁷ Tebbey (n 1) 554.

⁸ Ziyuan Sun and Weiwei Zhang, ‘Do government regulations prevent greenwashing? An evolutionary game analysis of heterogeneous enterprises’ (2019) 231 *Journal of Cleaner Production* 1489, 1489.

policies’,⁹ suggesting the societal demands of today have shaped consumers into non-standard, ‘complex and multifaceted’ shoppers.¹⁰ Decker’s analysis draws on the theory of standard and non-standard consumers, indicating that the challenges of today’s consumer are no longer reflected in government policy.¹¹ This is largely because the previously held notion that standard consumers were ‘invariant to attributes of the product’ is now outdated in light of current societal demands.¹² Therefore, recognition of today’s consumer behaviour is imperative to prevent the expansion of greenwashing, for Decker believes ‘if these parameters and challenges are acknowledged and ... incorporated into analytical framework, the potential exists for better targeted ... regulatory practices’.¹³ Subsequently, Decker’s analysis effectively captures the unique position of consumers today, generating discussion on the involvement of consumer priorities within the prevention of greenwashing.

This development of consumer awareness was explored in a survey conducted by the Consumer Policy Research Centre (“CPRC”) (see Figure 1 and Figure 2).¹⁴ In a survey of 2000 Australians, 47% of general shoppers were found to stop buying from a business if they were engaging in greenwash claims.¹⁵ Furthermore, CPRC’s ‘Consumer Experience of Green Claims in Australia’ revealed that the average Australian consumer was exposed to 122 “green” advertisements across 17 sectors in 24 hours.¹⁶

⁹ Christopher Decker, ‘Concepts of the consumer in competition, regulatory and consumer protection policies,’ (2017) 13 (1) *Journal of Competition Law and Economics* 151.

¹⁰ *Ibid* 152.

¹¹ *Ibid*.

¹² *Ibid* 155.

¹³ *Ibid* 151.

¹⁴ Kristal Burry, ‘Consumer protections for shoppers seeking sustainable purchasers, what is missing?’ (2023) 31 (1) *Australian Journal of Competition and Consumer Law* 76, 77.

¹⁵ *Ibid* 78.

¹⁶ Consumer Policy Research Centre, *The Consumer Experience of Green Claims in Australia* (Report, December 2022).



Figure 1- Categories of Australians threatened by the influence of green claims¹⁷

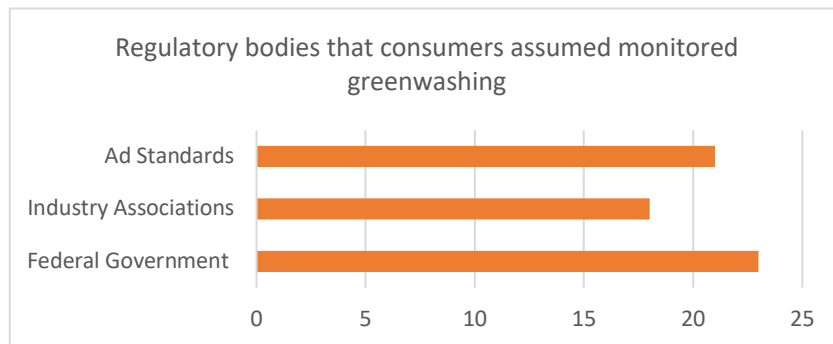


Figure 2 – Regulatory bodies that consumers assumed monitored greenwashing¹⁸

¹⁷ Burry (n 14), 77.

¹⁸ Ibid 76.

While such results are unsurprising against the growing literature around modern consumerism, the reliance consumers place on green checks without knowledge of their regulation is concerning. Kristal Burry explored this issue within her discussion of the results, suggesting the ‘sustainable shopper may be at a greater risk of greenwash, ... when purchasing sustainable products ... that a trusted third party has certified’.¹⁹ Burry draws on the vulnerability of non-standard consumers in her argument, to suggest the consumer’s willingness to pay additional costs for a sustainable product is likely to be exploited by the industry through misleading environmental claims.²⁰ Therefore, Burry’s analysis links such consumer exploitation to the limited choice at our current supermarkets, with ‘the proliferation of green information making it hard for consumers to pick the cherries from the lemons’.²¹



Figure 3 – Process of Greenwashing within the pork industry²²

Christine Parker, Fiona Haines and Hope Johnson’s article on labelling within the meat industry broadens this argument of consumer vulnerability to highlight the deceptive conduct of organisations today (see Figure 3).²³ By reference to “sow stall free” certification, this articles suggests that such

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Christine Parker, Rachel Carey and Fiona Haines, ‘Can labelling create transformative food system change for human and planetary health? A case study of meat,’ (2021) 10 (12) *International Journal of Health Policy and Management* 923, 926.

²³ Ibid.

conclusive representations of environmental impact are detrimental to the consumer.²⁴ For example, the supermarkets' 'selective focus on the issue of freeing sows' intentionally ignores the numerous welfare standards within the pork industry and instead creates a broad 'umbrella' certification intended to mislead consumers.²⁵ Parker, Haines and Johnson describe this conduct as 'industry co-optation of animal activism', effectively exposing the negative "take-over" of animal welfare by the meat and agriculture industries.²⁶ Despite the label's misleading nature, our government policy's absence of independent environmental standards, enables organisations to mislead consumers on the "green" characteristics of their products.

B *Political Consumerism*

While consumers wield significant power over consumption trends, a study by Boris Holzer on political consumerism argues that such individual power has its limits.²⁷ Holzer's theory is successful in illustrating the imbalance of power between producers and consumers in today's retail market, as the shopper's ability 'to choose among a range of options', is completely dependent upon the preferences of retailers of that store.²⁸ This demonstrates the key notion of consumer vulnerability, for shoppers fall secondary to their relationship with the product, providing the industry with unlimited power to advertise their product depending on consumer concerns.²⁹ However, in applying the perspective of political consumerism, Holzer interprets the independent economic choice to be substantial when presented through collective action, as he suggests 'social movements ... are the transmission belts for the effective translation of monetary resources into political power'.³⁰

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Boris Holzer, 'Political consumerism between individual choice and collective action: social movements, role mobilization and signalling' (2006) 30 (5) *International journal of consumer studies*, 406.

²⁸ Ibid 405.

²⁹ Ibid.

³⁰ Ibid 407.



Figure 4 – Traffic light example of social movements through ‘free range’ certification³¹

With consideration of Figure 4, it is clear the process in ‘lending consumer purchasing power’, to social movements transforms an individual’s political shopping into real industry change.³² Although this article emphasises the cogency of Holzer’s theory, it equally acknowledges its shortcomings in placing significant responsibility on the consumer to shift production and advertising habits. In an article by the International Journal of Health Policy and Management (“IHJPM”) this perspective was discussed in that ‘many consumers do not have the opportunity to learn about ... issues and are largely educated by simplistic labelling’.³³ Subsequently, the IHJPM points directly to the crux of this article, that stricter regulations around a product’s labelling could prevent further greenwashing. While Holzer is empowering in his analysis of a consumer’s purchasing power, this article argues it should not be the consumer’s responsibility to assess and criticise each characteristic of their groceries. The consumer wields significant economic power in their purchasing decisions, however without stronger accountability of industry

³¹ Parker, Carey and Haines (n 22) 929.

³² Holzer (n 27) 412.

³³ Parker, Carey and Haines (n 22) 928.

involvement in greenwashing, everyday consumers will continue to fall second to the industry-retailer relationship.

III THIRD PARTY CERTIFICATION SCHEMES

Whilst greenwashing can take various forms, the growing dependence upon third-party certification (“TPC”) schemes within the meat and seafood industry serves as the driving cause for consumer harm. Despite the purported success of the certifications in bridging the information gap between consumers and the industry, the intensified presence of industry input has limited TPC’s overall success.³⁴ The efficacy of TPC schemes was explored in the *Environment, Development and Sustainability Journal*, wherein Qianjing Zhu, Xianglian Zhao, Meihua Wu argued its initial purpose to ‘alleviate information asymmetry’,³⁵ has faced critical setbacks, as ‘information can be exploited by the issuers’.³⁶ This paper intends to draw on this discussion, generating support for stricter accountability of industry involvement in the protection of Australian consumers and the environment.

A *Purpose of Third-Party Certification Schemes*

TPC schemes promote transparency and accountability by signalling a products social, environmental, and economic impact to consumers within a singular label. As previously discussed, labelling is integral to consumers’ purchasing decisions, for their vulnerability to the gap in market information increases their reliance upon a third-party accreditation.³⁷ However, such consumer vulnerability is often exacerbated by TPC schemes, with organisations’ tendency to create broad and ill-defined labels further contributing to industry greenwashing. As explored by Marine Nehme and Michael Adams in their discussion of the Terra-Choice ‘sins of greenwashing,’ a company often commits the ‘sin of vagueness’ or ‘no proof,’ when stating an environmental claim that cannot be proven or is so ambiguous as to be

³⁴ Qianjing Zhu, Xianglian Zhao, Meihua Wu, ‘Third-party certification: How to effectively greenwash in green bond market? – analysis based on signalling game’ (2023) *Environment, Development and Sustainability*, 3.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Parker, Carey and Haines (n 22) 930.

misleading.³⁸ This was explored in a submission to the Senate Inquiry into Greenwashing by Australian Organic Ltd (“AOL”), arguing that ‘the term organic, becomes a marketing ploy used for uncertified operators to greenwash their products’.³⁹ Although such misleading conduct constitutes unfair commercial practice, our current framework for accountability has been criticised for its limited effect in preventing exploitation of this kind. Subsequently, it is palpable that there are internal barriers in addressing the widespread consequences of greenwashing.

Furthermore, the issue of consumer vulnerability was explored in a submission by World Wide Fund for Nature Australia (“WWF”), arguing that ‘certification bodies are trusted more than government and large companies in addressing sustainability issues’.⁴⁰ Whilst such influence is seminal to the prevention of greenwashing, WWF believes this dependence presents cause for greenwash, as ‘distilling complex information into a simple binary label’⁴¹ reduces the complex nature of farmed products into one succinct and commonly misleading label. Despite the purported intention of TPC schemes, organisations have exploited such practices to their own benefit, pushing the consumer further into a state of greenwash confusion.

| Table of certification bodies across the meat and seafood industries | | | | |
|--|--|---|--|---|
| Category | Beef | Pork | Poultry | Various Fish |
| Certification Bodies | AUS-MEAT Australian Animal Welfare Certification System (AAWCS) National Feedlot Accreditation Scheme (NFAS) Livestock Production Accreditation Scheme (LPAS) | Australian Pork Industry Quality Assurance Program (APIQ) APIQ Customer Specifications (Coles) Verification | Egg Standards Australia (ESA) Woolworths’s supplier auditor program | Aquaculture Stewardship Council (ASC) Tassal RSPCA |
| Process of green claims | AUS-Meat Language provides objective descriptions to meet national market requirements ‘Carbon neutral’ | Conventional indoor pigery is default definition for APIQ Certification ‘Sow stall free’ | 2 components comprising of the ESA processes for rearing day-old chicks up to the packaging of eggs for sale ‘Free range’ | ASC sets the international standard for third party certification labelling. Tassal utilises such standards to advertise their product is ASC certified ‘Responsibly sourced’ ‘ASC certified across all operations’ |
| Impact on consumers | Misleading to consumers as these schemes are founded by industry bodies and comply with industry standards | Misleading to consumers as certification reflects standard pork procedure as opposed to additional steps to protect welfare | Consumers are misled by the vague use of ‘free range’ and the ESA’s dependence on reaching industry and market regulations | ASC labels mislead the consumer, for their operations are commonly exclusive of important process of fish farming, specifically the salmon industry. |

³⁸ Marine Nehme and Michael Adams, ‘Section 18 of the Australian consumer law and environmental issues’ (2012) 24 (1) *Bond Law Review* 30, 40.

³⁹ Australian Organic Ltd, Submission No. 2 to Senate Standing Committee on Environment and Communications, *Greenwashing* (April 2023) 7 (‘AOL Submission’).

⁴⁰ WWF Australia, Submission No. 20 to Senate Standing Committee on Environment and Communications, *Greenwashing* (June 2023), 2, 4 (‘WWF Submission’).

⁴¹ *Ibid.*

Figure 5 – Table of certification bodies across the meat and seafood industry and their impacts on consumer protection⁴²

B Industry Involvement

Figure 5 illustrates that our current certification bodies are neither independent nor transparent in educating the consumer of a products environmental impact. For instance, with respect to salmon farming within the Tasmanian Macquarie Harbor, the Aquaculture Stewardship Council (“ASC”) is found to have approved exemptions of compliance with key environmental criteria and enabled auditors to exclude the smolt pens stage of the farming process.⁴³ This clear breach of environmental obligations demonstrates the lack of transparency within our industry regulators, enabling a product to be advertised as ‘responsibly sourced’ regardless of its unsatisfactory production.

Furthermore, this highlights the mutual agreement between TPC bodies and industries to exploit consumer trust and environmental consciousness for their own benefit. The co-operative relationship between the industry and certification bodies is present within almost all areas of production. This is best illustrated by the abovementioned “sow stall free” certifications which provides insights into the collaboration of industries and supermarkets.⁴⁴ Additionally, Aldi’s animal welfare policies succinctly outline the current shortcomings within the corporate response to TPC bodies.⁴⁵ The supermarket claims that ‘all fresh meat ... is certified by the Australian Livestock Processing Industry Animal Welfare Certification System (“AWCSS”), and is ‘independently audited by an animal welfare program’.⁴⁶ However, Figure 6 illustrates the foundations of AWCSS, with its finances, regulation, and

⁴² AUS-MEAT, *Language and Standards Committee* (2023) AUS-MEAT/AUS-QUAL <<https://www.ausmeat.com.au/about-us/language-standards-committee/>>; Australian Pork, *Certification Options* (ND) Australian Pork <<https://australianpork.com.au/apiq/certification-options/>>; Australian Eggs, *Egg Standards of Australia* (2023) Australian Eggs <<https://www.australianeggs.org.au/farming/egg-quality-standards#:~:text=ESA%20is%20a%20voluntary%20quality,needs%20of%20regulators%20and%20retailers/>>; Neighbours of Fish Farming, Submission No. 125 to Senate Standing Committee on Environment and Communications, *Greenwashing* (June 8 2023).

⁴³ Neighbours of Fish Farming, Submission No. 125 to Senate Standing Committee on Environment and Communications, *Greenwashing* (June 8 2023) 4 (‘NOFF Submission’).

⁴⁴ Parker, Carey and Haines (n 22) 926.

⁴⁵ Aldi, *Animal Welfare* (Web Page, 2023) <[https:// rate.aldi.com.au/en/corporate-responsibility/supply-chain/responsible-sourcing/animal-welfare/](https://rate.aldi.com.au/en/corporate-responsibility/supply-chain/responsible-sourcing/animal-welfare/)>.

⁴⁶ Ibid.

assessment of auditor's dependent upon representatives of the livestock industry.⁴⁷ Subsequently, such overwhelming presence of the meat industry within its operation raises concern of a conflict of interest between the economic growth of the industry and the increased measures for adequate animal welfare.



Figure 6 – The foundations of AAWCS as contradictory to their independent and regulatory obligations⁴⁸

Further, WWF's submission extended to the discussion of accountability, wherein they argued 'NGO's have taken on the role of watch dogs in challenging contentious certifications'.⁴⁹ However, the limited resources and increased financial strain within these organisations demonstrates the necessity for an independent body of regulation. This will be discussed later in further detail, as a dominant shortcoming in the regulation of industry greenwashing. Ultimately, our current framework for greenwashing within the meat and seafood industry fails to recognise the conflicting nature of our government departments, enabling the industry to fund and manipulate certification bodies.

IV MISLEADING OR DECEPTIVE CONDUCT

Consumers are increasingly aware of the environmental impact of their purchasing decisions. Whilst this consumption awareness is commended, the growing threat of green market abuse and intentional greenwashing poses a barrier for prompting significant change within the meat and seafood industry.

⁴⁷ The Australian Livestock Processing Industry Animal Welfare Certification System, *AAWCS Administration*, AAWCS (Web Page, 2023) <<https://aawcs.com.au/aawcs-administration/>>.

⁴⁸ The Australian Livestock Processing Industry Animal Welfare Certification System, *AAWCS Administration*, AAWCS (Web Page, 2023) <<https://aawcs.com.au/aawcs-administration/>>.

⁴⁹ WWF Submission (n 40) 5.

Despite numerous attempts of litigants to combat the misleading and deceitful nature of greenwashing, an analysis of Australia's legislative approach reveals the shortcomings of our law in invoking internal change. Whilst state parliaments have attempted to pass legislation specific to environmental labelling in the past,⁵⁰ their inability to generate bipartisan support further underscores the limitations of our current laws.

A *Australian Consumer Law*

The *Australian Consumer Law* ("ACL")⁵¹ serves as the most common pathway under which misleading or deceptive conduct proceedings are commenced, particularly under ss 18 and 29.⁵² Both provisions regulate misleading and deceptive conduct within Australian businesses and competition, with the statute's reference to trade and commerce comprising any promotional activities or conduct carried out during commercial business.⁵³ The test for whether conduct is likely to be misleading or deceptive is objective, questioning 'how the behaviour affects the target audience's impression of the good or service'.⁵⁴ In addition to the product's intended impression, the plaintiff carries the burden of proving the intention of the conduct was in fact achieved.⁵⁵ This emphasis upon proving the conduct *actually* misled a target audience presents a major flaw of our current laws in addressing greenwashing allegations.

Figure 7 distinguishes between the two provisions, with the reference to "goods and services" in s 29 broadening the scope of the provision's application to include a product's characteristics, representations or testimonials.⁵⁶ Meanwhile, s 18 is effective only in sanctioning strict conduct

⁵⁰ See Fair Trading (Environmental Labelling) Bill 1991 (Vic).

⁵¹ *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

⁵² *Ibid* ss 18, 29.

⁵³ Environmental Defenders Office, 'Misleading or Deceptive Handbook, A Legal Guide to Greenwashing,' *Environmental Defenders Office*, (Legal Guide, N/A), 6 <https://www.edo.org.au/wp-content/uploads/2023/07/EDO_MisleadingDeceptiveConductHandbook_final.pdf> ("Misleading or Deceptive Handbook").

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

⁵⁶ *Australian Consumer Law* (n 51) s 29.

of “trade or commerce”.⁵⁷ Nehme and Adams opined that the provision is limited given that ‘conduct ... only refers to the central conception of trade or commerce, and not to the immense field of activities in which corporations may engage in’.⁵⁸ Moreover, the ACCC can only seek penalties for contraventions of s 29(1) and not for contraventions of s 18.⁵⁹ Thus, the application of s 29 is significant in sanctioning greenwashing within the meat and seafood industries.

| Comparison of s 18 and s 29 of the Australian Consumer Law | | |
|--|---|--|
| Section 18 (1) | S 29 (1) (a) – (n) | Comparison |
| A person must not | A person must not | - S 29 presents significant more concern for the supply of goods and services, in relation to the conduct of trade of commerce |
| In trade or commerce | In trade or commerce | |
| Engage in conduct | In connection with the supply, or possible supply of goods or services | - Whilst s 18 (1) solely sanctions issues in trade or commerce, s 29 (1) explores its connection to goods or services, providing numerous occasions where a representation could be misleading |
| That is misleading or deceptive or | Or in connection with the promotion by any means of the supply, or use of goods or services: | |
| Is likely to mislead or deceive | a) Make a false or misleading representation that goods are of a particular standard, quality, value, or grade or b) That goods are new or c) That a particular person has agreed to acquire goods or services or d) That a testimonial by any person has been made relating to the goods or services or e) A testimonial by any person or a representation that purports to be such a testimonial f) That goods have a sponsorship, approval, performance characteristics, accessories uses or benefits g) To the price of goods or services h) Concerning the availability of facilities for repair i) Concerning the place of origin j) The existence, exclusion or effect of any condition, warranty, guarantee, right or remedy | - The various sub sections of s 29 (1) broadens the scope of misleading conduct within trade or commerce and has been used to sanction greenwashing - Issue remains within both provisions for the requirement to prove an innocent party was led into error due to this misleading representation - It is not necessary within either s 18 or 29 to prove the defendant intended to mislead the innocent party, both provisions are a strict liability test |

Figure 7 - Table of comparison between s 18 and s 29 of The Australian Consumer Law⁶⁰

⁵⁷ Ibid s 18.

⁵⁸ Nehme and Adams (n 38) 46.

⁵⁹ Misleading or Deceptive Handbook (n 53) 14.

⁶⁰ Australian Consumer Law (n 51) ss 18, 29.

Section 29 of the *ACL* was applied in the judgment of *ACCC v Kimberly-Clark*,⁶¹ where the ACCC brought proceedings against the wet wipe company for making misleading claims in relation to their product's "flushability", "characteristics" and "disintegration".⁶² Whilst demonstrating considerable argument for greenwashing, the ACCC failed to prove that such misleading conduct 'posed a risk of harm that was greater than the risk posed by toilet paper'.⁶³ The Full Court accepted there was a risk of harm from the flushability representation, however held that such risk was not proportional to its effect in leading a significant number of consumers into error.⁶⁴ Ultimately, the court's judgment relied on a distinction between proving 'actual harm' that was disclosed to consumers, compared to 'a risk of harm' that consumers were unaware of.⁶⁵ The ACCC's reliance on the former re-enforces the difficulty that a party can face in establishing that a misleading representation led an innocent party into error, when bringing proceedings under s 29.⁶⁶ Subsequently, this gap in Australia's *ACL* presents a common barrier within ongoing greenwashing allegations, with our regulator's inability to broaden the interpretation of our current law generating discussion for reform.

B *EU Directives*

In discussing the shortcomings of our current legislation, it is fruitful to undertake a comparative analysis into the approaches of our international counterparts who have effectively deterred greenwashing in their nations. For instance, a recent European Union ("EU") proposal sought to bridge the information gap between consumers and their products, pushing for consumers to make informed purchasing decisions.⁶⁷ With consideration of the proposal's explanatory memorandum, the EU Parliament signalled their concerns over misleading claims in generating consumer scepticism, as 'products that offered commercial guarantees ... were often unclear, imprecise or incomplete'.⁶⁸

⁶¹ *Australian Competition and Consumer Commission (ACCC) v Kimberly-Clark Australia Pty Ltd* [2020] FCAFC 107 ('*Kimberly-Clark*').

⁶² *Ibid* [3].

⁶³ *Ibid* [18].

⁶⁴ *Ibid* [30]–[34].

⁶⁵ *Ibid* [29].

⁶⁶ *Taco Co v Taco Bell* (1982) 42 ALR 177, 202 (Deane and Fitzgerald JJ).

⁶⁷ Explanatory Memorandum, Directive of the European Parliament 2022 (EU) ('Explanatory Memorandum').

⁶⁸ *Ibid* 3.

Moreover, the proposal made significant findings – recognising that it is commonplace for companies to ‘emphasise legal obligations as a supposed commercial guarantee of their product’.⁶⁹ The lack of transparency and accountability around certification standards and labelling schemes was highlighted by the EU directive, finding that corporate deceit and the intentional misleading of consumers is a dangerous example of unfair commercial practice.⁷⁰ Subsequently, the proposal emphasised a ban on sustainability labels that were not supported by sufficient evidence, as well as curating a new consumer agenda and economic action plan, aligned with the European green deal.⁷¹ Although the Australian Senate has made progress through its inquiry into greenwashing and acknowledging the current issues of consumer protection,⁷² such examples of EU recognition underscore the need to further develop preventative measures against greenwashing in Australia.

C *The Corporations Act 2001 (Cth)*

Throughout discussions of greenwashing litigation, academics have recently turned to *the Corporations Act 2001 (Cth)*⁷³ (“*the Act*”), as a possibility for promoting stronger corporate accountability. The provisions of *the Act*⁷⁴ and the *Australian Securities Investment Commission Act*⁷⁵ in relation to misleading or deceptive conduct only apply in the context of financial services and are not directly relevant to the scope of this paper. However, the notion of directors’ duties could be a useful mechanism in sanctioning greenwashing, to enforce deterrence and accountability more broadly. Under ‘*the Act*,’ a company has the legal capacity and powers of an individual, providing a distinction between the acts of the company and its respective directors.⁷⁶ Subsequently, a director is held to separate obligations, including a duty under s 180 to ‘discharge their duties with the degree of care and diligence of a reasonable person in their position’.⁷⁷ This duty of care has garnered

⁶⁹ Ibid 2.

⁷⁰ Ibid 1.

⁷¹ Ibid 2.

⁷² Senate Standing Committees on Environment and Communications, Parliament of Australia, *Inquiry into Greenwashing*, ‘Terms of Reference’ (29 March 2023).

⁷³ *Corporations Act 2001* (Cth).

⁷⁴ Ibid ss 1041H, 1041E.

⁷⁵ *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA (*‘ASIC Act’*).

⁷⁶ *Corporations Act 2001* (Cth) s 124; *Salomon v Salomon & Co Ltd* [1897] AC 22.

⁷⁷ Ibid s 180.

considerable support within the greenwashing discourse, promoting pursuit of director accountability by initiating litigation against the directors themselves.

This perspective was discussed in a recent report by Noel Hutley and Sebastian Hartford Davis, on an amendment of s 180 in relation to its effect on climate change.⁷⁸ The report drew on the author's previous findings from 2016 and 2019, arguing that the accelerating social changes within corporate conduct displays the necessity for 'elevating the standard of care that would be expected of a reasonable director'.⁷⁹ Although Hutley and Hartford consider the environment more broadly, their discussion also considered the developing relationship of the law and the environment, particularly through the lens of corporate sanctions. This discussion of the standard of care was further interpreted by Edelman J in the judgement of *ASIC v Cassimatis [No 8]*.⁸⁰ In his Honour's judgment, Edelman J drew on previous judgments and academic literature to consider broadening the scope of s 180(1) to include considerations of both public and private interests.⁸¹ His Honour's reasons offered compelling evidence for the broader interpretation of directors' duties, for 'the foreseeable risk of harm to the corporation ... is not confined to financial harm ... it includes harm to all interests of the corporation'.⁸²

It is evident that academics, as well as Australian courts have considered the utility of broader duties of directors in combatting greenwashing.⁸³ S 180 offers an appropriate avenue for greenwashing litigation that could encourage independent accountability and prompt industry change. In a recent appearance at a Senate Inquiry, the Department of Climate Change, Energy, the Environment and Water indicated that many organisations currently factor in penalties for breaches of the law 'into the cost of doing business'.⁸⁴ This "slap

⁷⁸ Noel Hutley and Sebastian Hartford Davis, *Climate Change and Directors' Duties* (Further Supplementary Memorandum of Opinion, 2021), 2.

⁷⁹ *Ibid* 2.

⁸⁰ *Australian Securities and Investments Commission v Cassimatis (No. 8)* [2016] 336 ALR 209 ('*Cassimatis Case*').

⁸¹ *Ibid* [459], (Edelman J). See also *Vrisakis v Australian Securities Commission* [1993] 9 WAR 395 [450] (Ipp J).

⁸² *Cassimatis Case* (n 80) [483] (Edelman J).

⁸³ Hutley and Hartford (n 78) 2.

⁸⁴ Senate Standing Committee on Environment and Communications, *Inquiry into Nature Positive (Environment Protection Australia) Bill 2024 and related bills*, Canberra, ACT, 26 July 2024, 82 (Mr Knudson, Deputy Secretary of the Department of Climate Change, Energy, the Environment and Water).

on the wrist” approach does not promote adequate deterrence against greenwashing within the meat and seafood industry. However, s 180 may provide the necessary independent accountability, when a corporation is found in breach of the law, which could trigger a breach of the director’s duty to act with care and diligence. If found in breach of this duty, ASIC is afforded the powers under *the Act* to invoke civil penalty proceedings against the director for a significant payment,⁸⁵ placing ASIC as the forerunner for proper accountability for greenwashing. However, this dependence upon our regulatory bodies to invoke this litigation may generate significant resistance, particularly without the Parliament’s ongoing support. This aspect will be discussed in more detail below.

D Critical Analysis of the ACCC and ASIC

The ACCC and ASIC are the leading statutory bodies in sanctioning organisations for misleading and deceptive conduct. The ACCC has continually raised concerns over the effect of misleading claims within business practice, with the establishment of the Trade Practices Commission in 1992 generating voluntary guidelines for misleading environmental claims.⁸⁶ Although the Commission’s powers were limited to entering an enforceable undertaking with companies,⁸⁷ the ACCC further demonstrated its focus on greenwashing in its 2023 internet sweep of greenwashing claims.⁸⁸ Whilst revealing that 57% of environmental claims were unlikely to be substantiated,⁸⁹ the Commission was criticised for its predominant focus on small businesses, rather than imposing severe penalties on big corporations.⁹⁰ Thus, at present the ACCC has not been entirely successful in preventing greenwashing, as per the AOL ‘there is little to no action taken against businesses who are selling misleading products’.⁹¹ Hence, the ACCC’s regulatory power in sanctioning misleading environmental claims, currently lacks the strength required to promote significant industry change. It is clear the ACCC remains committed to protecting consumers from misleading

⁸⁵ *Corporations Act 2001* (Cth) s 1317J.

⁸⁶ Nehme and Adams (n 38) 53.

⁸⁷ *Ibid.*

⁸⁸ Australian Competition and Consumer Commission, *Greenwashing by businesses in Australia* (Findings of the ACCC’s internet Sweep of Environmental Claims, 2023), 6.

⁸⁹ *Ibid* 1.

⁹⁰ AOL Submission (n 39) 4.

⁹¹ *Ibid.*

environmental claims, however the Commission's unlikelihood to take further regulatory action and focus on larger organisations reveals a concerning gap in our greenwashing policy.

Even though ASIC's direct enforcement capability in relation to misleading and deceptive conduct is limited to the 'financial services' sector,⁹² ASIC has voiced its support for the prevention of greenwashing in various industries, including through proceedings against directors' duties. With reference to the above discussion on the application of s 180, ASIC has recognised 'it is a director's duty to avoid being involved in greenwashing'.⁹³ Additionally, ASIC indicated its intention to move beyond misleading and deceptive conduct in greenwashing litigation and towards director's and officer's duties.⁹⁴ This commitment of ASIC to director's accountability is encouraging, for independent civil penalty claims are likely to promote a shift in "business as usual" practices across all industries. However, this paper has alluded to the under-resourced and over-worked nature of our current regulatory bodies. In a 2023 report into ASIC by the Senate Economics References Committee, concerns were raised regarding ASIC's resourcing and current workload 'noting that ASIC has one of the widest remits of any corporate regulator in the world'.⁹⁵ This presents a potential shortcoming in our current approach to greenwashing, with the ACCC and ASIC withholding the relevant mechanisms to prevent greenwashing but lacking sufficient resources and funding to accurately target greenwashing offenders. Subsequently, this paper asserts that greenwashing litigation will continue to face significant setbacks without the proper support from our Parliament in resourcing its regulatory bodies.

⁹² *ASIC Act* (n 75).

⁹³ Llinos Kent, 'The regulator crack-down: will it all come out in the greenwash?', *Kennedy's Law* (Web page, 10 May 2023) <<https://kennedyslaw.com/en/thought-leadership/article/2023/the-regulator-crack-down-will-it-all-come-out-in-the-greenwash/>>.

⁹⁴ ASIC, 'Red light for greenwashing', *Australian Securities & Investments Commission*, (Article, 7 November 2023) <<https://asic.gov.au/about-asic/news-centre/articles/red-light-for-greenwashing/>>.

⁹⁵ Human Rights Law Centre, Submission No 112 to Senate Standing Committee on Environment and Communications, *Inquiry into Nature Positive (Environment Protection Australia) Bill 2024 and Related Bills* (18 July 2024) 6.

V RECOMMENDATIONS

A *Prioritise the Powers of Australian Regulatory Bodies*

This paper recommends that the Australian Parliament prioritise the powers of our current regulatory mechanism in providing proper sanctions of greenwashing. The ACCC and ASIC already withhold the necessary powers to promote substantive change,⁹⁶ in sanctioning independent directors and conducting ongoing inspections of corporate business. However, the limited resources and significant workload of these commissions operates as a barrier to enabling complete prevention of greenwashing claims. This article strongly recommends the proper support of our current mechanisms to promote systemic change in corporate accountability and protect the Australian consumers from further deceit.

B *Invoke Section 1317E of the Corporations Act 2001 (Cth)*

This article recommends that when a company is found to be in breach of statute, ASIC ought to commence proceedings under s 1317E and seek a civil penalty against the relevant independent director.⁹⁷ Despite a considerable increase in greenwashing proceedings brought against organisations, the independent capacity of a company under *the Act* removes direct accountability of directors involved in greenwashing. On this basis, it is recommended that ASIC makes a proactive effort to invoke this power and deter directors from engaging in greenwashing behaviours.

C *Amend Section 29 of the Australian Consumer Law to Include 'Vague or Unsubstantiated Environmental Claim'*

Section 29 of the *ACL* has been crucial in sanctioning organisations for misleading statements of a products quality and value. However, recent case law has demonstrated its shortcomings in proving 'the degree of risk'.⁹⁸ This barrier within our legislation to prove 'actual harm' is inadequate and outdated against the numerous allegations of greenwashing. Therefore, it is recommended that s29(1)(a) be amended to include 'vague, misleading or

⁹⁶ Nehme and Adams (n 38) 40.

⁹⁷ Note: If found in breach of s 180 (1) of the *Corporations Act 2001* (Cth), ASIC is granted power under s 1317J to bring civil penalty proceedings against the independent director, per s 1317E of *the Act*.

⁹⁸ Kimberly-Clark (n 61) [30].

unsubstantiated' claims as an extension upon representations made of a product's 'quality, value or grade'.⁹⁹

VI CONCLUSION

In contemporary Australia, the ramifications of greenwashing are palpable, with the misleading nature of our meat and seafood industries raising concerns with respect to the inadequacy of consumer protections. Through an analysis of the role of the consumer, greenwashing was found to exacerbate the consumer's vulnerability to the retail market. Although a product's label was found to persuade the consumer, this article equally contemplated the power of non-standard consumers in promoting change and accountability through their consumption choices.¹⁰⁰ Whilst commended for its initial notion to succinctly inform consumers of a product's characteristics, this paper discovered that the increased influence of industry within TPC schemes were a driving cause for the accelerating presence of greenwashing across the meat and seafood industries. Furthermore, the papers focus on the *ACL*¹⁰¹ and the *Corporations Act*¹⁰² acknowledged the steps previously taken by the legislature and judiciary in combatting the threat of greenwashing. Whilst significant discussion was afforded to our legislation's shortcomings, this article's analysis of the *ACL*¹⁰³ and the *Corporations Act*¹⁰⁴ argues there is significant weight in our current mechanisms if our statutory bodies are prepared to take stronger action. Our current litigious approach is ineffective in prompting significant societal change and must be urgently addressed to improve consumer and competition trust. It is imperative that our regulatory bodies and policy makers place the protection of our consumers at the forefront of their decision-making and commit to a complete ban on greenwashing. It is what the everyday Australian deserves.

⁹⁹ *Australian Consumer Law* (n 51) s 29(1)(a).

¹⁰⁰ Decker (n 9) 151.

¹⁰¹ *Australian Consumer Law* (n 51).

¹⁰² *Corporations Act 2001* (Cth).

¹⁰³ *Australian Consumer Law* (n 51).

¹⁰⁴ *Corporations Act 2001* (Cth).