ALL THAT GLITTERS IS NOT GREEN: GREENWASHING INTERVENTIONS AS THE ENFORCEMENT ARM OF SUSTAINABLE FINANCE REGULATION

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'Greenwashing' has become a buzzword in efforts to address global sustainability challenges and particularly the impacts of climate change. Despite the term being commonly invoked, it has lacked a clear legal definition. This article fills this gap. It frames 'greenwashing' intervention as the enforcement arm of sustainable finance regulation and places redress for actual or potential harm by corporate and financial sector entities to the market system and market participants at its heart. Significantly, this means that greenwashing must be seen as only one tool that compliments a broader legal and regulatory architecture for sustainable finance.

I INTRODUCTION

Companies across a range of sectors including energy, vehicles, household products and appliances, food and drink packaging, as well as financial sector entities like superannuation fund trustees, banks and asset managers, are making environmental and sustainability claims that may not necessarily be true. This kind of behaviour has been referred to as 'greenwashing', namely, the range of representations, acts or omissions that companies and financial sector participants might engage in that are false, misleading or lack reasonable basis in terms of their environmental impact.

With the threat of climate change looming and growing, greenwashing has become a source of significant concern to many. This includes not only regulators and policy-makers but also civil society groups, consumers, companies and investors. The Australian Competition and Consumer Commission ('ACCC'), for example, has said that greenwashing limits consumer choice, leads to consumers paying more, unfairly disadvantages businesses doing the right thing and

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undermines consumer trust.[1] In relation to financial products and services, the Australian Securities and Investments Commission ('ASIC') has said that

> [g]reenwashing distorts relevant information that a current or prospective investor might require in order to make informed investment decisions … erode[s] investor confidence in the market for sustainability-related products and poses a threat to a fair and efficient financial system.[2]

Law and regulation are tools to address greenwashing. However, at present, the exact nature of this role has not been clearly articulated. Instead, greenwashing is sometimes used as a 'catch-all' term to refer to problematic behaviours adopted by firms in responding to global sustainability challenges like climate change. In particular, there is a lack of clarity about the rationale driving greenwashing regulation, the legal definition of greenwashing itself and how law and regulation might be used to respond to greenwashing. This gap exists not only in academia but also in practice.[3] This article therefore responds to this gap by addressing the following question: how can law and regulation be used as a tool to address greenwashing?

I argue that greenwashing regulation can be most appropriately conceptualised as part of enforcement activities in sustainable finance regulation. Its core function in this regard is to address the harm caused, or likely to be caused, by corporate and financial entities to the market system and market participants. This is relatively narrow understanding of greenwashing. As such, I argue that greenwashing regulation must complement a suite of other legal and regulatory interventions to ensure that corporations and financial sector participants help to achieve sustainable finance goals, whilst managing their own risks and opportunities. This would form part of an integrated legal and regulatory architecture for sustainable finance. While I concentrate on the legal and regulatory context in Australia, lessons from this jurisdiction offer policy insights for other countries.

This article proceeds as follows. In Part II, I review definitions of greenwashing offered in the literature and identify a particular gap in relation to a legal definition of greenwashing. Next, in Part III, to identify a legal definition, I first go back to identifying the rationale for greenwashing regulation. I argue that these rationales relate back to the need to protect against the harm, or potential harm, caused by greenwashing. Part IV then provides a legal definition of greenwashing, based on an analysis of greenwashing cases in the Australian

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1 Australian Competition and Consumer Commission, *Environmental and Sustainability Claims: Draft Guidance for Business* (Report, July 2023) 7 ('*Environmental and Sustainability Claims*').

2 'How to Avoid Greenwashing When Offering or Promoting Sustainability-Related Products', *Australian Securities and Investments Commission* (Web Page, June 2022) <https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/> ('How to Avoid Greenwashing').

3 See, eg, International Organization of Securities Commissions, *Supervisory Practices to Address Greenwashing* (Final Report, December 2023) 12–14.

and Pacific Climate Litigation Database. Building on this foundation, in Part V, I look at how law might be used as a tool to respond to greenwashing and propose a range of measures possible up-and-down a regulatory enforcement pyramid. Part VI then argues that measures to address greenwashing, whilst important, are only one tool in the toolkit and must be complemented by other measures to produce an integrated regulatory architecture.

II An Elusive Definition of Greenwashing

Many articles looking the issue of greenwashing start with a review of the various ways to define the concept. In this regard, a definitive definition of greenwashing has, intentionally or unintentionally, been elusive in the literature and practice. RepRisk, an environment, social and governance ('ESG') research provider, for example, does not define greenwashing but instead focuses on its consequences. As per their 2022 report, greenwashing 'misleads consumers and stakeholders to view a company's environmental footprint in a more positive light'.[4] Similarly, the United Nations Secretary General's High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities, established to prevent greenwashing in non-state entity's net zero pledges, did not define greenwashing in it's Integrity Matters report.[5] Instead, an attached press release said that '[b]y misleading the public to believe that a company or other entity is doing more to protect the environment than it is, greenwashing promotes false solutions to the climate crisis that distract from and delay concrete and credible action'.[6]

Academic articles across a range of disciplines have adopted different approaches to defining greenwashing. For example, Netto et al focus on the 'how' of greenwashing. In this regard, they argue that greenwashing can occur through 'selective disclosure' (where entities do or do not provide information), 'decoupling' (where entities commit to 'symbolic environmental protection behaviours' but do not actually follow through on these) and 'signalling and corporate legitimacy theory' (where entities make claims to enhance their legitimacy).[7] They also suggest that greenwashing claims can also be made about products or services or entities themselves.[8] Lyon and Montgomery, by contrast, provide a more concrete definition of greenwashing. They define greenwashing

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4 'Spotting Greenwashing with ESG Data', *RepRisk* (Web Page, July 2022) <https://www.reprisk.com/news-research/reports/spotting-greenwashing-with-esg-data>.

5 United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions* (Report, 2022).

6 'Greenwashing: The Deceptive Tactics Behind Environmental Claims', *United Nations* (Web Page) <https://www.un.org/en/climatechange/science/climate-issues/greenwashing>.

7 Sebastião Vieira de Freitas Netto et al, 'Concepts and Forms of Greenwashing: A Systematic Review' (2020) 32(19) *Environmental Sciences Europe* 1, 6.

8 Ibid 7–11.

as 'any communication that misleads people into adopting overly positive beliefs about an organisation's environmental performance, practices, or products'.[9]

However, more relevant to this article, there has been limited legal analysis on the definition of greenwashing. In particular, there is no standard legal definition of the concept. By 'legal definition', I refer to the elements that would need to be proved to substantiate an enforcement action to address such conduct. In Australia, for example, the ACCC's draft guidance says that it 'considers a business will be engaging in greenwashing where they use any claim that makes a product, service or business seem better or less harmful for the environment than it really is'.[10] ASIC defines greenwashing as 'the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical'.[11] While these definitions are helpful at a higher level, it is important to spell out the exact elements of a greenwashing claim so that, inter alia, regulators can target their interventions, companies and financial sector actors can act appropriately, and civil society can hold entities to account. To do so, I consider the rationales for regulating greenwashing in the following Part.

III Greenwashing as the Enforcement Arm of Sustainable Finance

Perhaps it is so obvious it goes without saying, but attempts to regulate greenwashing are undertaken for a reason. Despite this, and perhaps surprisingly, the rationale for addressing greenwashing has largely been taken for granted in academia and practice. In other words, while greenwashing is most definitely seen as a 'bad' thing, there has been limited clarity as to precisely why it is so problematic. Nevertheless, it is important to articulate the underlying motivations driving greenwashing regulation. This is not least because this will inform how the concept itself ought to be defined, but also how it ought to be used as an enforcement tool. Indeed, in this Part, I start to make the argument that greenwashing is the primary enforcement arm for sustainable finance regulation. The core rationale underpinning this is to provide protection against behaviour or practices that cause harm to the market system and market participants. While I concentrate on the Australian context, similar observations may be made in other jurisdictions.

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9 Thomas P Lyon and A Wren Montgomery, 'The Means and End of Greenwash' (2015) 28(2) *Organization and Environment* 223, 226.

10 *Environmental and Sustainability Claims* (n 1) 9.

11 'How to Avoid Greenwashing' (n 2).

A *Sustainable Finance Regulation*

Greenwashing interventions are situated within the broader context of sustainable finance regulation. This requires a definition of sustainable finance regulation. Taking the 'sustainable finance' part of this first, there is not one single definition of sustainable finance. At its most narrow, it could merely be understood as finance that delivers returns in the longer term. However, this misses the critical connection between the concept of sustainability and its relationship with social and environmental challenges. Reflecting this, therefore, others have put forward a broad definition of sustainable finance. For example, the Australian Government has defined 'sustainable finance' as describing 'financial flows that integrate consideration of impacts on society and the natural environment', reflecting the role that the financial sector can play in addressing global challenges and that these challenges also pose opportunities and risks to financial entities and the system itself.[12] From an academic perspective, Schoenmaker and Schramade have said that it 'looks at how finance (investing and lending) interacts with economic, social and environmental issues'.[13] A slightly more narrow approach, in the sense that it focuses on the positive impact of finance, suggests that sustainable finance 'is the management of financial resources and investments with the aim of promoting long-lasting, positive, and measurable social and environmental impacts'.[14]

The 'regulation' part of the concept of 'sustainable finance regulation' refers to legal and regulatory tools that aim to enable (both in terms of promoting and removing barriers to) sustainable finance.[15] In other words, sustainable finance regulation is about informing and enabling activities by and decisions from market participants that support sustainability objectives. Jurisdictions around the world are introducing regulatory instruments to further such objectives. These instruments include disclosure frameworks like those from the Task Force on Climate-Related Finance Disclosures[16] and from the International Sustainability Standards Board,[17] as well as sustainable finance

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[12] Department of the Treasury (Cth), 'Sustainable Finance Strategy' (Consultation Paper, November 2023) 5 ('Sustainable Finance Strategy').

[13] Dirk Schoenmaker and Willem Schramade, *Principles of Sustainable Finance* (Oxford University Press, 2018) 4.

[14] Felipe Arias Fogliano de Souza Cunha, Erick Meira and Renato J Orsato, 'Sustainable Finance and Investment: Review and Research Agenda' (2021) 30(8) *Business Strategy and the Environment* 3821, 3826.

[15] A similar definition of 'regulation' is in the following article, although the authors focus on the enabling part of regulation: Iris H-Y Chiu, Lin Lin and David Rouch, 'Law and Regulation for Sustainable Finance' (2022) 23(1) *European Business Organization Law Review* 1, 1–2.

[16] Task Force on Climate-Related Financial Disclosures, *Recommendations of the Task Force on Climate-Related Financial Disclosures* (Final Report, June 2017) ('*Recommendations of the Task Force*').

[17] International Sustainability Standards Board, *IFRS S2 Climate-Related Disclosures* (Report, 2023) ('*IFRS S2 Climate-Related Disclosures*').

taxonomies such as those developed in the European Union.[18] This core purpose of sustainable finance regulation also therefore means that greenwashing interventions are key to enforcement.

B *The Central Role for Market Enforcement Regulators*

The first point to note in relation to understanding the rationale for greenwashing interventions is that such regulation in Australia has largely not come from environmental and climate policy-makers. Rather, regulation to address greenwashing has largely come from the Treasury portfolio. The Treasury portfolio is comprised of activities aimed at achieving 'strong sustainable economic growth for the good of Australians'.[19] Interventions to address greenwashing, therefore, are not necessarily be at first instance about providing good environmental outcomes, although this may be an ancillary outcome of such regulation. Greenwashing, instead, is situated in the context of Treasury's focus on economic activities. Of the entities that fall within Treasury's remit, enforcement agencies, namely, the ACCC and ASIC have been the most active in addressing greenwashing.

The protective mandates of these regulators, the ACCC as competition and consumer watchdog and ASIC as market conduct regulator (including consumer protection), have shaped the way greenwashing regulation is approached in Australia. In particular, greenwashing regulation is a tool for enforcement and compliance. This compliance and enforcement function relates back to the mandates of each of these regulators. The ACCC aims to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.[20] ASIC has responsibilities to, inter alia, 'maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy' and to 'promote the confident and informed participation of investors and consumers in the financial system'.[21]

Greenwashing regulation therefore has been developed by market conduct regulators. In recent years, both the ACCC and ASIC have issued soft-law guidance briefly discussing why they are taking enforcement action to address greenwashing. Importantly, the reasons they give relate back in a broad sense to the need to protect market participants and the market system itself (the

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[18] *Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088 (Text with EEA Relevance)* [2020] OJ L 198/13.

[19] 'Treasury Portfolio', *Treasury* (Web Page) <https://treasury.gov.au/the-department/about-treasury/our-portfolio>.

[20] *Competition and Consumer Act 2010* (Cth) s 2.

[21] *Australian Securities and Investments Commission Act 2001* (Cth) ss 1(2)(a)–(b).

significance of this is developed below). In its draft guidance for businesses making environmental and sustainability claims, the ACCC focuses primarily on the harm to consumers, as well as touching on the detriment to other market participants. They state that environmental claims that are false or misleading:

- limit a consumer's ability to make informed choices
- lead consumers to pay more for the value of an environmental benefit that doesn't exist
- unfairly disadvantage businesses which do make significant investments in genuinely pursuing more sustainable products or services
- undermine consumer trust in environmental claims in general and can create a disincentive for businesses to invest in more sustainable practices.[22]

ASIC's guidance similarly focuses on the harm of greenwashing and the need to protect a particular cohort, namely, investors. In its information sheet, the regulator has said that greenwashing

> distorts relevant information that a current or prospective investor might require in order to make informed investment decisions. It can erode investor confidence in the market for sustainability-related products and poses a threat to a fair and efficient financial system.[23]

ASIC and the ACCC therefore then focus on the harm of greenwashing and the need for enforcement action to address this.

C *The Core Harm Focus of Greenwashing Regulation*

Above, I have argued that greenwashing regulation in Australia has largely been implemented by regulators with protection and enforcement mandates. In other words, it is an enforcement tool in sustainable finance regulation. However, this raises the question, what does it aim to protect? Below I argue that the primary purpose for regulatory interventions relating to greenwashing are to address harm, or the potential for harm, to market participants and the market system itself. Both of these are taken in turn below. To do this, I broaden the focus beyond the Australian context and include analysis from interdisciplinary and inter-jurisdictional literature.

22 *Environmental and Sustainability Claims* (n 1) 7.
23 'How to Avoid Greenwashing' (n 2).

1 *Harm to Market Participants*

Greenwashing regulation aims to prevent or minimise actual or potential harm to three key groups of participants in the market system. These groups are consumers, businesses and investors.

First, as recognised in the ACCC's draft guidance set out above, greenwashing has the potential to cause harm to consumers. This might include direct financial harms.[24] A straightforward example is where a consumer pays more for a product that claims to have some environmental benefit that does not actually exist. Another example is where an individual switches to a different electricity provider or superannuation fund based on their inaccurate environmental representations and is priced out of access to a cheaper plan. Several studies in this regard have aimed to causally link greenwashing with consumer purchase intentions and behaviour.[25] However, it is important to note that greenwashing does not necessarily have to involve actual harm such as financial loss. Indeed, it may be hard to pinpoint this type of harm in individual cases.[26] For example, a business might attract a consumer on the basis of a misleading environmental claim, but the consumer might not have paid more for the product.

As such, greenwashing regulation not only aims to address *actual* financial harm to consumers. It also aims to address the harm that greenwashing might have on consumer *choice*. In this regard, greenwashing might increase consumers' confusion and mistrust, diminish their willingness to pay more for certain products, and negatively impact their view of environmentally conscious businesses and products.[27] It could also lead to '[s]earch and informational costs involved in evaluating green claims', increase green information making it difficult for consumers 'to pick the "cherries" from the "lemons" which may make them disengage from the market' and reduce trust and increase scepticism for sustainable products and claims.[28] Protecting consumer choice is of fundamental importance, particularly in Western liberal market economies and therefore justifies regulatory intervention.

Beyond consumer protection, I argue that greenwashing regulation exists to address harm to businesses. Market conduct regulators like the ACCC and ASIC are also concerned about taking enforcement action to address greenwashing

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[24] Kristal Burry, 'Consumer Protections for Shoppers Seeking Sustainable Purchasers: What Is Missing?' (2023) 31(1) *Australian Journal of Competition and Consumer Law* 76, 77.

[25] For a review of these publications, see Célia Santos, Arnaldo Coelho and Alzira Marques, 'A Systematic Literature Review on Greenwashing and Its Relationship to Stakeholders: State of Art and Future Research Agenda' (2024) 74(3) *Management Review Quarterly* 1397, 1411–12.

[26] Miriam A Cherry, 'The Law and Economics of Corporate Social Responsibility and Greenwashing' (2014) 14(2) *UC Davis Business Law Journal* 281, 301.

[27] Hendy Mustiko Aji and Bayu Sutikno, 'The Extended Consequence of Greenwashing: Perceived Consumer Scepticism' (2015) 10(4) *International Journal of Business and Information* 433, 438–9.

[28] Burry (n 24) 76–7.

because of the actual or potential harm such behaviour could cause to other businesses. For example, greenwashing might be used by companies to make themselves look better than they are and to get them ahead of their competitors who are acting legitimately.[29] Greenwashing therefore has the potential to unfairly disadvantage businesses investing in sustainable practices and cause them to lose customers they should otherwise have gained. This harm is likely to be especially true in circumstances where companies are paying more to take steps to 'green' their business activities.

Moreover, beyond potentially damaging businesses doing the 'right' thing, businesses engaged in greenwashing might also cause harm to other businesses who are their customers. For example, greenwashing might cause harm to businesses who are in contractual relationships with entities engaged in greenwashing. Lane argues that green commercial players may make misleading representations to business consumers and lead to breach of contract claims, trademark infringement actions or fraud cases.[30] In addition, greenwashing could cause harm to businesses who are themselves engaged in greenwashing. For example, some have shown that if stakeholders perceive that a firm is engaging in greenwashing, this negatively impacts the entity's reputation and credibility,[31] as well as their ability to attract investors.[32]

Finally, enforcement action aims to address harm to investors potentially caused by greenwashing. In this regard, investors are reliant on information from firms to make decisions about where to put their money. If they do not have this information, they are unable to make informed choices. Greenwashing may cause harm because it distorts the information that is available to investors. This may have flow on effects in terms of reducing investor confidence in the sustainability market. The need for high-quality information about the veracity of companies claims regarding their climate commitments and management of climate change risks has driven the rise of frameworks like those proposed in the Task Force on Climate-Related Financial Disclosures' final recommendations and now the International Sustainability Standards Board Reporting Standards.[33] The core focus of greenwashing regulation therefore is as an enforcement tool to address harm to these three groups of market participants.

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29 Yu-Shan Chen and Ching-Hsun Chang, 'Greenwash and Green Trust: The Mediation Effects of Green Consumer Confusion and Green Perceived Risk' (2013) 114(3) *Journal of Business Ethics* 489, 490.

30 Eric L Lane, 'Greenwashing 2.0' (2013) 38(2) *Columbia Journal of Environmental Law* 279, 303.

31 Juliane Keilmann and Thomas Koch, 'When Environmental Claims Are Empty Promises: How Greenwashing Affects Corporate Reputation and Credibility' (2024) 18(3) *Environmental Communication* 266, 281.

32 Lucia Gatti, Marta Pizzetti and Peter Seele, 'Green Lies and Their Effect on Intention to Invest' (2021) 127 *Journal of Business Research* 228, 229.

33 *Recommendations of the Task Force* (n 16); *IFRS S2 Climate-Related Disclosures* (n 17).

2 *Harm to the Market System*

Greenwashing regulation is also the enforcement arm of sustainable finance as it aims to address harm to the market system itself. Market conduct regulators like the ACCC and ASIC, and similar bodies in other jurisdictions, are therefore regulating in this area to prevent these harms. I argue that harm to the market system from greenwashing may manifest in at least two ways.

In one sense, greenwashing has the potential to undermine competitive markets. In Western liberal economies, competitive markets are understood to be 'an efficient means to transmit information, to allocate resources (allocative efficiency), reduce costs (productive efficiency) and to promote invention and innovation (dynamic efficiency)'.[34] Information is essential for competitive markets to function. For example, if a market participant is provided with inaccurate or misleading information, or information is omitted, they cannot make rational decisions before acting. In this way, greenwashing may undermine competitive markets. In addition, companies may use greenwashing to 'exercise market power or gain unfair competitive advantage', reducing competition overall.[35] This is problematic because competitive markets are seen as the main vehicle through which to enhance consumer welfare.

In addition to, and beyond, harm to market competition, I argue that enforcement bodies are taking action to address greenwashing to prevent harm to the specific market for green claims and activities.[36] Greenwashing has the capacity to undermine the existence of the market in the first place. For example, it may undermine consumer trust, increase consumers' suspicion towards green claims and reduce demand for green activities and products.[37] In other words, '[i]f the market is so distorted by "greenwashing noise" that it is difficult to tell real from fake [corporate social responsibility], then why should anyone continue to support such an endeavour?'[38] Thus, greenwashing threatens the integrity of the market. It may be difficult to distinguish greenwashing claims from legitimate claims which therefore decreases transparency. This may have flow on effects in terms of achieving good environmental outcomes. Enforcement action therefore might be undertaken to preserve the integrity of green markets.

3 *The Enforcement Arm of Sustainable Finance*

Putting together the sections above, I argue that the central focus of greenwashing regulation is to be the enforcement arm of sustainable finance

[34] Arlen Duke, *Corones' Competition Law in Australia* (Thomson Reuters, 7th ed, 2018) 27.
[35] Burry (n 24) 77.
[36] Magali A Delmas and Vanessa Cuerel Burbano, 'The Drivers of Greenwashing' (2011) 54(1) *California Management Review* 64, 65.
[37] Chen and Chang (n 29) 489–90.
[38] Cherry (n 26) 302.

regulation. Market conduct regulators like ASIC and the ACCC in Australia are responding to greenwashing to address harm to market participants and the market system. This is protection against harms to individual participants, namely, consumers, businesses and investors, as well as protection against harm to the economic system. This rationale for regulating greenwashing, in turn, can help to usefully identify the scope of a legal definition of the concept, a task to which I now turn in the next section.

IV Legal Elements of Greenwashing in Sustainable Finance Enforcement

Given that a legal definition of greenwashing has been lacking in the literature, in the following Part, I propose a definition based on an analysis of the 38 legal interventions addressing greenwashing in the Australian and Pacific Climate Litigation Database[39] as at November 2023. Almost all these interventions were brought pursuant to misleading and deceptive conduct provisions in the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'), the *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') and the *Corporations Act 2001* (Cth) ('*Corporations Act*') (see discussion in the following sections).

In short, I define greenwashing as conduct (being acts or omissions) that has some connection to sustainability where that conduct is actually, or is likely to be, misleading or deceptive, or otherwise false, as to its impact on sustainability matters. Moreover, an additional characteristic to help regulators to prioritise enforcement action could be a requirement for mental elements, for example, intention, recklessness, negligence and/or knowledge or the existence of actual harm, but these are not essential to prove a greenwashing claim. This definition of greenwashing is informed by the rationale for greenwashing regulation identified above and places redress for actual or potential harm to the market system and market participants by corporate and financial sector entities at its heart. Before discussing each element in turn, I first provide a brief overview of trends in greenwashing cases in Australia.

In addition, I note here that it is beyond the scope of this article to comprehensively assess the analytical or normative force that this definition may play in the future. Rather, providing a clear legal definition of the term is the first step. With a clear definition in place, it will arguably help entities to understand what behaviour does and does not constitute greenwashing. It may also help regulators in terms of prioritising what they should and should not addressing as

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[39] This database records all cases of climate-related litigation in Australia and the Pacific: 'Australian and Pacific Climate Change Litigation', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/index.php>.

'greenwashing' behaviour. Future research projects could look at whether or not these provisions are 'fit for purpose' in terms of providing adequate scope to addressing greenwashing harms.

A *Trends in Greenwashing Cases Over Time*

Several empirical trends can be identified by analysing greenwashing claims in the Australian and Pacific Climate Litigation Database. This database adopts a definition of climate litigation proposed by Peel and Osofsky. Peel and Osofsky define climate litigation as cases where climate change is not only a central issue in the dispute, but also where climate change is raised as a peripheral issue, where climate concerns motivate the lawsuit, or where the case has implications for mitigation or adaptation.[40] The database also includes some legal interventions that occur beyond the courtroom. The definition of 'climate litigation' adopted in the database is broader than those put forward by international litigation database providers.[41] However, the advantage of a broader definition of climate cases means that the database arguably captures trends at the frontier of climate litigation and law. This includes greenwashing cases.

Turning to trends in greenwashing cases in the Australian context, legal interventions to address greenwashing have become more common in recent years. Indeed, more of these interventions have been brought in the last two years (15 in 2023 and 12 in 2022) than in all preceding years (11 cases).[42] Another important observation is that these cases have not just been confined to litigation filed to judicial bodies. Indeed, while just over half of these cases have been brought in courtrooms or before another complaint resolution body (20 cases), other legal interventions have included 12 legal letters written by not-for-profit groups and individuals and 6 infringement notices that have been issued by ASIC.

Greenwashing legal interventions have been brought by and against a range of actors. The parties primarily involved in greenwashing cases have been government regulators, not-for-profit civil society groups and corporate and financial sector participants. On the complainant side, ASIC and not-for-profit groups have been the main complainants in these cases (15 interventions commenced by ASIC and 16 commenced by not-for-profit groups). On the defendant side, these actors have included companies in sectors such as energy, mining, oil and gas, vehicles, banking, and household products (25 cases), and

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40 Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) 8.

41 Sabin Center for Climate Change Law, *Climate Change Litigation Databases* (Web Page) <https://climatecasechart.com/>; Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, *Climate Change Laws of the World* (Web Page) <https://climate-laws.org/>.

42 These numbers are current as at November 2023.

entities in the financial sector namely superannuation fund trustees and an investment manager (9 cases).

Beyond the number and 'who' of greenwashing interventions, greenwashing cases can also be categorised as falling into several main 'types'. In other words, there is arguably a typology of greenwashing interventions that can be identified in the database. These are distinguished by the type of activity that is said to have constituted greenwashing. In this regard, greenwashing cases have pertained to company products or projects or financial products, related to company-wide claims or financial-entity-wide claims, and cases relating to accreditation schemes or logos and symbols. Cases falling into these types have been mainly been brought pursuant to provisions in the *Corporations Act*, the *ASIC Act* and the *Australian Consumer Law*, amongst other provisions. Below lists the provisions that claims for each of these types have been brought pursuant to:

- Company products or projects: *Australian Consumer Law* ss 18, 29, 33; *ASIC Act* ss 12DA–12DB; *Corporations Act* s 1041H; Australian Association of National Advertisers, *Environmental Claims Code* (at 1 May 2018) ss 1–2 ('*AANA Environmental Claims Code*'); *Trade Practices Act 1974* (Cth) ss 52–53 ('*Trade Practices Act*');
- Financial products: *ASIC Act* ss 12DB, 12DF;
- Company-wide claims: *Australian Consumer Law* ss 18, 29, 33; *Corporations Act* s 1041H; *AANA Environmental Claims Code* ss 1–2;
- Financial entity-wide claims: *ASIC Act* ss 12DA–12DB, 12DF; *Corporations Act* ss 247A, 1041H;
- Accreditation schemes or logos and symbols: *Australian Consumer Law* ss 18, 29, 33; *Copyright Act 1968* (Cth) ss 31, 36; *Trade Marks Act 1995* (Cth) s 120; *Renewable Energy (Electricity) Act 2000* (Cth) ss 24B, 154N; *Trade Practices Act* ss 53, 87B.

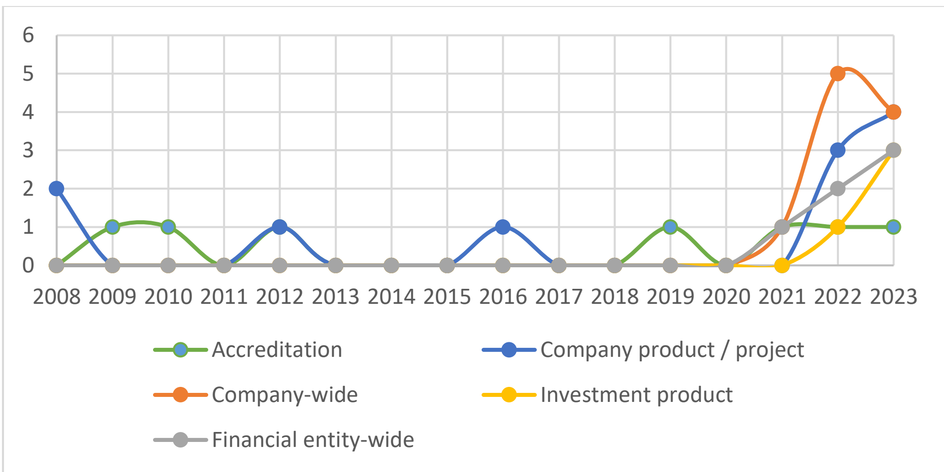
A typology of greenwashing cases is particularly useful to identify two 'generations' of greenwashing cases that have been filed in Australia: first generation and next generation greenwashing cases.[43] To elaborate, as per the graph below, between 2008 to 2021, 'first generation' greenwashing cases only fell into two of the types identified above, namely, cases related to company products or projects, or to accreditation schemes or logos. The cases in these categories related to false or misleading claims made in relation to particular products or projects marketed as having 'green' credentials, for example, tyres or paint, or claims made by companies that their products or services were

[43] The idea of 'distinguishing between' is inspired by Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the "Next Generation" of Climate Change Litigation in Australia' (2017) 41(2) *Melbourne University Law Review* 793.

accredited under particular schemes. Such claims have continued to be filed, with an increase in the number of company product/project cases in particular in 2022 and 2023. However, at the same time, there has also been a rise in 'next generation' greenwashing cases.

The next generation of greenwashing cases have appeared between 2021 and 2023. Unlike first generation cases that related to particular company products and projects, next generation cases have related to financial product, company-wide and financial-entity-wide claims. Taking each of these in turn, similar to greenwashing cases brought in relation to misleading claims about company products or projects, claimants in next generation greenwashing cases have challenged representations made by financial sector entities about financial products. These products have included misleading claims about the 'greenness' of superannuation products or other investment fund products. However, cases falling into the next generation of greenwashing legal interventions have also challenged sustainability conduct at an entity-wide level. These cases challenge the conduct of corporate and financial sector entities.

Table 1: Trends in Greenwashing Cases Over Time



In terms of thinking about the future of greenwashing cases, it is likely that enforcement action will continue to grow. This may include claims falling across the range of types of interventions identified thus far. While forecasting future trends in greenwashing litigation is beyond the scope of this article, what is important is the observation that an increasing interest in the topic means it is essential to clearly identify what is, and what is not, greenwashing. As such, in the following section, I consider elements of a legal definition of greenwashing.

B *Elements of a Legal Definition of Greenwashing*

Despite the increasing number of greenwashing cases being pursued by regulators and civil society groups elements of enforcement action to address greenwashing have not been spelled out in detail in existing case law or literature.[44] This may be due to the fact that greenwashing is still a relatively new phenomenon and therefore the contours of the concept are still being navigated. However, I argue that it is important to identify elements of an enforcement action to address greenwashing. This will help regulators understand where to prioritise their interventions, so companies and financial sector actors can act in accordance with the law and so that others (including civil society groups and individuals) can identify what constitutes greenwashing behaviour and what constitutes legitimate environmental action. Possible elements are therefore identified below. While this concentrates on the Australian context, these elements could be adopted in other jurisdictions.

1 *Conduct (Act or Omission)*

First, enforcement action must relate to some 'conduct' undertaken by a corporate or financial sector entity. This conduct includes 'positive' acts or representations made by a corporate or financial sector entity. By positive acts or representations, I mean entities actively 'doing something', rather than commenting on the morality of the conduct. Such positive conduct could include empty or exaggerated claims, provision of inconsistent or irrelevant information, outright lies, and/or suggestive terminology, imagery and sounds.[45] For example, in *Australasian Centre for Corporate Responsibility v Santos Ltd*,[46] complaints relate to statements made in Santos' reports and briefings. In this case, the statements themselves are the positive conduct. Similarly, positive conduct has involved representations made by a company as to the environmental benefits of Eagle LS2000 tyres in media releases, point of sale material, flyers and the company's website.[47] In other cases, positive conduct has included statements in a Facebook

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[44] However, since writing this article, the Federal Court of Australia has said that greenwashing is not governed by a specific statutory regime and is instead to be determined pursuant to existing provisions on misleading and deceptive conduct: *Australian Securities and Investments Commission v Mercer Superannuation (Australia) Ltd* [2024] FCA 850, [53] (Horan J) ('*ASIC v Mercer*').

[45] This 'positive' conduct was identified by European regulators, although they focus only on the provision of information: European Securities and Markets Authority, *Progress Report on Greenwashing* (Report, 31 May 2023) 18 ('*Progress Report on Greenwashing*').

[46] (Federal Court of Australia, NSD858/2021, commenced 25 August 2021). The case was adjourned, part heard, on 6 November 2024 by the Federal Court. For discussion, see 'Australasian Centre for Corporate Responsibility v Santos Ltd', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=701&browseChron=1>.

[47] See 'Australian Competition and Consumer Commission v Goodyear Tyres', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=618&browseChron=1> ('Goodyear Tyres').

post,[48] ASX announcements,[49] and statements on the entity's website[50] or product disclosure statements.[51]

Beyond positive conduct, I also argue that enforcement action could address the 'negative' conduct of a corporation or financial sector entity. By negative conduct, I refer to entities not doing something ie omissions. Such negative conduct could include selective disclosure, lack of information, vague statements, lack of clear and meaningful comparisons, unsubstantiated claims or outdated information.[52] For example, in one case, a complaint was lodged about statements made by Glencore that discussed their involvement in mining minerals for a low carbon future but were silent about their current operations focused on coal mining.[53] In this case, the conduct was the omission of information. There is an open question as to whether the complete lack of action by a corporate or financial sector entity could constitute greenwashing. However, it might be argued that this sort of conduct could be better captured under provisions relating to a lack of continuous disclosure to the marketplace[54] or breaches of directors' duties, especially the duty of care and skill.[55] This is because these provisions either specifically account for omissions (eg failure to correct an incorrect information being supplied to the market place pursuant to continuous disclosure provisions) or are sufficiently broad so as to potentially encompass omissions (eg directors'

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48 Australian Securities and Investments Commission, *Infringement Notice: Section 12GX of the Australian Securities and Investments Commission Act 2001* (S02515914, 21 April 2023). For discussion, see 'ASIC Issues Infringement Notice to Future Super Investment Services for Greenwashing', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=959&browseChron=1>.

49 Australian Securities and Investments Commission, *Infringement Notice: Section 12GX of the Australian Securities and Investments Commission Act 2001* (B00725794, 20 December 2022) ('*Black Mountain Energy Infringement Notice*'). For discussion, see 'ASIC Issues Infringement Notices to Black Mountain Energy Limited for Greenwashing', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=897&browseChron=1>; 'ASIC Issues Infringement Notice to Tlou Energy Limited for Greenwashing', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=892&browseChron=1> ('Tlou Energy').

50 Australian Securities and Investments Commission, *Infringement Notice: Section 12GX of the Australian Securities and Investments Commission Act 2001* (S02553193, 11 November 2022). For discussion, see 'ASIC Issues Infringement Notice to Superannuation Trustee Diversa Trustees Limited (Diversa) for Greenwashing', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=896&browseChron=1>.

51 Australian Securities and Investments Commission, *Infringement Notice: Section 12GX of the Australian Securities and Investments Commission Act 2001* (S02553190, 11 November 2022). For discussion, see 'ASIC Issues Infringement Notice to Vanguard Investments Australia for Greenwashing', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=894&browseChron=1>.

52 *Progress Report on Greenwashing* (n 45) 18.

53 Ad Standards Community Panel, *Case Report* (Case 0225-22, 28 September 2022). For discussion, see 'Complaints Over Glencore's Net Zero by 2050 Claims', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=945&browseChron=1>.

54 *Corporations Act 2001* (Cth) s 674 ('*Corporations Act*'); ASX, *Listing Rules* (at 5 June 2021) r 3.1.

55 Ibid s 180.

failing to provide information about their current activities constituting a breach of their duty of due care and skill).

2 *Conduct Relates to Sustainability*

In addition, enforcement action to address greenwashing must be directed at conduct that has a connection to sustainability. Greenwashing conduct may be related to sustainability in at least three different ways.[56] First, greenwashing cases have aimed to challenge conduct relating to the product/project or entities' environmental impact. For example, a legal letter written to the ACCC by civil society groups has argued that statements made by the Australian Petroleum Production and Exploration Association about the environmental benefits and future role of gas constitute greenwashing.[57] In another case, ASIC issued infringement notices to Black Mountain Energy[58] and Tlou Energy[59] for making claims that their gas projects would have net zero carbon emissions, when this was unlikely to be true. Other cases relate to sustainability in terms of the environmental impact of certain products such as cars, paint and tyres.[60]

In addition, greenwashing conduct could also be connected to sustainability in terms of the methods and procedures used by company or financial sector entity. For example, in *Australian Securities and Investments Commission v LGSS Pty Ltd*,[61] ASIC had commenced civil penalty proceedings against Active Super for

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[56] These are environmental impact, methods and procedures, and strategy and engagement (including targets). Note that in the European context they have said that sustainability topics about which a claim is communicated have related to three categories: governance and resources, environment, social and governance ('ESG') strategy, and sustainability metrics and targets. See *Progress Report on Greenwashing* (n 45) 18.

[57] See 'Complaint Lodged on Potentially False or Misleading Conduct by APPEA', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=971&browseChron=1>.

[58] *Black Mountain Energy Infringement Notice* (n 49).

[59] Australian Securities and Investments Commission, *Infringement Notice: Section 12GX of the Australian Securities and Investments Commission Act 2001* (S02563037, 18 October 2022). For discussion, see 'Tlou Energy' (n 49).

[60] See, eg, *Mitsubishi Motors Australia Ltd v Begovic* (2023) 98 ALJR 155, discussed in 'Mitsubishi Motors Australia Ltd v Begovic', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=681&browseChron=1>; *Australian Competition and Consumer Commission v DuluxGroup (Australia) Pty Ltd* [2014] FCA 1158, discussed in 'Australian Competition and Consumer Commission v DuluxGroup (Australia) Pty Limited', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=735&browseChron=1>; *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166, discussed in 'Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=641&browseChron=1>; 'Goodyear Tyres' (n 47).

[61] *Australian Securities and Investments Commission v LGSS Pty Ltd* [2024] FCA 587. For discussion see 'Australian Securities and Investments Commission v Active Super (LGSS Pty Limited ACN 078 003 497 as Trustee for Local Government Super ABN 28 901 371 321)', *The University of Melbourne* (WebPage) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=974&browseChron=1>.

claiming to have screened and eliminated investments that pose too great a risk to the environment and the community. The connection to sustainability there was in the methods used by Active Super to screen investments. In a similar vein, the case of *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd* relates to representations that all securities in the Vanguard Ethically Conscious Global Aggregate Bond Index Fund were screened against certain ESG criteria.[62] This case was preceded by an infringement notice issued by ASIC over claims that the fund had excluded sales of tobacco. Similarly, *Australian Securities and Investments Commission v Mercer Superannuation (Australia) Ltd* relates to claims that a 'Sustainable Plus' investment option excluded investments in certain industries.[63]

Finally, conduct might also be related to sustainability in terms of the entity's sustainability strategy and engagement. For example, a legal letter written to HESTA's trustees challenged representations that:

> HESTA is a leader on climate action and investment in clean energy; HESTA's corporate and investment strategy are aligned with the Paris Agreement; HESTA is reducing its portfolio emissions and aims to reach net zero by 2050; HESTA's investment decisions are in line with [SDGs]; HESTA's investment strategy ... will help deliver long-term value for HESTA members; HESTA is committed to reducing its environmental impact; and HESTA has been engaging with those companies in which it is invested (including Woodside and Santos) to transition them in line with the Paris Agreement.[64]

Another complaint challenged the sustainability representations made by Shell regarding their plans, or lack thereof, to reduce the overall amount of oil and gas produced.[65] In addition, applicants have also sought documents from the Commonwealth Bank after believing that certain investments put the company in breach of their environmental and social investment policy frameworks.[66]

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[62] [2024] FCA 308, [3]–[4] (O'Bryan J). For discussion see 'Australian Securities and Investments Commission v Vanguard Investments Australia Ltd', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=972&browseChron=1>.

[63] *ASIC v Mercer* (n 44) [2] (Horan J). For discussion see 'Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=901&browseChron=1>.

[64] Letter from Environmental Defenders Office to The Trustees for HESTA, 4 August 2022, 2 [3] <https://www.edo.org.au/wp-content/uploads/2023/02/Letter-to-HESTA-Trustees.pdf>. See also Hannah Wootton, 'Bushfire Survivor in Legal Challenge Over Super Fund's Woodside Shares', *The Australian Financial Review* (Sydney, 27 June 2023); 'Legal Letter to HESTA Over Investments in Santos and Woodside', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=967&browseChron=1>.

[65] Ad Standards Community Panel, *Case Report* (Case 0280-22, 25 January 2023). For discussion see 'Complaint Over Shell's Net Zero by 2050 Claims', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=944&browseChron=1>.

[66] See, eg, 'Abrahams v Commonwealth Bank of Australia', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=700&browseChron=1>. This case was resolved by consent, see Order of Markovic J in *Abrahams v Commonwealth Bank of Australia* (Federal Court of Australia, NSD864/2021, 13 April 2023).

3 *Sustainability Conduct is, or is Likely to be, Misleading, Deceptive or False*

The third, and arguably most important, part of a legal enforcement action to address greenwashing, is that the conduct related to sustainability is actually, or likely to be, misleading and deceptive or false. Indeed, almost all greenwashing claims have been brought pursuant to misleading and deceptive conduct provisions under Australian law. This is arguably what distinguishes greenwashing from other types of problematic behaviour. Greenwashing in this regard is not problematic because it relates to conduct that is necessarily 'morally' wrong (although greenwashing could be characterised as moral problem). If the 'wrongness' of greenwashing came from its morally dubious undertones, it would be more likely to see cases brought in relation to unfair practices, unconscionable conduct or unfair contract terms. Rather, greenwashing interventions focus on the harm to market participants and the market system (as set out in Part III).

To elaborate on the harm aspect of greenwashing, claimants in greenwashing cases have relied on a range of provisions prohibiting misleading and deceptive conduct and, in particular, the *ASIC Act* ss 12DA, 12DB(1)(a), (c), (e), 12DF, the *Australian Consumer Law* ss 18, 29 and 33 and the *Corporations Act* s 1041H. These provisions are all slightly different but in the broad sense prohibit misleading or deceptive conduct relating to financial products and services and in relation to corporate goods and services.[67] The central question in these cases is 'whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter'.[68] A successful claim for greenwashing will therefore depend on whether the conduct is likely to be misleading or deceptive to the public and/or to an identified individual.

4 *Mental Elements*

The above has set out the three main elements of a legal enforcement claim to address greenwashing. Enforcement proceedings are therefore based on showing that there was some conduct (act or omission) relating to sustainability and that conduct was, or was like to be, misleading or deceptive or otherwise false. However, beyond these elements, other factors may help regulators to

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[67] It is beyond the scope of this paper to discuss the fragmented nature of this regime. For discussion, see Elise Bant and Jeannie Marie Paterson, 'Developing a Rational Law of Misleading Conduct' in John Eldridge, Michael Douglas and Claudia Carr (eds), *Economic Torts and Economic Wrongs* (Hart Publishing, 2021) 275–302.

[68] *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932, [98] (O'Bryan J). See also *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198 (Gibbs CJ).

distinguish between the types of cases that they ought to bring. In particular, regulators might wish to address greenwashing conduct that involves some 'mental' element, for example, where the corporate or financial sector entity was intentionally misleading or deceptive, negligent or reckless or otherwise had knowledge that their conduct was likely to be misleading or deceptive. These mental elements are not necessarily included in legislation or in case law to date, however, they could be factors that inform the decision from a regulator whether to bring an enforcement action in the first place. In addition, regulators might prioritise greenwashing interventions that cause actual harm to the market system or market participants. This is a space for future research. It also invites further consideration in the next section of how greenwashing might be implemented as a tool for sustainable finance enforcement.

V Implementing the Enforcement Arm of Sustainable Finance

Above I have defined greenwashing as the primary enforcement tool of sustainable finance that focuses on harm to the market system and market participants. Below, I look at how greenwashing might be implemented as an enforcement tool in practice and I provide a typology of the different legal tools that have emerged in Australia to address greenwashing. To date, regulators have largely relied on existing enforcement tools. These have concentrated on prohibiting and punishing harmful conduct, rather than defining what is 'good' environmental conduct. Future research projects could look at whether or not these existing provisions are sufficient to redress the harm that greenwashing causes.

A *Typology of Enforcement Responses*

Enforcement measures to address greenwashing can be characterised according to an 'regulatory enforcement instrument pyramid'.[69] This instrument-pyramid ranges from measures that are less coercive, less interventionist and cheaper, at the bottom of the pyramid, to measures that are more coercive, more interventionist and more expensive at the apex of the pyramid. Below provides a typology of these regulatory responses.

1 *Persuasion*

Two tools of 'persuasion' have emerged in the Australian context to address the harm of greenwashing. The first approach has been to compile surveillance reports on greenwashing. This has been used by regulators as a way to gather

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[69] The 'regulatory enforcement pyramid' has developed in, eg, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 39.

information and also to signal to companies and financial sector entities that they should not engage in greenwashing conduct. ASIC, for example, provided a report on its greenwashing surveillance activities to 'provide transparency to the market on the nature of the matters where [they] have recently intervened'.[70] Similarly, the ACCC issued a report on greenwashing that aimed to 'identify industries or sectors which commonly use environmental and sustainability claims, and to assess whether these claims have the potential to mislead consumers'.[71] These reports concentrate on the harm caused by the greenwashing conduct.

To complement these surveillance and information tools which concentrate on persuasion, ASIC and the ACCC have also issued guidance to companies and financial sector entities to prevent them from doing the wrong thing. In particular, ASIC has put together a list of questions to consider when offering or promoting sustainability-related products. These questions include:

> Is your product true to label? Have you used vague terminology? Are your headline claims potentially misleading? Have you explained how sustainability-related factors are incorporated into investment decisions and stewardship activities? Have you explained your investment screening criteria?[72]

The ACCC has gone down the 'principles approach' route by identifying eight principles for trustworthy environmental and sustainability claims.[73] Again, these guides are not prescriptive as to what 'good' looks like but, rather, they concentrate on making sure entities do not cause harm.

2 *Direct Engagement*

The second type of enforcement tool that has been used to address greenwashing in Australia has invoked more direct engagement with corporate and financial sector entities. Engagement is arguably more interventionist and coercive than persuasion because it is a tool for direct contact with an entity in relation to its conduct. In this regard, for example, ASIC has engaged with a number of entities to ensure they correct their greenwashing behaviour.[74] However, it is not only regulators who may use direct engagement as an enforcement tool. Indeed, civil society groups have been particularly active on this front by writing warning letters to companies and financial sector entities, as well as regulators, to set out evidence that the firm is arguably engaging in greenwashing behaviour.[75] This has been used as tool to not only try to address the problematic behaviour directly by

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[70] Australian Securities and Investments Commission, *ASIC's Recent Greenwashing Interventions* (Report No 763, 10 May 2023) 3 ('*ASIC's Recent Greenwashing Interventions*').

[71] Australian Competition and Consumer Commission, *Greenwashing by Businesses in Australia: Findings of the ACCC's Internet Sweep of Environmental Claims* (Report, 2 March 2023) 4.

[72] 'How to Avoid Greenwashing' (n 2).

[73] *Environmental and Sustainability Claims* (n 1) 5–6.

[74] See generally *ASIC's Recent Greenwashing Interventions* (n 70).

[75] See above Part IV.

asking for regulatory intervention but to also use these letters as a public 'name and shame' tool.

3 *Administrative Notices*

Enforcement action on greenwashing has been more coercive than persuasion or direct engagement. These interventions might be most appropriately saved for entities that have failed to respond to the less coercive enforcement mechanisms identified above. In particular, regulators like ASIC and the ACCC have more coercive enforcement powers to address the actual or potential harm caused by greenwashing to the market system and market participants. For example, ASIC has the power under the *ASIC Act* to issue an infringement notice if they believe 'on reasonable grounds' that there has been a contravention under the Act.[76] As at May 2023, they had issued 11 such infringement notices which are also available on a register on the ASIC website. The ACCC similarly has power to issue infringement notices to entities to address harmful behaviour.[77]

4 *Civil and Criminal Penalties*

At the most extreme end of measures to address greenwashing, both ASIC and the ACCC have taken, and have the power to take, enforcement action in the courts. Indeed, in calendar years 2022–23 and 2023–24, both regulators made enforcement in relation to greenwashing a key priority. For example, one of the ACCC's 2023–24 compliance and priorities was '[c]onsumer, product safety, fair trading and competition concerns in relation to environmental claims and sustainability'.[78] ASIC similarly has made '[m]isleading conduct in relation to sustainable finance including greenwashing' a key priority.[79] This included taking enforcement steps in the courts, which occurred in 2024 and preceding years. Civil and criminal penalties might therefore be thought of as the apex of enforcement action in relation to sustainable finance in Australia.

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[76] ASIC has power to issue infringement notices under a range of provisions. The website with the register is available here: 'Infringement Notices', *Australian Securities and Investments Commission* (Web Page, 30 March 2023) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/infringement-notices/>.

[77] The ACCC's infringement notice website is available here: 'Infringement Notices Register', *Australian Competition and Consumer Commission* (Web Page) <https://www.accc.gov.au/public-registers/infringement-notices-register>.

[78] 'Compliance and Enforcement Priorities', *Australian Competition and Consumer Commission* (Web Page) <https://www.accc.gov.au/about-us/accc-priorities/compliance-and-enforcement-policy-and-priorities>.

[79] 'ASIC Enforcement Priorities', *Australian Securities and Investments Commission* (Web Page, 14 November 2024) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/>.

B *Further Steps to Strengthen Greenwashing Enforcement*

There are at least three ways policy-makers could strengthen the use of greenwashing as an enforcement tool. First, I argue that there is a need to think for policy-makers and regulators to think around how interventions could be prioritised. One possibility could be to prioritise enforcement action against those 'entities that flagrantly disregard Australian laws and misrepresent their sustainability related risks, credentials and strategies' as compared to 'entities that adopt a "best endeavours" approach to managing their sustainability related risks, credentials and strategies'.[80] This would attempt to address concerns about 'greenhushing' ie entities who fail to disclose any of their actions on sustainability for fear of regulatory enforcement. In addition, an alternative or complementary factor could be to prioritise interventions in terms of the conduct that has the most potential to cause harm to the market system and market participants. Further thought could be given to devising these criteria for legal interventions.

Second, and in addition to specific enforcement tools outline above, thought could be given to creating an administrative body to issue administrative guidance on, and to 'police', greenwashing. This body would step in prior to enforcement action being brought in court. The body's mandate would be to act as a watchdog on false, misleading or deceptive sustainability-based conduct that might cause, or which has caused, harm to market participants or the market system. It could do this by determining disputes regarding whether or not particular conduct constituted greenwashing. In this way it could publish decisions on greenwashing behaviour. The body could also provide a space for government, private sector and civil society groups to work together to identify what is positive environmental conduct (ie what is not greenwashing), potentially informed by sustainable finance taxonomies being developed around the world.

Finally, the forthcoming reform to the *Corporations Act* in Australia will make climate risk disclosure mandatory, alongside the Australian Accounting Standards Board consultation on reporting standards. While, currently, these changes will require entities to disclose their climate-related risks, it is likely that these standards will be broadened in the future to encompass other sustainability matters, like nature.[81] The disclosure of this information could help strengthen greenwashing enforcement by providing investors and regulators with information about how entities are responding to sustainability challenges like climate change. Market participants, like investors, will have access to more information through reporting about the credibility behind an entities' climate commitments. In addition, this could help regulators to prioritise which entities

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80 Business Council of Australia, Submission No 57 to Senate Standing Committees on Environment and Communications, Parliament of Australia, *Inquiry into Greenwashing* (June 2023) 3.

81 'Sustainable Finance Strategy' (n 12) 5.

to bring enforcement actions against, while also supporting those who need assistance in meeting sustainability targets.

VI Enforcement as Part of an Integrated Sustainable Finance System

In Part V, I argued that legal responses to greenwashing are the essential enforcement arm of sustainable finance regulatory architecture. As explained earlier, I define sustainable finance regulation as legal and regulatory developments that provide support for and remove barriers to financial flows that integrate consideration of impacts on society and the natural environment. However, given the narrow focus of greenwashing, it is also important to consider how it fits within a broader architecture of sustainability finance regulation in each country. In this Part, I concentrate on the Australian context but suggest that similar thinking might be undertaken in other jurisdictions.

A *An Overarching Governance Body*

It is important that there is an integrated legal and regulatory architecture to govern sustainable finance in Australia. Up to now, much of the focus of regulators and policy-makers, as well as firms and civil society, has been to develop the building blocks for sustainable finance. This includes taking steps to address greenwashing. However, with the Treasury's Sustainable Finance Strategy released in November 2023, there is an opportunity to start to draw all these strands together to ensure that the financial system plays a role in addressing global challenges, including by delivering financial flows for climate change mitigation and adaptation, and that it manages its own risks and opportunities in the face of these challenges.[82]

Implementation of this overarching legal and regulatory architecture could be led by a 'Sustainable Finance Taskforce', a permanent governance body situated within, or exterior to, Treasury that aims to draw together all the different components of sustainable finance in Australia. This Taskforce would adopt a 'regulatory instrumentalist' approach (put simply, a problem-solving approach) where law and regulation are used as the means to implement policy to address sustainable finance problems.[83] In particular, the Taskforce might report annually to Treasury with law, regulation and policy recommendations that are necessary to achieve priority outcomes on sustainable finance.

[82] These ideas were developed in Sustainable Finance Hub, Melbourne Climate Futures, Submission to the Department of the Treasury (Cth), *Sustainable Finance Strategy* (1 December 2023).

[83] This is the approach taken in another new area of regulation: Iris H-Y Chiu, *Regulating the Crypto Economy: Business Transformations and Financialisation* (Hart Publishing, 2021) 45.

B *Review Existing and New Legislative and Regulatory Actors and Tools*

The first activity for the Taskforce could be to undertake three mapping and review exercises with a view to understanding how all the different components of sustainable finance 'fit' together and, most relevant to this article, how these interact with greenwashing regulation. First, the Taskforce could undertake a mapping and review exercise of the different actors involved in regulatory standard setting and policy development relevant to sustainable finance. This would include reviewing all the mandates of government departments, firms involved in standard setting and non-government organisations and civil society groups also involved in regulatory development. Second, the Taskforce might undertake a mapping and review of existing legal frameworks in Australia relevant to sustainable finance, including a review of current corporate governance obligations, prudential frameworks and oversight, and review of the superannuation system. Third, the Taskforce might undertake a mapping and review exercise of the new legal and regulatory tools that are being developed such as the disclosure framework, the sustainable finance taxonomy and labelling requirements for sustainable investment products.

The aim of these mapping and review exercises would be to assess how well all these mandates and frameworks fit together to provide a framework to address greenwashing. Some ideas include:

- Assessing the mandates of regulators like ASIC and the ACCC to determine whether they are broad enough to include interventions to address greenwashing, as well as to assess any capacity constraints.
- Considering whether the misleading and deceptive conduct provisions are sufficiently broad to address greenwashing or whether there needs to be some expansion to these provisions.
- Using tools like the forthcoming Australian Sustainable Finance Taxonomy,[84] new disclosure reporting requirements and investment labelling to identify what is and what is not greenwashing.
- Creating a regulatory space (potentially in an administrative body) where firms, regulators and civil society actors could provide examples of 'best practice' sustainability behaviour to drive conduct away from greenwashing conduct.

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84 'Taxonomy Project', *Australian Sustainable Finance Institute* (Web Page) <https://www.asfi.org.au/taxonomy>.

VII Conclusion

Addressing greenwashing has become a significant priority for policy-makers and regulators in recent years. This makes it all the more important to articulate a crisp legal definition of greenwashing. A clear legal definition could help to clarify that the purpose of greenwashing is to regulate conduct of corporate and financial sector entities that could harm market participants or the market system. However, interventions to address greenwashing cannot exist in isolation. Rather, there ought to be careful consideration as to how this enforcement tool fits within an integrated sustainable finance regulatory architecture. This includes by providing for an overarching governance body and reviewing the range of tools that could be used to address greenwashing and other sustainable finance issues.