

Submission to the Senate Inquiry – Greenwashing

8 June 2023

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Australians are bombarded with claims about green and sustainable features of products and services. Marketers and businesses are trying to tap into a growing desire of many Australians to actively look after people and planet. **Yet the nature of many green claims means that consumers cannot verify them—they are left hoping that businesses are doing the right thing and following through on their sustainable promises.**

We need stronger protections to stop inaccurate and misleading green claims, but this isn't the only challenge for governments. We cannot just stop poor information; we also need to encourage the release of more accurate and useful information about sustainable factors to help consumers make informed decisions.

The Consumer Policy Research Centre (CPRC) is a not-for-profit think tank that champions new thinking to create systemic change for consumers. We have been researching consumer views on green claims and the harms of greenwashing. We have further research underway into green claims being made on social media.

From our research and engagement with other consumer experts, we know that sustainable purchasing choices are dependent on consumer buy-in, protection and empowerment. As stated by Consumers International Director-General Helena Leurent in 2022, *"...it is clear that climate change could slip down on consumer priorities if there is no action to ensure that sustainable choices aren't expensive or unaffordable for all consumers, everywhere. Consumer buy-in is, therefore, needed in the solution. Climate change action must be linked to broader consumer empowerment or else decreasing consumer trust will be ripe for exploitation"*.¹

Australia does have a strong consumer protection framework that can stamp out many misleading and deceptive practices, and regulators have been ramping up their enforcement to stop unhelpful green claims. However, there are clear gaps in our laws and regulatory frameworks that the Federal Government must address to help consumers play a meaningful role in the transition to a genuinely green economy.

We recommend five broad types of action to address greenwashing and provide Australians with the confidence they deserve when they make sustainable choices. The Federal Government should:

1. **Stop poor green claims:** ban claims that are inherently deceptive and develop standard definitions for commonly used but confusing environmental terms.
2. **Make the Australian Consumer Law more powerful to deal with greenwashing:** Our consumer law still allows unfair business practices to thrive and does not penalise businesses that repeatedly fail to repair or fix problem products (i.e., comply with the consumer guarantees). Making the consumer law stronger will help address other common consumer issues, as well as greenwashing.

¹ Helene Leurent, Consumers International, 'Tackling the climate crisis starts with consumer protection and empowerment', 23 May 2022, <https://www.weforum.org/agenda/2022/05/tackling-climate-change-starts-with-consumer-empowerment/>.

3. **Get good quality information about environmental factors in front of consumers:** use labelling to help people understand the environmental impact of a product or service, how long it will last and if it can be repaired or recycled. Require businesses to regularly report on their environmental impact as a way to provide basic, comparable information that can be used to help consumers.
4. **Make it easier for consumers to compare green options:** Find new ways to help people put products and services side-by-side to understand better green options. Make sure that trustmarks and certifications are useful and genuinely trustworthy.
5. **Make products and services more sustainable:** Information and disclosure alone won't help create a green economy. We need to explore how the consumer law can introduce new minimum standards for environmental performance.

We would welcome the opportunity to work with the Senate Committee and share further insights from our consumer research projects. For further discussion regarding our research and the contents of this submission, please contact erin.turner@cprc.org.au.

Yours sincerely

A handwritten signature in black ink, appearing to be 'ER' followed by a long horizontal line.

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Summary of recommendations

Action needed	Recommendations to implement the change
<p>Stop poor green claims</p> <p>Develop standard definitions of commonly used environmental terms.</p> <p>Ban claims that are inherently deceptive</p>	<p>Recommendation 2: Empower the ACCC and ASIC to consult and make rules with respect to generic environmental claims (including banning the use of terms) in line with legislated objectives.</p> <p>Recommendation 3: Include a blacklist of unfair practices related to ‘green’ advertising claims when developing a prohibition on unfair trade practices for Australia.</p>
<p>Make the Australian Consumer Law more powerful to deal with greenwashing</p> <p>Make unfair business practices illegal</p> <p>Make it easier to get broken things fixed</p> <p>Make it easier to resolve complaints and for individuals to take action</p> <p>Penalise companies that repeatedly don’t fix problems</p>	<p>Recommendation 1: That Federal, State and Territory Governments proceed quickly to enact a prohibition on unfair trade practices, covering unfair omission of relevant information, including environmental impacts.</p> <p>Recommendation 4: Amend the ACL to include a new consumer guarantee for manufacturers to provide reasonable software updates for a reasonable time after purchase.</p> <p>Recommendation 5: Improve alternative dispute resolution processes to empower consumers to resolve disputes relating to durability or reparability of goods.</p> <p>Recommendation 6: Amend the ACL to enable ACL regulators to obtain pecuniary penalties for breach of consumer guarantees.</p> <p>Recommendation 16: Adopt improvements to private redress measures for greenwashing to support a greater incentive for firms to comply with the law, including a ‘justice fund’ to support public interest claims, overcoming evidentiary barriers to class actions, and improving individual alternative dispute resolution options.</p>

<p>Get good quality information about environmental factors in front of consumers</p> <p>Create a label to tell people how long a product will last, how easy it will be to repair and if it can be recycled.</p> <p>Make businesses that use complex claims about future environmental benefits be transparent about the evidence they're using</p> <p>Require businesses to report on their environmental impact overall in a standard, regular format</p>	<p>Recommendation 7: Develop a mandatory, government-led product labelling scheme covering durability, repairability and recyclability to provide information that is accurate, relevant, consistent, and actionable. Ensure labelling and disclosure requirements are consumer-tested and developed independently of industry (although with appropriate input).</p> <p>Recommendation 8: Require businesses that make environmental claims relating to carbon offsets to publicly substantiate these claims and explain what other actions have been taken before adopting offsets.</p> <p>Recommendation 9: Require businesses that make 'forward looking' environmental claims to substantiate the claims by setting milestones for achieving the commitment and regularly reporting on achievements.</p> <p>Recommendation 10: The introduction of Corporate Sustainability Reporting must be accompanied by measures to ensure integrity of reporting as well as efforts to translate information so it is useful and effective for consumers.</p>
<p>Make it easier for consumers to compare green options</p> <p>Create guides for good comparison sites or systems</p> <p>Explore how we can rank products or companies on green credentials</p> <p>Reduce the number of trustmarks and certification schemes in the market</p> <p>Make sure trustmarks and certification schemes meet minimum quality standards</p>	<p>Recommendation 11: That the ACCC update its guidance on comparator websites to provide guidance regarding comparison on environmental, social, or ethical concerns.</p> <p>Recommendation 12: Policy makers should explore extending existing government comparison services in energy and superannuation to cover environmental and social factors, including making salient the worst performers in comparison results.</p> <p>Recommendation 13: Ensure environmental trustmarks or certification schemes are subject to:</p> <ul style="list-style-type: none"> • mandatory authorisation or approval by a regulator (such as the ACCC) which has demonstrated expertise in considering consumer and public benefit outcomes • a requirement that there is only one scheme allowed for each sector or product type, and • assessment as to whether the trustmark or certification scheme has: <ul style="list-style-type: none"> ○ robust governance standards, including consumer interest representation at the oversight entity level ○ independence from the industry it seeks to oversee

	<ul style="list-style-type: none"> ○ scheme requirements that are developed by experts to ensure scientific rigour ○ transparency and adequacy of certification standards and oversight arrangements, including appropriate complaint processes and the ability to suspend or remove certification should there be persistent non-compliance, and ○ utilised effective public consultation during development and regular review of schemes. ○ A unique contribution when compared with existing certifications or trustmarks.
<p>Make products and services more sustainable</p> <p>Explore a new consumer protection about minimum environmental performance.</p> <p>Use existing laws to improve investment products</p>	<p><u>Recommendation 14:</u> Conduct an independent review (with secretariat support from Treasury) to investigate an ACL consumer guarantee for goods and services relating to environmental performance. This review should also consider marketing practices that encourage over-consumption.</p> <p><u>Recommendation 15:</u> ASIC should take active compliance and enforcement action on product design and distribution obligations to promote sustainable investment choices.</p>

Green claims in Australia

Claims being made by companies

In 2021, CPRC undertook research to better understand what it is like to be a 'green' consumer in Australia.² This research used a 'day-in-the-life' scan to document the types and location of green claims over a 24-hour period on a typical weekend. The day-in-the-life scan was designed to be conducted both online and offline and serve as a snapshot of green claims.

We found that green claims are everywhere—in 24 hours, we documented 122 green claims across 17 sectors including groceries, personal care products, banking, and superannuation. Only 39 of 122 green claims had any supporting evidence or verification to provide confidence that the claim was accurate or meaningful.

Many of the claims we saw were unhelpful, confusion or potentially misleading. For example, some of the unhelpful claims we saw included:

- “our freezers are greener” with no contextual information to understand what the claim was comparing freezers against.
- “Banking you can feel good about” with numerous images of happy wildlife and green technology like windfarms but no context about what the bank was actually doing to make a meaningful contribution to any environmental cause.
- A “GoZero” Soda Maker with no information about what “GoZero” meant (i.e., zero plastic? Zero emissions?)
- Trustmarks or images on products that looked like certification schemes but where the business isn't participating in any external program to verify what they're doing.

We have provided our research into green claims and the consumer experience as attachment one to this submission.

The impact of greenwashing on consumers

CPRC has also undertaken a nationally representative survey of 2,000 Australians seeking views about green claims. The results included:

- 74% of people recall seeing green claims on product labels, particularly in household cleaning products, groceries and beauty/personal care products.
- 45% of people say that they always or often consider sustainability as part of their purchasing decision-making.
- around 50% said that they were worried about green claim truthfulness across every sector.
- 69% of those surveyed said they were likely to trust a green claim that had a trustmark with it.
- 45% of Australian think someone checks green claims before they are used, either government, industry associations or AdStandards.

CPRC's and other's research³ confirms that greenwashing harms consumers, the marketplace, and the environment.

² CPRC, 'The consumer experience of green claims in Australia', December 2022, <https://cprc.org.au/green-claims/>.

³ ACCC, 'Greenwashing by businesses in Australia - findings of ACCC's internet sweep', March 2023, <https://www.accc.gov.au/about-us/publications/greenwashing-by-businesses-in-australia-findings-of-acccs-internet-sweep>.

Consumer harm: Consumers can experience financial harms. They may spend more on a green product, spend money that they would have on another genuine green product, or risk losing money due to an untrue claim.

Environment harm: Greenwashing can erode consumer trust in labels and certification schemes, or genuine green claims. When businesses fail to act on promises made that should be contributing to larger sustainability goals, consumers can in turn have a reduced desire to adopt sustainable actions. Our research shows that many people would feel manipulated if they discovered a business had been greenwashing.⁴ They also felt it would impact on their ability to exercise their choices and desire to be more sustainable in the future.

Market harms: Greenwashing can also impact market competition. Companies engaging in greenwashing may be able to exercise market power or gain an unfair competitive advantage which has the potential to reduce competition in some markets. This is likely to create harms for those businesses who are using green claims responsibly.

⁴ CPRC, above n 2.

International approaches to greenwashing

Lessons Australia can learn from international approaches

We've looked at the approach that four jurisdictions have taken or are planning to take to stop the harm caused by greenwashing. A summary of our findings is in the section below.

Looking at how other countries are regulating green claims, we see two lessons that Australia should consider.

First, is that stopping harmful green claims only addresses part of the problem. While many jurisdictions are restricting the use of unhelpful or misleading claims, this is being done alongside of action to encourage or require disclosure of key information to support consumer decision making.

The second important observation is that regulators cannot address this issue alone. Regulators are well placed to issue guidance and enforce existing laws, but specific law reform is required to stop some of the most harmful practices.

A summary of international approaches to greenwashing

Below is a summary of our understanding of different approaches to regulating green claims across four major jurisdictions: the European Union, New Zealand, the United Kingdom and the United States (Federal only, note we haven't examined state-level legislation).

Jurisdiction	Law or regulation	Intended outcome
EU	Amendments to the Unfair Commercial Practices Directive (proposed).	Stop misleading green claims Information disclosure (repair and durability)
	Directive on Substantiation and Communication of Explicit Environmental Claims (proposed)	Pre-market green claim approval Substantiate claims, improve rigor and trust in labels/trust marks
	EU Corporate Sustainability Reporting Directive & European Sustainability Reporting Standards	Disclose business environmental and social impact
NZ	Green marketing guidelines	Stop misleading green claims
	Mandatory climate-related disclosures	Disclose business climate impact
UK	Green claims code (voluntary)	Stop misleading green claims
	Financial sustainability disclosures regime (in development)	Disclose business climate impact Reduce greenwashing
US	FTC green guidelines (under review)	Stop misleading green claims
	SEC Rules to standardise climate-related disclosures (proposed)	Disclose business climate impact

Europe

Proposed Amendments to the Unfair Commercial Practices Directive (UCPD)⁵

⁵ European Commission (2022), *Proposal for a directive of the European Parliament and of the Council amending Directives 2005/29/ER and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information* https://eur-lex.europa.eu/resource.html?uri=cellar:ccf4e0b8-b0cc-11ec-83e1-01aa75ed71a1.0012.02/DOC_1&format=PDF

This reform was proposed by the European Commission in March 2022 and passed by the EU parliament in April 2023.⁶ We understand that it is still to be considered by the EU Council and implemented by member states.

The reform:

1. Bans some specific green claims including:
 - a. the use of generic environmental claims without evidence of “excellent environmental performance” relevant to the claim. Generic claims include: eco-friendly, eco, green, nature’s friend, natural, animal-friendly, cruelty-free, sustainable, climate neutral.
 - b. generic claims based on offsetting alone.
 - c. advertising benefits that are considered common practices.
 - d. instances where information is omitted about comparison methods (for example, through a sustainability information tool).
2. Identifies and bans new unfair practices including:
 - a. Misusing third-party certifications (e.g., logos and trust marks).
 - b. Making excessive or unhelpful green claims including claims about an entire product when it’s only relevant to a specific aspect and presenting requirements imposed by law as a feature.
 - c. Restricting repairability and durability of a product.
3. Requires that information about durability and repairability of goods needs to be provided to customers including how long software updates will be provided and the repairability score or information about spare parts and a repair manual.

Proposed Directive on Substantiation and Communication of Explicit Environmental Claims⁷

This reform was proposed by the European Commission in March 2023 as a complement to the unfair trading reforms, it has yet to be passed by the European Parliament and Council and adopted as law.

The proposed law:

1. Requires that businesses substantiate environmental claims. The Directive sets out criteria to assess claims which includes that:
 - a. Claims rely on scientific evidence and considers impact from a life cycle perspective.
 - b. Demonstrates if the claim is accurate for the whole product or only aspects of it.
 - c. Identifies if a positive achievement leads to significant worsening of another impact.
 - d. Requires transparent reporting on the use of offsets.
 - e. Comparative claims are based on transparent and equivalent information.
 - f. Businesses must provide information about how they’ve substantiated green claims.
2. Bans labels based on self-certification and improves trust marks/ecolabelling schemes. Schemes will have to:
 - a. Be transparent about ownership, decision-making bodies and objectives.
 - b. Use criteria developed by experts and reviewed by stakeholders.
 - c. Stop using a rating or score based on aggregate data unless approved/developed at the EU level.
 - d. Have a complaint and resolution mechanism.
 - e. Have procedures to deal with non-compliance, including to withdraw/suspend label use.

⁶ European Parliament (2023), *Report – A9 – 0099/2023* https://www.europarl.europa.eu/doceo/document/A-9-2023-0099_EN.html

⁷ European Commission (2023), *Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive)* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A0166%3AFIN>

- f. New schemes will have to be assessed by national authorities and only approved if they demonstrate they add new value compared to existing labels.
3. Requires that environmental claims and labelling schemes are verified before they go to market (ex-ante verification). Claims will need to be verified by an officially accredited body to be set up by EU member states.
4. Provides some support for small businesses. Very small businesses (under 10 employees, under 2 million EU turnover) are exempt from the substantiation requirement. Financial support, training, and technical assistance will be provided to small and medium businesses.
5. Delegates enforcement to EU states. Each state will determine what body enforces the law, with requirements that regulators undertake monitoring and set penalties.

EU Corporate Sustainability Reporting Directive & European Sustainability Reporting Standards.⁸

The Directive requires all large companies operating in the EU to publish regular reports on their environmental and social impact. The Sustainability Reporting Standards provide a common reporting framework. All EU states need to integrate the Directive into state laws by mid-2024.

Reports are expected to be included in annual reports, accompanying financial reports. Large companies will need to report on:

- environmental impact: climate change, pollution, water/marine resources, biodiversity and ecosystems, resource use and the circular economy.
- social impact: workers, affected communities, consumers and end users.
- governance to achieve goals.
- third-party assurance (although this will be phased in over time and is relatively undefined).

New Zealand/Aotearoa

Green marketing guidelines⁹

The Commerce Commission New Zealand released green marketing guidelines in July 2020. The guidelines include principles to help businesses comply with the Fair Trading Act. They are not enforceable but may be used by regulators to guide enforcement activity.

The guidelines state that green claims should:

- Be truthful, accurate and specific.
- Substantiated with evidence (noting that some tests or surveys may not be rigorous enough).
- Use plain language and not exaggerate.

Mandatory climate-related disclosures¹⁰

The New Zealand government passed legislation in 2021 to require around 200 large companies to disclose standardised information about climate risks and opportunities. The first disclosures are required from FY 2023. Reports must have independent assurance from FY 2024.

Businesses must disclose information about governance for climate matters, their strategy, risk management and performance against metrics and targets. This is more limited than the EU disclosures approach which include broader environmental and social factors.

United Kingdom

⁸ European Commission (2023), "Corporate Sustainability Reporting", accessed 8 June 2023 https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en

⁹ Commerce Commission New Zealand (2020), *Environmental Claims Guidelines: a guide for traders* https://comcom.govt.nz/_data/assets/pdf_file/0017/220247/Environmental-claims-guidance-July-2020.pdf

¹⁰ Ministry for the Environment, (2023), "Mandatory climate-related disclosures", accessed 8 June 2023 <https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/mandatory-climate-related-financial-disclosures/>

Green Claims Code¹¹

In September 2021 the Competition and Markets Authority (CMA) updated its guidance for businesses making environmental claims.⁸ The guidance is voluntary and outlines principles for the use of green claims. The CMA considers compliance with the Code when prioritising enforcement.¹²

Businesses are expected to ensure that claims:

- Are truthful and accurate.
- Are clear and unambiguous.
- Do not omit or hide important information.
- Compare goods or services in a fair and meaningful way.
- Consider the full life cycle of a product or service.
- Are substantiated.

There is a proposal to increase penalties for companies that breach 'core' consumer laws to up to 10% of global turnover and this would likely to apply to misleading green claims.¹³

The CMA has also proposed reforms to the UK Government to amend laws to further address greenwashing. These proposals include legislating to create standard definitions of key environmental terms, requiring disclosure of key information (like environmental impact, recyclability, repairability and durability) and strengthening redress for consumers.¹⁴

Financial Conduct Authority (FCA) sustainability disclosures proposal

The UK's financial services regulator is consulting on changes to sustainability disclosures.¹¹ The FCA has proposed the following measures to reduce greenwashing:

1. Sustainable investment labels that will help consumers to identify if investment products fit into three categories:
 - a. Investments that already have a sustainable focus.
 - b. Investments where there is a strategy to influence the environmental or sustainability of assets over time (e.g., through influencing businesses as investors).
 - c. Investments that are achieving real-world sustainable impact (e.g., green tech).
2. Consumer-facing disclosures that will be mandatory for all investments that specify sustainability objectives, investment approaches and performance against objectives.
3. Detailed disclosure requirements including pre-contractual information, sustainability product-level reports and sustainability entity reports.
4. Anti-greenwashing rules requiring all green claims and sustainability labels to be clear, fair, and not misleading.

USA

FTC Green Guides¹⁵

The Federal Trade Commission is currently reviewing their green guides, last revised in 2012. The review asked for specific views on guidance needed for:

- Claims about carbon offsets or climate change, noting specific concern about terms like 'net zero', 'carbon neutral' and 'low carbon'.

¹¹ Competition & Markets Authority (2021), *Green Claims Code*, <https://greenclaims.campaign.gov.uk/>

¹² For example see recent actions against ASOS, Boohoo and Asda <https://www.gov.uk/cma-cases/asos-boohoo-and-asda-greenwashing-investigation>

¹³ Ungoed-Thomas, Jon (2023), "Greenwashing firms face steep new UK fines for misleading claims", *The Guardian UK* <https://www.theguardian.com/environment/2023/feb/19/greenwashing-firms-face-steep-new-uk-fines-for-misleading-claims>

¹⁴ Competition & Markets Authority (14 March 2022), *Correspondence: Environmental sustainability and the UK competition and consumer regimes: CMA advice to Government*, available at <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government#cma-advice-to-the-government>

¹⁵ Federal Trade Commission (2022), *Guides for the Use of Environmental Marketing* <https://www.federalregister.gov/documents/2022/12/20/2022-27558/guides-for-the-use-of-environmental-marketing-claims>

- Claims about specific environmental features of products: compostable, degradable, ozone-safe, recyclable, recycled content, energy efficiency and organic.

Securities and Exchange Commission – Rules to standardise climate-related disclosures¹⁶

The SEC has proposed a narrower version of the EU's disclosure requirement, focusing primarily on large business disclosure of climate risk. The proposed rules only apply to public companies that sell securities (approx. 7,000 large companies).

The proposed rules require these businesses to disclose:

- Information about direct greenhouse gas emissions (scope 1).
- Information about indirect emissions through purchased electricity (scope 2).
- Emissions from activities in its value chain (scope 3).

¹⁶ US Securities and Exchange Commission (2022), "Press release: SEC proposes rules to enhance and standardise climate-related disclosures for investors", accessed 8 June 2023 <https://www.sec.gov/news/press-release/2022-46>

Current Australian approach to regulating green claims

Regulators, including the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC), have rightly identified greenwashing as a regulatory and enforcement priority.¹⁷

These regulators have focused their efforts on enforcement action to address misleading representations. Australian laws are powerful when it comes to targeting misleading and deceptive conduct. For example, the Australian Consumer Law (ACL), the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001 (ASIC Act)* all contain general prohibitions against making statements that are false or misleading, or engaging in dishonest, misleading, or deceptive conduct.¹⁸ These provisions cover representations that are made about future matters that are not supported with reasonable grounds, for example, achieving certain carbon emissions targets.¹⁹

Each of the regulators have published specific guidance about these laws as they apply to greenwashing,²⁰ and have actively taken enforcement steps in recent times:

- In February 2023, ASIC commenced civil penalty proceedings against Mercer Superannuation (Australia) Ltd for allegedly making statements on its website that its 'Sustainable Plus' investment options excluded investments in companies involved in carbon-intensive fossil fuels like thermal coal, as well as those involved in alcohol production and gambling. However, the Sustainable Plus options had investments in many companies that were involved in these industries.²¹
- In March 2023, the ACCC published findings from its 2022 internet sweep of environmental claims. It found 57% of businesses reviewed were making concerning claims, including using vague or unclear environmental claims; not providing sufficient evidence for claims; setting environmental goals without clear plans for how these would be achieved; and using third-party certifications and symbols in a confusing way. The ACCC indicated it would take enforcement and compliance action where appropriate.²²

CPRC welcomes this focus and urges the regulators to continue this effort. However, there are three key weaknesses that arise if we only address greenwashing through prohibitions on misleading conduct or misrepresentations:

1. There are limitations in Australia's existing case law.
2. Omissions can also mislead consumers but may not be illegal.
3. Some businesses claim there is a risk of "green-hushing", i.e., that businesses will avoid making any form of sustainable or environmental claims.

¹⁷ ASIC, 2023 Enforcement Priorities, available at: <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/>; ACCC, 2023 Enforcement Priorities, available at:

¹⁸ See sections 18, 29, 33 and 34 of the ACL; sections 1041E, 1041G and 1041H of the Corporations Act; and sections 12DA and 12DB of the ASIC Act.

¹⁹ See, e.g., section 4 of the ACL.

²⁰ ASIC, Info Sheet 271, How to avoid greenwashing, <https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>; ACCC, Green Marketing and the Australian Consumer Law, March 2011, <https://www.accc.gov.au/about-us/publications/green-marketing-and-the-australian-consumer-law>.

²¹ ASIC, '23-043MR ASIC launches first Court proceedings alleging greenwashing', 28 February 2023, <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-043mr-asic-launches-first-court-proceedings-alleging-greenwashing/>

²² ACCC, above n 3.

Limits in the existing case law

Greenwashing has not been effectively addressed in previous court decisions relating to misrepresentations, and misleading and deceptive conduct. In particular, the cases confirm that existing law does not require suppliers to have grounds to substantiate “-able” green claims (i.e., biodegradable, recyclable) – see two case examples below.

Australian Competition and Consumer Commission v Woolworths Group Limited [2020] FCAFC 162

In this matter, the Full Federal Court unanimously upheld a decision in favour of Woolworths that labelling its W Select Eco picnicware as “Biodegradable and Compostable” was not a breach of the ACL.

The products were sold in packaging branded with the word "Eco" and featured a green colour scheme, with graphics of grass and butterflies around the label. The packaging contained the statement, "Biodegradable and Compostable". The ACCC contended that by offering for sale and selling the products in this packaging, Woolworths represented to consumers that the products would biodegrade and compost within a reasonable period of time after disposal. Specifically, the ACCC alleged that Woolworths did not make reasonable or adequate efforts to substantiate these claims and that the representations were false, misleading, and deceptive.

The court rejected that the representations about the products being biodegradable and compostable were representations relating to future matters. The claims were found not to be a prediction, promise or similar statement, but that the ‘capacities and inherent qualities’ of the products allowed them to biodegrade or be composted.

Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd [2020] FCAFC 107

In this case, the ACCC alleged that Kimberly-Clark Australia engaged in misleading or deceptive conduct in relation to its representations that Kleenex Cottonelle wipes were “flushable”. The ACCC contended that the wipes were not suitable to be flushed because they caused harm to sewerage systems.

The Court dismissed the ACCC's case, finding that Kimberly-Clark's "flushable" claims were not false or misleading because there was insufficient evidence that the wipes caused or contributed to real harm to sewerage systems and the wipes complied with international "flushability" standards. This was despite evidence that there was a risk of harm, and that the standards were developed by scientists who were employed by the wipe's manufacturers.

These decisions confirm existing consumer laws based on misleading conduct are not always sufficiently strong to require businesses to substantiate confusing statements or deliver strong environmental outcomes. In the flushable wipes case, the judge acknowledged concerns about sewerage blockages and indicated that one solution to addressing those issues would be to establish legislation or standards to govern the characteristics of flushability.²³

²³ Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd [2020] FCAFC 107 at [2].

Misleading omissions can be lawful

Unlike similar provisions in other jurisdictions, the various prohibitions on misrepresentations and misleading conduct in Australia do not require businesses to be upfront, clear, and timely in their provision of information.

The omission of information (that is, a failure to disclose), in some circumstances, could technically be found to be misleading. Some cases have confirmed that, when assessing misleading conduct, the task is to examine conduct as a whole and determine whether it conveys a representation that is misleading.²⁴ Leaving out essential information may then be misleading in specific cases.

Elsewhere, courts have referred to the notion of a 'reasonable expectation'²⁵ that if some relevant fact existed, it would be disclosed. Similarly, this case law might indicate some positive duty to disclose. Unfortunately, there are many examples (outside green claims) where consumers have experienced harm due to lawfully not being informed of relevant information – see examples below. These examples indicate that lies by omission about sustainable factors would be very difficult to prosecute using the Australian Consumer Law

Australian Competition and Consumer Commission v LG Electronics [2018] FCAFC 96

LG Electronics made statements outlining what it was prepared to offer a customer as remedy for a defective appliance, where a manufacturer's warranty had expired.

These statements were found not to be misleading. This is despite that the consumer guarantee provisions of the *ACL* provide consumers with remedies greater than what was being offered by LG Electronics. The court held that LG's statements were mere 'offers', as part of a 'negotiation', and were not considered to be representations of the consumers' statutory rights. There was also no obligation to inform customers about their statutory rights in the circumstances.

The findings in this case put the onus on the customer to know their consumer guarantee rights and, if they do not, they are likely to suffer detriment by agreeing to a remedy less than those rights.

Australian Competition & Consumer Commission v AGL South Australia Pty Ltd [2014] FCA 1369

The energy provider, AGL, had signed certain residential customers up to energy plans in 2012. In mid-2013, the rates for these customers were increased, but the customers were informed that there was no change in the discount they would continue to receive under their energy plan.

This representation was not found to be misleading, and there was no obligation on AGL to inform its customers that the underlying rates had increased. This practice made it more likely that the customers did not shop around and were thus paying a higher price.

These outcomes can be contrasted with those provided under European Union and United Kingdom laws relating to unfair commercial practices, which covers misleading omissions. In these

²⁴ Miller & Associated Insurance Broking Pty Ltd v BMW Australia Finance Ltd [2010] HCA 31 at [23].

²⁵ Demagogue v Ramensky [1992] FCA 557.

jurisdictions, the relevant provisions prohibit conduct that ‘hides or provides [material information] in an unclear, unintelligible, ambiguous or untimely manner’.²⁶

In its Green Claims Code, the UK Competition and Markets Authority states that “Consumers can be misled where claims do not say anything about environmental impacts. This can also happen where claims focus on just one aspect of a product, service, brand, or business. They can be misleading because of what they do not include or what they hide”.²⁷ Unfortunately, Australia’s laws regarding misleading conduct do not go this far.

Consumer groups have long argued that Australia’s consumer protection framework needs to be updated to address unfair commercial practices, including misleading omissions.²⁸ This was recommended by the Australian Consumer Law Review in 2017²⁹ and Consumer Affairs Ministers committed to consulting on this proposal in 2022.³⁰ We believe that a strengthened economy-wide prohibition on unfair commercial practices, including a stronger requirement regarding misleading omissions, would aid consumer protection in relation to greenwashing.

Recommendation 1: *That Federal, State and Territory Governments proceed quickly to enact a prohibition on unfair trade practices, covering unfair omission of relevant information, including environmental impacts.*

Risks of ‘green-hushing’

There have been some claims that active enforcement of greenwashing can result in businesses avoiding risk through no longer making environmental and sustainable representations, denying consumers the opportunity to understand the environmental impacts of their purchases.³¹ This has been termed ‘green-hushing’. CPRC considers we should be suspicious about these claims, as our research shows that green claims still remain very widespread. Green claims have become an important tool for marketers, as they are aware that many consumers have pro-environmental goals when it comes to their market choices.

However, if this risk exists, the answer is not to ‘go easy’ on deceptive claims. As noted, consumers are seeking information about the environmental impact of products and services, and this should be provided to enable them to make effective choices in the marketplace. Policy makers need to consider alternative ways in which relevant, actionable, and accurate information is provided to consumers. Only if consumers have the information that they want and need, will they be able to drive effective market outcomes that promote environmental outcomes and climate action. Another benefit of broader information reforms is that it will target all relevant firms, not just those that seek to make environmental claims.

In the following sections, we consider the nature of regulatory interventions that can promote the provision of accurate, relevant, and actionable information so that consumers can achieve their pro-sustainability goals.

²⁶ E.g., The Consumer Protection from Unfair Trading Regulations 2008, Clause 6, ‘misleading omissions’.

²⁷ CMA, Green Claims Code, <https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims>.

²⁸ EG. CPRC, How Australia can stop unfair business practices, October 2022, <https://cprc.org.au/stopping-unfair-practices/>.

²⁹ Consumer Affairs Australian and New Zealand, Final Report—ACL Review, 2017, <https://consumer.gov.au/consultations-and-reviews/australian-consumer-law-review/final-report>

³⁰ Consumer Affairs Ministers meet in Adelaide in September 2022, <http://consumersfederation.org.au/consumer-affairs-ministers-meet-in-adelaide-in-september-2022/>.

³¹ E.g., Southpole, 2022 Net Zero and Beyond, <https://www.southpole.com/publications/net-zero-and-beyond>.

New laws and approaches to help consumers buy green

There are a number of interventions that can promote more effective product-level environmental claims. These are:

- banning and/or defining generic green claims that are likely to confuse or cause harm
- ensuring the proposed prohibition of unfair trade practices deals with specific 'green' unfair practices
- requiring minimum standards associated with environmental or green claims, and
- considering requirements to substantiate certain green claims.

Power to ban or define generic green claims

Several jurisdictions are moving to ban or define generic green claims, which are commonly used to make products or services sound more environmentally friendly than they are. By banning or defining these claims, governments can help to ensure that consumers have access to accurate information about the environmental impact of products and services.

For example, a European Union proposal on empowering consumers for the green transition³² will prohibit generic environmental claims which are not based on recognised excellent environmental performance relevant to the claim. Examples of such generic environmental claims include 'environmentally friendly', 'eco-friendly', 'eco', 'green', 'nature's friend', 'ecological', 'environmentally correct', 'climate friendly', 'gentle on the environment', 'carbon friendly', 'carbon neutral', 'carbon positive', 'climate neutral', 'energy efficient', 'biodegradable', 'biobased' or similar statements, as well as broader statements such as 'conscious' or 'responsible' that suggest or create the impression of excellent environmental performance.

Similarly, the UK Competition and Markets Authority has proposed legislating to create standardised definitions of commonly used environmental terms, to which businesses must adhere when marketing and labelling their products.³³ These include terms like 'biodegradable', 'compostable' and 'carbon neutral'.

CPRC considers that a power to ban and define terms is required in relation to generic environmental claims. As the cases outlined above demonstrate, non-specific environmental claims can be found to be lawful, even where they are confusing for consumers and contribute to poor environmental outcomes. Generic environmental claims should be prohibited or defined wherever specification of a claim is not provided in clear and prominent terms on the same medium, such as the same advertising spot, product's packaging, or online selling interface. For example, the claim 'biodegradable', referring to a product, would be a generic claim, whilst claiming that 'the packaging is biodegradable through home composting in one month' would be a specific claim, which could remain. This way, the Federal Government could incentivise the use of specific claims, which are more meaningful during a consumer's decision-making process.

CPRC also considers that a regulator should be given the power to ban and define claims. The ACL does include provision to make information standards for goods and services.³⁴ Existing information standards cover care labelling or clothing and textiles, tobacco, cosmetics, country-of-origin food labelling, button/coin batteries and free-range eggs. These information standards are made by the Commonwealth Minister after long and arduous policy-making processes, often taking

³² European Commission, 'Circular Economy: Commission proposes new consumer rights and a ban on greenwashing', 30 March 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2098. The proposal is to amend the existing Consumer Rights Directive.

³³ CMA, Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government, March 2022, <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government>.

³⁴ Part 3-4, Australian Consumer Law.

many years. For example, the free-range eggs information standard was first agreed to by Ministers in June 2015, but was not ultimately made until April 2017. In relation to button batteries, the ACCC first released its national strategy to improve the safety of button battery products in 2016 after several years of targeted consumer education programs but the mandatory standards were introduced in 2020 and came into effect in 2022.

The fast-changing nature of marketing in the modern digital economy, as well as the urgent need to transition our economy to carbon zero, require a more dynamic regulatory approach. As there are technical aspects to determining and defining terms, the responsibility sits best with a regulator. There are a range of other technical areas of regulation where a specialist regulator is empowered to consult and determine standards, such as prudential regulation and energy market regulation. CPRC considers a similar approach should be adopted, so that the ACCC is empowered to consult and make rules with respect to banning and defining generic environmental claims in line with legislated objectives around accurate, relevant, and actionable information for consumers to make effective market choices. There could be requirements to review and update the rules regularly (e.g., annually) and ensure that rules are made in a structured, non-partisan and consultative fashion.

The Federal Government should award a similar power to ASIC so that it can ban or define generic green claims relating to financial products and services. Particularly when making investment choices, consumers are tripping over the differences between terms like ‘sustainable investing’, ‘impact investing’ and ‘ESG investing’.³⁵ The approach taken by fund managers to sustainability can be quite varied from ‘negative screens’ (a negative screen might exclude companies that operate in the tobacco or gambling industries or that have a poor environmental record), ‘positive screens’ (an investment strategy that selects companies that meet certain ethical, environmental or social responsibility considerations) to ‘impact investing’ (investing that seeks to generate measurable social and environmental impact). We consider that the market would become more transparent and efficient if ASIC is also empowered to consult and make rules with respect to banning and defining these sorts of generic claims for investments and financial products. This would complement ASIC’s existing regulatory guidance relating to advertising financial products and services.³⁶

Recommendation 2: Empower the ACCC and ASIC to consult and make rules with respect to generic environmental claims (including banning the use of terms) in line with legislated objectives.

Specific unfair trade practices with respect to environmental claims

As described above, the Federal, State and Territory Governments are working to develop a framework for prohibiting unfair trade practices, including an economy-wide general prohibition. In other jurisdictions, an economy-wide prohibition is accompanied by specific prohibitions (known as a ‘blacklist’) which are prohibited outright.³⁷ This approach supports business certainty in complying with an otherwise undefined principle prohibiting unfair trade practices.

³⁵ Lucy Dean, ‘The \$1.54 trillion word investors are getting wrong’, Australian Financial Review, 24 May 2023, <https://www.afr.com/wealth/personal-finance/the-1-54-trillion-word-investors-are-getting-wrong-20230518-p5d9fx>.

³⁶ ASIC, RG234 Advertising Financial Products and Services (including Credit): good practice guidance, November 2012, <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-234-advertising-financial-products-and-services-including-credit-good-practice-guidance/>.

³⁷ See EU Unfair Commercial Practices Directive (UCPD), UK Consumer Protection from Unfair Trading Regulations 2008.

Both, EU³⁸ and the UK³⁹ have unfair trading prohibitions and are currently proposing to strengthen their rules by including ‘blacklists’ of unfair practices in the area of ‘green’ advertising claims. Proposed prohibitions include:

- making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and an independent monitoring system
- making an environmental claim about the entire product when it concerns only a certain aspect of the product
- displaying a sustainability label which is not based on a certification scheme or not established by public authorities, and
- presenting requirements imposed by law as a feature of the trader’s offer.

CPRC considers further examples could be taken from relevant standards and rules, such as the International Standard on Environmental Labels and Certifications.⁴⁰ One example included is making a claim which is based on an absence of ingredients or features which have never been associated with the product category.

A clear blacklist of prohibited unfair trade practices with respect to green claims will make compliance more effective and efficient for industry and improve trust among consumers.

***Recommendation 3:** Include a blacklist of unfair practices related to ‘green’ advertising claims when developing a prohibition on unfair trade practices for Australia.*

Minimum standards for advertising and labels

As noted above, relying primarily on an approach that requires environmental information to be ‘not misleading’ means that there is no requirement for consumers to be provided with accurate, relevant, consistent, and actionable information that enables them to make pro-sustainability choices. There needs to be a proactive requirement for firms to provide environmental information in all circumstances, not just where they choose to make a claim about the environmental impact of their product or service.

In the UK, the Competition and Markets Authority has proposed an express positive obligation to disclose environmental information describing the change as ‘particularly helpful for consumers to identify less environmentally-friendly products which might otherwise not disclose their impact’.⁴¹

The EU is proposing additional information requirements⁴² including:

- information on the existence and length of a producer’s guarantee of durability
- information on the availability of free software updates for goods with digital elements, contents or services, and
- information on the reparability of products, through a reparability score or other relevant reparability information.

The ACL already includes mandatory consumer guarantees that goods must be durable, and that repairs and spare parts are reasonably available.⁴³ However, as found by the Productivity Commission, reasonable product durability is difficult for consumers to measure, and the ACL does

³⁸ European Commission, above n 20.

³⁹ CMA, above n 21.

⁴⁰ ISO 14024: 2018 Environmental labels and declarations <https://www.iso.org/standard/72458.html>

⁴¹ CMA, above n 21.

⁴² European Commission, above n 20.

⁴³ Section 54 and 58, ACL.

not empower consumers to prioritise repair over other options.⁴⁴ The ACL consumer guarantees also do not explicitly specify obligations relating to software embedded in products and any associated updates.

The Productivity Commission has made a range of recommendations to address these concerns, including:

- amending the ACL to include a new consumer guarantee for manufacturers to provide reasonable software updates for a reasonable time period after the product has been purchased, with no option to limit or exclude that guarantee⁴⁵
- enhancing dispute resolution processes to empower consumers to resolve consumer guarantee disputes⁴⁶
- enabling ACL regulators to obtain pecuniary penalties for breach of consumer guarantees, thereby incentivising compliance,⁴⁷ and
- enacting a product labelling scheme that provides consumers with information about product repairability and/or durability.⁴⁸

CPRC strongly supports all these recommendations and suggests that the Federal Government develop a product labelling scheme covering durability, repairability and recyclability in line with principles of information being accurate, relevant, consistent, and actionable.

Other product rating schemes, like energy and water efficiency, have been remarkably effective at informing consumers.⁴⁹ Importantly, labels aimed at consumers need to be tested to make sure they are clear, understood and align with how products are understood and used in the real-world. In the context of the recent review of the water efficiency labelling scheme, CHOICE has argued that consumers do not use appliances in the way companies make assessments for compliance, creating risks for trust in the scheme.⁵⁰

CPRC also considers that a label in the form of an index will encourage improvement in the environmental performance of products by encouraging a 'race to the top'. There has been some evidence of similar effects in relation to energy efficiency ratings, which CHOICE have suggested drive innovation, by encouraging research and development to find cost-effective ways of improving energy efficiency.⁵¹ Such an effect is likely to be enhanced if the label also shows the consumer the cost of choosing a poorer standard of product over its lifetime, so it is not just the upfront cost that is salient at the point of purchase.

To be effective, the development of an environmental label or ratings scheme should be done through market-wide consultation, including with consumer interests. This will ensure that it is robust, and not driven by industry-interests alone. CPRC considers that at a minimum, an effective labelling disclosure regime would:

- allow for comparison across related products

⁴⁴ Productivity Commission (PC), Inquiry Report 97, Right to Repair, October 2021, pages 80-86, <https://www.pc.gov.au/inquiries/completed/repair/report>.

⁴⁵ PC, above n 32, recommendation 3.1.

⁴⁶ PC, above n 32, recommendation 3.3.

⁴⁷ PC, above n 32, recommendation 3.4.

⁴⁸ PC, above n 32, recommendation 6.1.

⁴⁹ E.g., 93% of CHOICE members surveyed recognise the water efficiency label (known as WELS), and the same percentage find it easy or very easy to understand: <https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2021/february/submission-to-the-water-efficiency-standards-and-labelling-review>

⁵⁰ CHOICE, Submission to the Water Efficiency Labelling Standards review, February 2021, <https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2021/february/submission-to-the-water-efficiency-standards-and-labelling-review>

⁵¹ Australian Government, Final Report of the Independent Review of the Greenhouse and Energy Minimum Standards Act 2012 (GEMS Act), September 2019, page 20, <https://www.energyrating.gov.au/industry-information/publications/report-independent-review-gems-act-final-report>.

- be based on factors that are meaningful for consumers and align with real-world use of products
- be based on factors that genuinely contribute to environmental benefit, and
- ensure labels and relevant information are salient, easy to understand and promote action by consumers.

CPRC would not support a self-regulatory approach to advertising or labelling standards. In our experience, self-regulation of advertising responds primarily to industry management of risks of public criticism rather than to the genuine information needs of consumers. Self-regulation generally also suffers from weak enforceability, inconsistent standards and interpretations, as well as limited transparency and accountability.⁵²

Fundamentally, self-regulation of advertising relies on complaints from consumers or competitors to trigger investigations into potentially misleading claims. This reactive approach means that many problematic claims may go unnoticed or unchallenged until someone raises a concern. Given the vastness of advertising and promotions generally, it is almost impossible to proactively monitor the vast number of advertisements and claims being made.

***Recommendation 4:** Amend the ACL to include a new consumer guarantee for manufacturers to provide reasonable software updates for a reasonable time after purchase.*

***Recommendation 5:** Improve alternative dispute resolution processes to empower consumers to resolve disputes relating to durability or repairability of goods.*

***Recommendation 6:** Amend the ACL to enable ACL regulators to obtain pecuniary penalties for breach of consumer guarantees.*

***Recommendation 7:** Develop a mandatory, government-led product labelling scheme covering durability, repairability and recyclability to provide information that is accurate, relevant, consistent, and actionable. Ensure labelling and disclosure requirements are consumer-tested and developed independently of industry (although with appropriate input).*

Substantiation of green claims

The ACL includes an ability for regulators to require substantiation of claims. Section 219 empowers a regulator to seek information and/or documents from a person/entity to substantiate or support the claim or representation. The ACCC referred to this power in its recent greenwashing internet sweep⁵³ which found that more than half of the businesses reviewed made concerning claims about their environmental or sustainability practices.

This power, however, only arises *post-factum* when the regulator has concerns about a certain claim. The power requires a business to provide information to the regulator but not necessarily to the general public.

In other jurisdictions, such as the EU, proposals are moving forward to require substantiation of explicit green claims based on minimum criteria before products are released to the market. These proposals would require firms to substantiate through assessment that their claim:

- relies on scientific evidence and state-of-the-art technical knowledge
- demonstrates environmental performance from a lifecycle perspective

⁵² Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Vol 1, February 2019, page 105, <https://treasury.gov.au/publication/p2019-fsrc-final-report>.

⁵³ ACCC, above n 3.

- demonstrates whether the claim is accurate for the whole product or only for parts of it
- identifies whether a positive achievement in one area leads to significant worsening of another impact, and
- requires greenhouse gas offsets to be reported in a transparent manner.

While this approach could enhance consumer trust in claims, it also suffers from some weaknesses. The EU proposal recognises that this would be costly for some businesses and proposes excluding very small/micro businesses (i.e. less than 10 employees and a turnover of less than 2 million Euros).⁵⁴ Despite this, small sustainable businesses in the EU have raised concerns that the substantiation requirements will disadvantage them vis a vis larger businesses that can amortise the cost of pre-market substantiation across larger product sales volumes.⁵⁵

Such a proposal is also likely to result in a ‘verification’ or ‘substantiation’ industry to facilitate compliance. This is likely to create independence issues and may require its own regulatory framework to ensure ‘substantiator’ independence. Should there be a fraud or deception in green claim substantiation, this is likely to reduce consumer trust in the entire endeavour. At this stage, CPRC considers it is worth monitoring the EU developments before considering them for Australia. Any moves to introduce substantiation requirements should consider both what information should be stored by businesses, what should be provided proactively to regulators and what should be transparently released to the public, allowing for third-party engagement with the science behind any claims.

Pre-market substantiation

Despite not supporting a broad requirement for pre-market substantiation, CPRC considers that there is a strong case for upfront substantiation requirements for carbon-offset claims that requires assumptions and calculations. Pre-market substantiation should include a requirement to publicly explain what other actions have been taken before adopting offsets and why a company may have a reasonable basis for doing so. There are several reasons for this.

First, offsetting is not the plan to decarbonise. The first option to facilitate climate transition is to reduce omissions, rather than simply offset. Second, there have been numerous concerns about the integrity of offsets in Australia,⁵⁶ particularly that emission reductions counted for the purposes of offset schemes are not ‘additional’ to reductions that would have happened without the scheme.

While claims of integrity problems have been questioned,⁵⁷ an upfront substantiation requirement would build consumer confidence in offset-related claims and community confidence in environmental action generally. Substantiation documents should be made public, ideally referred to and available where information about the company or product is available.

Recommendation 8: Require businesses that make environmental claims relating to carbon offsets to publicly substantiate these claims and explain what other actions have been taken before adopting offsets.

⁵⁴ Osborne Clarke, Next step against “greenwashing”: The EU Commission’s proposal for a Green Claims Directive, 28 March 2023, Lexology, <https://www.lexology.com/library/detail.aspx?q=d9a65d35-f236-4533-a2c9-3bb37f146b66>.

⁵⁵ Luc Hendrickx, SMEunited criticizes Green claims proposal, 1 June 2022, SME United, <https://www.smeunited.eu/news/smeunited-criticises-green-claims-proposal>.

⁵⁶ The Australia Institute, The Problem with Carbon Credits and Offsets Explained, February 2022, <https://australiainstitute.org.au/post/carbon-credits-and-offsets-explained/>

⁵⁷ Australian Government, Independent Review of Australian Carbon Credit Units, December 2022, <https://www.dcceew.gov.au/climate-change/emissions-reduction/independent-review-accus>

Addressing future claims

Any forward-looking claim relies on a range of assumptions and measurements. At minimum, these assumptions should be transparent and have some foundation in legitimate measures or science.

There should be substantiation requirements for 'forward-looking' claims, for example, companies that claim they will be plastic-free or carbon neutral by a certain date. This would support the existing provision of the *ACL* that facilitates proof in misrepresentation cases involving representations as to future matters, requiring a person to have reasonable grounds for making future representations.⁵⁸

Substantiation requirements could mirror what is being proposed in the EU, such as that the claim shall include:

- commitments, milestones and a clearly specified timeframe by which milestones will be met by the company, and
- regular reporting of the achievement or non-achievement of these milestones.

Such an approach would build trust in future claims as well as accountability that claims are being met.

Recommendation 9: *Require businesses that make 'forward looking' environmental claims to substantiate the claims by setting milestones for achieving the commitment and regularly reporting on achievements.*

Better information about business environmental impact

There are a range of current proposals, in Australia and elsewhere, to mandate consistent corporate sustainability reporting. CPRC considers that reforms in this area, while not immediately useful for consumers, can support improved consumer understanding about the environmental performance of businesses with which they deal. In particular, they can empower trustworthy comparison services to use such disclosures to provide information that is useful to consumers.

A key issue with business level sustainability reporting is that there is a proliferation of voluntary disclosure schemes. These include schemes focused on social concerns such as the Global Reporting Initiative,⁵⁹ the OECD Guidelines for Multinational Enterprises,⁶⁰ the UN Guiding Principles on Business and Human Rights,⁶¹ as well as schemes more focused on environmental or climate risk, such as the Sustainability Accounting Standard Board,⁶² and the Taskforce on Climate-related Financial Disclosures.⁶³ These schemes have developed on a sporadic and fragmented basis, and have led to practices and policies that avoid consistency or comparability. This fragmentation may enable greenwashing through corporate disclosure of compliance with certain standards to give a misleading impression of compliance with other, more rigorous, standards. There is no way for a consumer to adequately compare or rank standards prior to or at the point of sale.

⁵⁸ *ACL*, section 4.

⁵⁹ Global Reporting Initiative, <https://www.globalreporting.org/>.

⁶⁰ OECD Guidelines for Multinational Enterprises, <https://mneguidelines.oecd.org/guidelines/>.

⁶¹ UN Guiding Principles on Business and Human Rights, <https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/>.

⁶² Sustainability Accounting Standard Board, <https://www.sasb.org/>.

⁶³ Taskforce on Climate-related Financial Disclosures, <https://www.fsb-tcfd.org/>.

In the last 12 months, Treasury has consulted on mandatory climate-related financial disclosure⁶⁴ and accounting sustainability standards,⁶⁵ and it seems likely that a future step will be mandatory sustainability reporting more broadly. CPRC welcomes the development of a mandatory and consistent standard for sustainability reporting in Australia.

The EU Corporate Sustainability Reporting Directive is a very comprehensive reporting standard that will eventually require businesses to disclose information about environmental matters (climate change, pollution, water and marine resources, biodiversity and ecosystems, resource use and circular economy), social standards (workforce, workers in the value chain, affected communities, consumers and end-users) as well as governance (risk management, internal control, business conduct).⁶⁶ This reporting goes beyond environmental, but consumers are concerned about other ethical dimensions of their purchases, including labour conditions, animal welfare and human rights impacts on communities. It's a model that Australia should consider when developing its own mandatory disclosure regime.

The availability of consistent corporate sustainability reporting may, with appropriate translation by third parties, facilitate consumer understanding about the environmental impact of companies. Below, we comment on the role of comparison services and aggregators that might make this information more useful for consumers. Alternatively, government can play a role in either explaining this information or providing resources to aid comparison.

Ultimately, we need ‘the light of day, not just the lighthouse’ to make use of corporate sustainability reporting disclosure. Requiring public disclosure of key information is an important first step to creating useful, comparable information that consumers can use to make informed decisions. However, we can't assume that this disclosure alone will reach this goal. Governments should consider how to encourage or support comparable labelling or information services.

To be effective and to inform consumers, there also needs to be integrity in corporate sustainability disclosure reporting. As with any corporate reporting regime, there is a clear need for effective auditing practices to ensure the reliability of data and avoid greenwashing and double counting. Audit standards need to be robust and independent. There are a range of risks with relying solely on independent auditors to ensure integrity in corporate sustainability reporting, including subjectivity and estimation by auditors risking comparability of information; incomplete or biased information being provided to auditors; and limited expertise to make assessments. Considering this, CPRC considers integrity also requires an active and resourced civil society to bring attention to environmental, social and governance issues of corporate entities.

With these caveats, CPRC can see some real value in business level reporting to help address green washing—both to aid third party aggregators and comparison services, but also to identify greenwashing within a business strategy. To take just one example, we are aware of the practice of some firms producing a “sustainable range of products” and marketing them intensely, while the range is only an exceedingly small part of the firm’s overall product range or sales. While claims about particular products may be verifiably “green”, when considered as part of the firm’s overall efforts, the picture may be quite different. An example is the “Conscious Collection” marketed until recently by retailer H&M masking its overall unsustainable fast fashion brand makes it seem as though the company is more environmentally friendly than it is.⁶⁷

⁶⁴ Treasury, Consultation Paper: Climate-related financial disclosure, December 2022, <https://treasury.gov.au/consultation/c2022-314397>.

⁶⁵ Treasury, Exposure Draft and Materials, Empowering the AASB to deliver sustainability standards, November 2022, <https://treasury.gov.au/consultation/c2022-340878>.

⁶⁶ European Commission, Corporate Sustainability Reporting, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en.

⁶⁷ Zara Ramaniah, ‘H&M’s Greenwashing: Short-sighted and Unethical’, Branding Mag, 12 December 2019, <https://www.brandingmag.com/2019/12/12/hms-greenwashing-short-sighted-and-unethical/>.

Recommendation 10: *The introduction of Corporate Sustainability Reporting must be accompanied by measures to ensure integrity of reporting as well as efforts to translate information so it is useful and effective for consumers.*

The role of third parties - comparison services and aggregators

Comparison services or aggregators refer to a platform or service that collects and presents information to consumers from multiple sources in a unified and easily accessible format. Such services can act as a central hub where consumers can compare various products, services, or offers from different providers within a specific market.

Increasingly, these services are comparing products based on environmental or ethical performance. For example, CHOICE has augmented its product assessments with the 'Ethical Shopper' ratings service⁶⁸ while Australian social impact company, Good On You, assesses the ethical and sustainability of fashion brands and retailers.⁶⁹ CPRC welcomes the development of these services and recognises that, where provided effectively, they can aid pro-sustainability choices. As noted above, the effectiveness of these services might be enhanced through high-quality and consistent corporate sustainability reporting, as these services can play the crucial translation role to make information useful and actionable for consumers.

CPRC remains concerned, however, that there are potential risks with some comparison service, including data accuracy, scope and robustness of the comparison methodology, transparency, commissions and hidden relationships risking bias, and dynamic market information impeding accuracy. Risks are heightened when the comparisons are provided by for-profit organisations that may have conflicting goals, balancing good consumer information provision alongside of increasing sales.

The ACCC has prepared guidance⁷⁰ relating to comparison services to ensure compliance with consumer and competition laws that addresses many of these risks (including guidance about providing transparency on commercial relationships). However, we consider the ACCC guidance could be updated to provide specific advice relating to comparisons based on environmental or ethical concerns, addressing at least the need for a transparent and robust methodology, effective data gathering and potentially responsiveness to stakeholder complaints.

For example, the guidance could be enhanced by ensuring any environmental comparisons consider the full lifecycle of the company or product, that is, assessing environmental performance of products compared across their entire lifecycle, including raw material extraction, manufacturing, use, and disposal. It could also specify when use of a formal lifecycle approach is appropriate. The guidance could also deal with risks associated with overemphasis on single metrics (i.e., a focus on carbon footprint, rather than the full environmental and/or social impact of a product or company including for example other important aspects like water usage, resource use, pollution, or social aspects). Incomplete assessments can easily lead to misrepresentations of a product's overall sustainability.

CPRC also considers that there are opportunities in certain industries for aggregator or comparison services to incentivise better environmental performance. This might be achieved through 'best in show' or 'top ten' shortlists. Such an approach was recommended by the Productivity Commission in relation to superannuation which recommended that, to aid the 'weeding out' of long-term underperforming superannuation funds, new employees would be shown a list of top-performing

⁶⁸ Shop Ethical, <https://www.ethical.org.au/3.4.2/>.

⁶⁹ Good on You, <https://goodonyou.eco/how-we-rate/>.

⁷⁰ ACCC, Comparator websites: A guide for comparator website operators and suppliers, August 2015, <https://www.accc.gov.au/about-us/publications/comparator-websites-a-guide-for-comparator-website-operators-and-suppliers>

funds from which to choose.⁷¹ While this reform has not ultimately proceeded, the Government now offers a YourSuper comparison tool and it appears that people are making choices about their super after using the tool.⁷² Other government-sponsored comparison initiatives in the superannuation sector have also incentivised improved performance. One such initiative is the super performance test, which came into effect on 1 July 2021.⁷³ This test assesses a product's net returns against an objective benchmark and assesses its fees against its peers. Funds that fail the test must notify affected members and products that fail the test two years in a row are closed to new members until they pass a future test. Treasury reports that the first test had significant impact on the funds that failed,⁷⁴ with members leaving these underperforming funds while some funds have merged. In the second year, there were four products that failed the test for two years in a row, meaning that they can no longer accept new members.

This style of incentivisation would need to be examined closely before being applied in relation to environmental or sustainability performance. CPRC considers it would be more likely to be effective in relation to markets where there is more limited product diversity (e.g., energy, or superannuation) and it might be more difficult in markets like cosmetics, fashion, and food. CPRC recommends policy makers, as a start, explore extending sustainability information on existing government comparison services across energy and superannuation, including making salient the worst performers in comparison results. Done well, these sorts of ranking systems can introduce competitive tension on environmental and social factors.

***Recommendation 11:** That the ACCC update its guidance on comparator websites to provide guidance regarding comparison on environmental, social, or ethical concerns.*

***Recommendation 12:** Policy makers should explore extending existing government comparison services in energy and superannuation to cover environmental and social factors, including making salient the worst performers in comparison results.*

Certification schemes and trustmarks

There are growing numbers of certification schemes or 'trustmarks' which seek to build trust and confidence among consumers by indicating adherence to certain quality, safety, environmental or ethical standards. These schemes are different to comparison services and involve businesses working with the certification scheme or trustmark to show that they meet criteria or standards, potentially through independent audits, inspections, or assessments to ensure compliance. By contrast, comparison services will generally not work directly with the businesses it compares, and will compare a wide range of products and services. These certification schemes or 'trustmarks' will generally involve the use of a logo or label to indicate to consumers that the product or service meets certain standards.

Some examples of environmental or social certification schemes in the Australian marketplace include:

- Australian Certified Organic: certifies that products are produced without the use of synthetic pesticides, herbicides, or fertilizers.⁷⁵

⁷¹ Productivity Commission, Inquiry Report 91 Superannuation: Assessing Efficiency and Competitiveness, December 2019, recommendation 2, <https://www.pc.gov.au/inquiries/completed/superannuation/assessment/report>.

⁷² Treasury, Review of Your Future Your Super Measures, Summary of Issues, April 2023, <https://treasury.gov.au/consultation/c2022-313936>.

⁷³ APRA, Annual Superannuation Performance Test, <https://www.apra.gov.au/annual-superannuation-performance-test-2022>.

⁷⁴ Treasury, above n 58.

⁷⁵ See: <https://www.aco.net.au/>.

- Fairtrade: certifies that farmers and workers in developing countries receive a fair price for their produce.⁷⁶
- Rainforest Alliance: certifies that products are produced in a way that protects rainforests and the people who live in them.⁷⁷
- Sustainably Grown: certifies that products are grown using sustainable agricultural practices.⁷⁸
- Marine Stewardship Council: certifies that seafood products are caught sustainably.⁷⁹
- Ethical Clothing Australia: certifies that clothing products are produced in ethical and sustainable conditions.⁸⁰
- Good Environmental Choice Australia: certifies that a wide range of products, including cleaning products, food, and furniture, meet certain environmental standards.⁸¹
- The Forest Stewardship Council: certifies that wood products come from sustainably managed forests.⁸²
- B Corp Certification: B Corp standards define social, environmental and governance best practices for businesses, and measure a company's entire environmental and social impact as part of the certification process.⁸³

While some schemes have robust governance and integrity, there are risks with the proliferation of these schemes. For example, in its recent internet sweep of greenwashing, the ACCC identified a variety of different certification schemes for the same type of product.⁸⁴ It identified:

- 4 different cocoa certification schemes
- 4 different seafood or aquaculture certification schemes
- 7 different textile certification schemes, and
- 7 different carbon neutral certification or offsetting schemes.

The ACCC notes in its report that it is difficult for consumers to understand what every certification scheme or trustmark means or to assess how robust the scheme is. The ACCC also notes that some businesses have created their own certification scheme for their own products, risking that such schemes become meaningless, and no longer help consumers distinguish products with strong environmental or social performance. Examples include the Body Shop's Community Fair Trade,⁸⁵ or Patagonia's Our Footprint Program.⁸⁶

The EU has proposed a variety of new market interventions to improve consumer confidence in trustmarks and certification schemes through its new Green Claims Directive.⁸⁷ This directive will require specific requirements for Environmental Labelling Schemes (ELs, defined as 'a certification scheme which certifies that a product, a process or a trader complies with the requirements for an environmental label') while at the same time curtailing the introduction of any new scheme after the directive is enacted. A key goal is to reduce the proliferation of environmental trustmarks and certification schemes.

The EU approach is still being refined and confirmed. Australian policy makers would benefit from watching this development but note that the EU approach will involve very detailed and resource

⁷⁶ See: <https://www.fairtrade.net/>.

⁷⁷ See: <https://www.rainforest-alliance.org/>.

⁷⁸ See: <https://www.scsglobalservices.com/services/sustainably-grown-certification>.

⁷⁹ See: <https://www.msc.org/en-au>.

⁸⁰ See: <https://ethicalclothingaustralia.org.au/>.

⁸¹ See: <https://geca.eco/>.

⁸² See: <https://fsc.org/en>.

⁸³ See: <https://www.bcorporation.net/en-us/certification/>.

⁸⁴ ACCC, above n 3.

⁸⁵ See: <https://www.thebodyshop.com/en-au/about-us/brand-values/community-fair-trade/a/a00009>.

⁸⁶ See: <https://www.patagonia.com/our-footprint/>.

⁸⁷ European Commission, Proposal for a Directive on Green Claims, March 2023, https://environment.ec.europa.eu/publications/proposal-directive-green-claims_en.

intensive regulation of trustmarks and claims. Australia may be able to achieve similar benefits through more limited intervention, such as by mandating minimum requirements that all trustmark and certification schemes must meet.

Product stewardship and authorisations

CPRC considers that reforms are required in the Australian context to ensure the quality of trustmarks and certification schemes, as well as to address proliferation. This could be done through enhancements to the voluntary product stewardship framework under the *Recycling and Waste Reduction Act 2020 (Cth) (R&WR Act)*, and via the ACCC authorisation process under the *Competition and Consumer Act 2010 (Cth) (CCA)*. However, there are limitations in these mechanisms as they both do not go far enough to address policy concerns that would adequately address consumer scepticism of certifications and trustmarks.

Australia's product stewardship regime is regulated by the *R&WR Act* which provides for voluntary, co-regulatory and mandatory product stewardship schemes. Product stewardship schemes are slightly different to environmental labelling schemes. Product stewardship schemes go beyond providing information to consumers, which is the focus of environmental labelling schemes, and involve producers and other stakeholders in taking responsibility for the environmental impacts of products throughout their life cycle. This can include things like designing products for easy disassembly and recycling, or collecting and recycling used products. However, there are similarities in that they are a tool to reduce the environmental impact of products.

To date, there are no mandatory schemes under *R&WR Act*, there is one co-regulatory scheme, and several accredited voluntary schemes.⁸⁸ Voluntary schemes can operate independently of government or apply for accreditation. Accreditation enables the use of the logo that signals to the public that an arrangement is Australian Government accredited, achieves sustainable outcomes, aligns with circular economy principles, and has industry support.

While the scope of the *R&WR Act* is broad⁸⁹, there are some limitations to the arrangements. First, mandatory product stewardship is rarely used, with a preference for considering whether voluntary schemes are suitable. For example, the Minister is required to publish a list of products where regulation might be suitable, indicating to industry to take voluntary steps in the first instance.⁹⁰ Second, the rules guiding Ministerial decision as to whether to accredit a voluntary stewardship scheme could be improved.⁹¹ Compared with criteria for the proposed EU ELS arrangements, there does not appear to be a requirement that the scheme be developed by experts that can ensure their scientific robustness or a requirement around effective public consultation.

⁸⁸ There is a separate mandatory product stewardship scheme for oil under the *Product Stewardship (Oil) Act 2000 (Cth)*. The co-regulatory scheme mentioned is the National Television and Computer Recycling Scheme, and there is a separate co-regulatory scheme for packaging (the Australian Packaging Covenant) under the *National Environment Protection Council Act (Cth)* and similar state-based acts. Government-accredited industry-led voluntary schemes include MobileMuster, Tyre Stewardship Australia, and the Battery Stewardship Scheme.

⁸⁹ Section 14 of the *R&WR Act* provides for product stewardship criteria which defines the coverage of stewardships schemes, being one of the following:

- the product contains hazardous substances;
- there is potential to significantly increase the conservation of materials used in the product, or the recovery of resources (including materials and energy) from waste from the product; or
- there is the potential to significantly reduce the impact that the product has on the environment, or that substances in the product have on the environment, or on the health or safety of humans.

⁹⁰ Minister's Product Stewardship Priority List, 2022-23, <https://www.dcceew.gov.au/environment/protection/waste/product-stewardship/ministers-priority-list>

⁹¹ Rule 9 of the Recycling and Waste Reduction (Product Stewardship—Accreditation of Voluntary Arrangements) Rules 2020 provides that arrangements should adequately deal with: governance and organisational matters (including procedures for decision-making and dispute resolution); financial arrangements and funding to achieve outcomes; assessing the adequacy of the environmental, health, and safety policies and practice, the use of a product stewardship logo; and monitoring and evaluating the performance of the arrangement.

A product stewardship or other environmental labelling scheme may also require authorisation by the ACCC under the CCA. Authorisation is one option available to market participants to protect against the risk of legal action for anti-competitive conduct in breach of the CCA. For example, if a scheme or arrangement imposes industry levies on the sale of particular goods or services, the proceeds of which may then be used to fund proper disposal of environmentally harmful products, then authorisation may be required.⁹² Current practice around authorisation suggests it has been used for certain product stewardship schemes and industry codes of conduct (including related license or trademarks) but less so for environmental labelling schemes.

The ACCC may grant authorisation where the proposed conduct or arrangement is likely to result in a net public benefit (i.e., where the likely public benefit resulting from the conduct or arrangement outweighs the likely public detriment). Public benefit is not defined and can be given a broad meaning, including social and/or environmental benefits.⁹³ However, in general, public benefits are considered through the goal of economic efficiency, that is, the best use of society's resources.⁹⁴

There has been some criticism of the existing public benefit test. For example, a Consumer Action Law Centre report in 2007 recommended that the scope of the public benefit test should be expanded to include the specific inclusion of non-economic factors in consideration of both the public benefit and any counter-balancing detriment.⁹⁵ This would allow for broader health considerations (physical and mental) and environmental considerations (air, water, noise, visual pollution, and the preservation of endangered species). While environmental benefits are mentioned in ACCC's guidance about the public benefit test, the 'inclusion of non-economic factors [has been] ad hoc, rather than coordinated' when considered by the Australian Competition Tribunal or the courts.⁹⁶ In a more recent report, Consumer Action Law Centre also recommended that a broader understanding of 'public benefit' should be adopted to allow for a greater consideration of consumer vulnerability and the experiences of disadvantaged consumers.⁹⁷ This would allow public benefit to more clearly consider social or distributional concerns as well as efficiency concerns.

CPRC considers that neither the product stewardship arrangements nor the ACCC authorisation arrangements are entirely suitable to address the policy concerns relating to consumer scepticism in trustmarks and certification schemes, or the proliferation of those schemes. Rather, we would recommend an accreditation process that:

- requires mandatory authorisation or approval of such schemes
- is assessed by a regulator (such as the ACCC) which has demonstrated expertise in considering consumer and public benefit outcomes, and
- conducts assessments based on requirements such as:
 - robust governance standards, including consumer interest representation at the oversight entity level (schemes which are exclusively operated or dominated by industry should be prohibited)
 - independence from the industry it seeks to oversee
 - whether scheme requirements are developed by experts to ensure scientific rigour

⁹² ACCC, Guidelines for Authorisation Conduct (non-merger), December 2022, page 7, <https://www.accc.gov.au/about-us/publications/guidelines-for-authorisation-of-conduct-non-merger>.

⁹³ ACCC, above n 79, page 34.

⁹⁴ ACCC, above 9, page 33.

⁹⁵ Consumer Action Law Centre, Defining 'public benefit' - Social and Environmental Considerations in Part VII of the Trade Practices Act 1974 (Cth), August 2007, https://www.galexia.com/public/research/assets/defining_public_benefit_report_final_sept_07.pdf

⁹⁶ As above, page 24.

⁹⁷ Consumer Action Law Centre, The New Energy Tech Consumer Code, Representing the interests of consumers in the Australian Competition Tribunal, March 2021, <https://consumeraction.org.au/report-our-response-to-the-new-energy-tech-consumer-code/>

- the transparency and adequacy of certification standards and oversight arrangements, including appropriate complaint processes and the ability to suspend or remove certification when persistent non-compliance occurs
- the use of effective public consultation during development and regular review of schemes, and
- demonstration of added value or unique contributions compared to existing certifications or trustmarks, ensuring that there is no duplication of schemes.

Recommendation 13: *Ensure environmental trustmarks or certification schemes are subject to:*

- *mandatory authorisation or approval by a regulator (such as the ACCC) which has demonstrated expertise in considering consumer and public benefit outcomes*
- *a requirement that there is only one scheme allowed for each sector or product type, and*
- *assessment as to whether the trustmark or certification scheme has:*
 - *robust governance standards, including consumer interest representation at the oversight entity level*
 - *independence from the industry it seeks to oversee*
 - *scheme requirements that are developed by experts to ensure scientific rigour*
 - *transparency and adequacy of certification standards and oversight arrangements, including appropriate complaint processes and the ability to suspend or remove certification should there be persistent non-compliance, and*
 - *utilised effective public consultation during development and regular review of schemes.*
 - *A unique contribution when compared with existing certifications or trustmarks.*

Beyond disclosure: product performance

Disclosure alone cannot help consumers with complex choices or prevent harm in markets. Even if we establish mandatory and strong requirements for disclosure of environmental information, and improve third-party information such as comparison sites or trustmarks, this information may not be used by consumers to make sustainable choices.

Research confirms the limitations of disclosures:⁹⁸

- **Disclosure does not eliminate complexity.** Ethical dimensions of products are complex, covering an array of attributes, such as durability and reparability of products, carbon intensity, manufacturing labour standards and supply-chain concerns. Even if disclosure requirements can make this simpler, there are other dimensions of products that are to be considered, such as price, quality, and service. The mix of factors make choice complex.
- **Disclosure must compete for consumer attention.** Even where there is regulated disclosure, commercial imperatives can mean that other information is used to attract, distract, and influence us. There is some research that colour and imagery are used as cues for 'greenness', rather than specific claims.⁹⁹
- **One size does not fit all.** Mandated disclosure regimes are generally 'one size fits all' interventions, yet people and contexts differ markedly. Consumer choice is often driven by broader contextual or emotional dimensions that mean decision-making is not based on rational choices. There are also different decision-making styles and ways of engaging with information that can influence decisions.

More broadly, there are a range of factors that can drive consumer choices more than environmental information, particularly the prices charged but also habits of consumers. In one recent survey, 65% said they want to buy purpose-driven brands that advocate sustainability, yet only about 26% do so.¹⁰⁰ CPRC believes incentives must be considered to support and promote the production of sustainable, durable, and repairable products and services. This might be through promoting 'sustainability by design' principles, in which consumer law can play a role.

A new consumer guarantee: environmental performance

The *ACL* includes an important set of consumer guarantees, including the guarantee that goods are of an acceptable quality.¹⁰¹ Goods are of acceptable quality if they are

- fit for all the purposes for which goods of that kind are commonly supplied
- acceptable in appearance and finish
- free from defects
- safe, and
- durable.

When considering whether a product is of acceptable quality, a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable, having regard to:

- the nature of the goods

⁹⁸ ASIC, REP 632 Disclosure: Why it shouldn't be the default, October 2019, <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>

⁹⁹ Arancha Larranaga & Carmen Valor, Consumers' categorization of eco-friendly consumer goods, *Sustainable Production and Consumption*, November 2022, vol 34, pages 518-527, <https://www.sciencedirect.com/science/article/pii/S2352550922002731#s0070>.

¹⁰⁰ Katherine White, David J. Hardisty, and Rishad Habib, The Elusive Green Consumer, *Harvard Business Review*, July-August 2019, <https://hbr.org/2019/07/the-elusive-green-consumer>.

¹⁰¹ Section 54, *ACL*.

- the price of the goods (if relevant)
- any statements made about the goods on any packaging and label on the goods
- any representation made about the goods by the supplier or manufacturer of the goods, and
- any other relevant circumstances relating to the supply of goods.

This definition of acceptable quality does not specifically require a level of environmental performance for products. While products are required to be durable, consumers can struggle to understand what this will mean for their specific situation.¹⁰² The guarantee does not specifically require the product to meet any design standard that achieves an optimal lifetime for the product, nor are there specific requirements about the repairability, upgradeability and recyclability of products, let alone whether the product is sourced from sustainable materials or supply chains.

There is a separate *ACL* consumer guarantee relating to repairs and spare parts.¹⁰³ This requires a manufacturer to take reasonable action to ensure goods can be repaired and that parts are available for a reasonable period after the goods are supplied. However, this does not apply if the manufacturer notified the consumer that repair facilities or spare parts would not be available. There are also a range of barriers to repair—including that a replacement can be cheaper, repairs can take time and are inconvenient, and that the repair market in Australia is small or non-existent.¹⁰⁴

CPRC encourages policymakers to investigate whether the *ACL* could be enhanced and meet ‘sustainability by design’ preferences by extending the definition of acceptable quality so that it includes a standard of environmental performance. This would help to protect consumers from being misled by businesses that make false or misleading claims about their environmental performance. It would also encourage businesses to improve their environmental performance, as they would be liable for any loss caused by their product not meeting the performance standard.

The investigation should consider the cost implications for consumers. While over time, we would hope that sustainable choices would become the cheaper options when all externalities are considered, we acknowledge that the manufacturing and production processes for ‘green’ products generally mean that they are likely to cost more than traditional products. Nevertheless, given promotion of sustainable consumption is a key consumer right recognised by the UN Guidelines on Consumer Protection, we consider that investigation of a consumer guarantee as to environmental performance is warranted.

Addressing overconsumption

An investigation into a consumer guarantee as to environmental performance could also consider the range of marketing and market practices that can encourage over-consumption. For example, many offers are designed to encourage consumers to purchase multiple products, often via discounts for multi-purchases or ‘free’ delivery over a certain spend. These offers may encourage purchasing of goods in a volume such that they cannot reasonably be consumed, which then results in unnecessary use of resources and waste. Such offers may exploit consumers’ present-bias where they overweight the immediate financial appeal of an offer despite the future regret associated with over-purchase.

While these practices can help consumers save money, from an environmental perspective they are not costless and can make it more difficult for consumers to shift towards sustainable patterns

¹⁰² Productivity Commission, above n 57, page 86.

¹⁰³ Section 58, *ACL*.

¹⁰⁴ Productivity Commission, above n 57.

of consumption. It may be more responsible for marketers, for example, to offer percentage reductions on each product so the consumer has less financial incentive to purchase more than they prefer.

Other market practices that promote over-consumption include free and easy product returns which incentivise purchase while resulting in products ending up in landfill¹⁰⁵ and 'dark patterns' which use manipulative online choice architecture so that people buy things that they do not need or that does not meet their needs.¹⁰⁶

CPRC considers that policymakers should develop incentives for retailers to develop marketing and offer strategies that do not encourage over-consumption. In the first instance, this could be done by indicating that regulation will follow unless industry improves practices through their own standards or requirements.

Recommendation 14: *Conduct an independent review (with secretariat support from Treasury) to investigate an ACL consumer guarantee for goods and services relating to environmental performance. This review should also consider marketing practices that encourage over-consumption.*

Meeting consumer preferences for sustainability in financial markets

Recent reforms to the regulation of financial products have focused on these complex products being designed so that they meet consumer needs and objectives. These reforms emanated from the Financial System Inquiry in 2014 which acknowledged the limitations of disclosure and financial advice as effective consumer protection mechanisms for financial services.¹⁰⁷ CPRC considers that these reforms should be implemented and enforced in the context of consumer preferences for sustainable investment products. Doing so is likely to drive sustainable investments more so than a regulatory focus on misleading disclosure alone.

Since October 2021, new 'design and distribution obligations' apply to financial products.¹⁰⁸ These obligations are intended to help consumers obtain appropriate financial products by requiring issuers and distributors to have a consumer-centric approach to designing and distributing products.¹⁰⁹ Product issuers and distributors are required to develop and maintain effective product governance arrangements across the lifecycle of financial products to ensure that consumers are receiving products that are likely to be consistent with their objectives, financial situation and needs.

These reforms require product issuers to identify a 'target market', that is, the class of consumers for whom the product is suitable and would meet their objectives and needs. They must also specify distribution conditions and restrictions so that products are marketed towards the target market. In addition, they must regularly monitor and review the outcomes produced by the design and distribution of financial products and consider whether product changes are required, or whether changes are required to the way products are sold or to whom they are sold. Each product

¹⁰⁵ Harriet Constable, Your brand new returns end up in landfill, BBC Earth, <https://www.bbcearth.com/news/your-brand-new-returns-end-up-in-landfill>

¹⁰⁶ CPRC, Duped by design – Manipulative online design – Dark patterns in Australia, June 2022, <https://cprc.org.au/dupedbydesign>, and ACCC, Digital Platforms services inquiry, Interim report 3, Search defaults and choice screens, September 2021, <https://www.accc.gov.au/about-us/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2021-interim-report>.

¹⁰⁷ Financial System Inquiry, Final Report, 2014, <https://treasury.gov.au/publication/c2014-fsi-final-report>.

¹⁰⁸ *Corporations Act 2001 (Cth)*, Part 7.8A.

¹⁰⁹ ASIC, RG274 Product design and distribution obligations, December 2020, para 274.5, <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-274-product-design-and-distribution-obligations/>

issuer must publish a ‘target market determination’ (TMD) which sets out the target market, distribution conditions, and information relating to review and monitoring.

The marketing strategies and TMDs of several superannuation and investment providers reveal that financial products are being targeted and marketed in response to consumers’ sustainability preferences. For example, Hostplus’ TMD for its ‘Socially Responsible Investment’ option states that it is ‘designed for members specifically seeking to reduce exposure to fossil fuels, companies that breach human rights or labour rights, uncertified palm oil, tobacco production and other particular industries, while investing in assets that contribute to sustainable outcomes’.¹¹⁰ However, the Hostplus TMD does not clearly state how it ensures this option is being directed towards consumers who have these preferences, arguably in breach of the distribution condition requirements.¹¹¹ These requirements mean that the TMD should include sufficient information to reasonably conclude that the distribution conditions make it likely that the consumers who acquire the products are in the target market.¹¹²

Furthermore, we would expect that companies that offer a range of investment options (some sustainable, some not), would be taking steps to make sure consumers who have preferences for sustainable investment are being directed to the products that meet their sustainability objectives rather than alternative ‘dirty’ products. This requires effort from the firm, and a regulatory posture that views unlawful greenwashing to include offering a sustainable investment option without actively ensuring customers with sustainability objectives are accessing that investment class. Active compliance and enforcement action by the regulator, ASIC, would promote sustainable investment choices more broadly.

Recommendation 15: ASIC should take active compliance and enforcement action on product design and distribution obligations to promote sustainable investment choices.

Planned obsolescence

Planned obsolescence involves a company taking steps to intentionally shorten the life of a product with the goal that consumers will spend money replacing or upgrading it. The ACCC has argued that the growth of ‘smart devices’ provides manufacturers with new opportunities to engage in planned obsolescence due to software and security updates being an inescapable characteristic of the product.¹¹³

One notable example of planned obsolescence has involved the Nintendo Switch, which was alleged to have recurring technical problems meaning that game controllers broke within the first two years.¹¹⁴ CPRC encourages the Federal Government to consider product obsolescence as part of fully addressing greenwashing.

In the EU, the Unfair Commercial Practices Directive (UCPD) defines planned obsolescence as a commercial policy involving ‘*deliberately planning or designing a product with a limited useful life so that it will become obsolete or non-functional after a certain period of time*’ and makes this unfair where information about limited lifetime is not provided. As noted above, Australia’s laws with respect to misleading and deceptive practices are not strong in relation to misleading omissions,

¹¹⁰ Hostplus Superannuation and Personal Plan, Target Market Determination, <https://hostplus.com.au/members/our-products-and-services/investment-options/your-investment-options/pre-mixed/socially-responsible-investment--sri---balanced>

¹¹¹ Rather, the distribution conditions and restrictions are met by the product being sold through the following distribution channels – direct through Hostplus, through personal advice, through authorised representatives, through rating and research agencies.

¹¹² ASIC, above n 26, para 274.66.

¹¹³ ACCC, Submission to PC Right To Repair Inquiry, February 2021,

https://www.pc.gov.au/data/assets/pdf_file/0007/272662/sub106-repair.pdf

¹¹⁴ BUEC, Complaint against Nintendo for premature obsolescence, January 2021, <https://www.beuc.eu/nintendo>

and the law is unlikely to be breached due to a failure to inform the consumer about a product's limited lifetime.

The proposed economy-wide prohibition on unfair trade practices could address:

- undisclosed, planned obsolescence that relies on high switching costs to force consumers to regularly purchase additional or replacement products
- businesses not disclosing that, as a result of internal decisions on future support, a product will be obsolete in an unreasonably brief period of time, and
- a business not providing security updates for smart products for a reasonable amount of time, thereby putting sensitive consumer information at risk.

CPRC again endorses the proposed economy-wide prohibition on unfair trade practices (see recommendation 1) and considers that its adoption can help deal with product obsolescence.

Consumer redress

Currently, compliance and enforcement action relating to greenwashing is being primarily led by regulators. There is, of course, a limit to the resources of regulators to bring to this task. Moreover, greenwashing can be lucrative for many companies, so the conduct is widespread. While active compliance and enforcement action is part of creating the right incentives to address greenwashing, we consider that redress mechanisms for affected consumers need to be improved.

First, we note that the penalties for misleading representations are inconsistent between financial services and other products and services. This is the result of the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth)* which increased penalties for breaches of pecuniary penalty provisions of the *ACL*. For corporations, penalties were increased to the greater of \$50 million; if the court can determine ‘reasonably attributable benefit obtained, three times that value; or if the court cannot determine the benefit, 30% of the corporation’s adjusted turnover during the breach turnover period for the offence. When these penalties were introduced, ACCC Chair Gina Cass-Gotlieb said, “*These maximum penalty changes will allow the Courts to ensure that the penalties imposed for competition and consumer law breaches are not seen as a cost of doing business, but rather as a significant impost and something likely to raise the serious attention of owners or shareholders*”.¹¹⁵

However, this increase in penalties was not applied to the equivalent pecuniary penalty provision in the *ASIC Act*. Under the *ASIC Act*, the maximum civil penalty is the greater of \$13.75 million; three times the benefit and detriment avoided; or 10% of turnover. This results in an anomalous situation that a retailer, energy company or car manufacturer can be fined substantially more than a bank or superannuation firm when they engage in greenwashing. This needs to be addressed.

Second, there are limited incentives for private actors to take legal action in relation to unlawful greenwashing, for example, whether individually or through class actions. This is because the loss suffered from greenwashing individually may be difficult to ascertain—while there is a clear loss of trust and confidence in firms, demonstrating financial loss in terms of a consumer purchasing a product that they otherwise would not of because of greenwashing may be an evidentiary barrier that is difficult to overcome. Alternatively, it could be because the financial loss is minimal such that the class action is uneconomic to run. Certainly, individuals are rarely likely to take individual action for misleading representations in civil tribunals due to the costs involved and other barriers to using these tribunals.¹¹⁶

There are some examples of private litigants taking legal action in relation to greenwashing. For example, the Australian Centre for Corporate Responsibility has filed proceedings against Santos Ltd for misleading and deceptive conduct relating to its ‘clean energy’ claims and its Net Zero plan in its 2020 Annual Report.¹¹⁷ This action is not seeking compensation but rather declaration that Santos breached the law and injunctions requiring it not to engage in future misconduct and also requiring a corrective statement about the environmental impact of its operations. CPRC considers this sort of legal action is welcome but recognises the costs of legal action can be out of reach of most non-profit organisations that might wish to use the law in this way.

In the US, by contrast, there are many greenwashing class actions. The US consumer organisation TINA.ORG provides a list of class actions relating to greenwashing on its website, and there are many.¹¹⁸ In the EU, it is proposed that consumers harmed by greenwashing will be entitled to

¹¹⁵ ACCC, Media release: ACCC welcomes new penalties and expansion of unfair contract terms laws, 1 November 2022, <https://www.accc.gov.au/media-release/accc-welcomes-new-penalties-and-expansion-of-the-unfair-contract-terms-laws>

¹¹⁶ Productivity Commission, Consumer Law and Administration Research Report, chapter 6.2, <https://www.pc.gov.au/inquiries/completed/consumer-law/report>.

¹¹⁷ ACCCR, Australian Centre for Corporate Responsibility expands landmark Federal Court case against Santos, August 2022, <https://www.accr.org.au/news/australasian-centre-for-corporate-responsibility-expands-landmark-federal-court-case-against-santos/>

¹¹⁸ See Tina.org, <https://truthinadvertising.org/articles/companies-accused-greenwashing/>

redress via the Representative Actions Directive.¹¹⁹ This directive facilitates consumer organisations and independent public body bring representative or class actions.

Mechanisms for redress

CPRC considers that there are a range of mechanisms to promote private redress options with respect to greenwashing. To be effective, private redress options will build upon regulator action to provide an incentive to comply with the law. Below are types of mechanisms that the Federal Government could implement:

- The creation of a 'justice fund', previously been recommended by the Victorian Law Reform Commission,¹²⁰ which would support viable consumer matters arising under the *ACL*. This sort of fund might aid private greenwashing legal action through providing upfront funding and protecting against adverse costs orders. We note that the EU Representative Action Directive includes something similar, with member states being required to provide relevant assistance such as funding or other structural support.
- Overcoming barriers to group or class complaints about greenwashing, by codifying compensatory award amounts for loss when consumers are misled. Rather than having to demonstrate direct loss, complainants could be entitled to compensation of a specified amount if they relied on a misleading claim to their detriment. This might overcome evidentiary barriers and facilitate more efficient access to justice.
- Improving dispute resolution procedures for consumer law matters generally. As previously noted, the Productivity Commission has acknowledged concerns with the system of existing civil tribunals, and recommended reviewing and enhancing alternative dispute resolution procedures for small claims so as to improve access to justice. Consumer advocates have previously advocated for a retail ombudsman¹²¹ that might be well-placed to resolve individual claims for loss associated with misleading green claims.

Recommendation 16: *Adopt improvements to private redress measures for greenwashing to support a greater incentive for firms to comply with the law, including a 'justice fund' to support public interest claims, overcoming evidentiary barriers to class actions, and improving individual alternative dispute resolution options.*

¹¹⁹ European Commission, above n 20.

¹²⁰ Victorian Law Reform Commission, Civil Justice Review, Report No 14 (2008), 616.

¹²¹ Consumer Action Law Centre, Media Release: New polling shows Australians are reading for a Retail Ombudsman, June 2016, <https://consumeraction.org.au/media-release/>.