

Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600
via email: ec.sen@aph.gov.au

Dear Committee Secretary

The National Environmental Law Association Ltd ACN 008 657 761 (**NELA**) welcomes the opportunity to make a submission on your inquiry into greenwashing.

1. NELA's Objects and its interest in this Inquiry

NELA is the national peak body for advancing Australian environmental law and policy. It is an independent, multidisciplinary, member-based association focused on environmental law and sustainability. NELA is managed by a national board that includes Directors with expertise in international and domestic legal frameworks for biodiversity conservation, climate change and natural disasters, environmental regulation and regulatory theory and natural resource management.

One of NELA's core objectives is to provide a forum for, and to otherwise assist in, the discussion, consideration, and advancement of environmental law across the legal profession and the wider community. NELA is also a member of the leadership committee of the Professional Bodies Climate Action Charter Australia and New Zealand Forum, which represents professional members in Australia across a wide range of sectors from finance, insurance, science, engineering, law, health, construction, and the built environment.

Greenwashing involves making a false representation about sustainability, usually in the context of finance, commerce and corporate reporting. Greenwashing undermines the integrity of environmental initiatives and sustainability. It dilutes the impact of genuine environmental action and slows down progress to a more sustainable future. By strengthening greenwashing laws, the Australian Government can promote genuine environmental sustainability, and better position Australia as a responsible global citizen in addressing environmental challenges.

NELA is grateful for the opportunity to make a submission to this inquiry into greenwashing.

2. Summary of Submissions

NELA welcomes the Australian Government's recent efforts to protect consumers from greenwashing and promote genuine environmental sustainability, including the announcement by Treasurer Jim Chalmers in December 2022, that the Government would deliver a new, 'comprehensive sustainable finance strategy and climate risk disclosure framework'. These priorities offer a useful baseline but are insufficient, on their own. NELA urges the Australian Government to continue to improve upon that baseline, and submits that:

1. we support the current enforcement regime as a sensible starting point, but recommend that regulators be further resourced to prevent and penalise greenwashing;
2. consumers be given more accessible education on greenwashing;
3. a more comprehensive transparency regulatory regime for environmental disclosure should be created;
4. Director's duties should expressly include considering the impact of a company's operations on the environment;
5. general deterrence against greenwashing across the main legislative instruments can be improved by aligning the objectives and removing inconsistencies in the application of those penalties;
6. mechanisms to support civil claims against greenwashing should be strengthened; and

7. regulators should assess and report on how Australia's regulatory environment is supporting or hindering transparency about greenwashing, and the potential for shortfalls in that regulatory environment exacerbating the risk of greenwashing in future.

3. Detailed submissions

3.1 NELA supports the current enforcement regime as a sensible starting point, but regulators must be further resourced to prevent and penalise greenwashing

As consumers become increasingly concerned about environmental degradation and climate change, there is a growing commercial incentive for corporations to demonstrate their 'green' credentials. The enforcement regime to prevent greenwashing, including as a form of misleading or deceptive conduct, is relatively strong in Australia. Regulators such as the Australian Competition and Consumer Commission (**ACCC**) and the Australian Securities and Investments Commission (**ASIC**) have identified greenwashing as a priority target for compliance and enforcement activities. As such, those making greenwashing claims already risk investigation, enforcement action and subsequent penalties, including fines, for greenwashing.

Individuals and businesses already have the option to report suspected greenwashing to the regulators, thereby providing another pathway for the regulators to discover potential infringement.

NELA supports the current enforcement regime but notes strong evidence that greenwashing will continue to increase over coming years, as climate and environmental crises drive a transformation in consumption patterns, reporting obligations and, e.g., greenhouse gas emission caps. In anticipation of greenwashing activities increasing and becoming more sophisticated, NELA urges the Australian Government to invest further resources in the regulators to build capacity and expertise, and to enhance the efficiency and effectiveness of their investigations of greenwashing.

3.2 NELA submits that accessible education on greenwashing is required for consumers

Comprehensive and effective greenwashing education must 'activate' consumers, business, regulators and environmental organisations, making them savvier to greenwashing claims, and helping to disincentivise or deter greenwashing efforts.

Current guidance documents from ASIC¹ and the ACCC² are not accessible to a wide range of audiences. They are designed for businesses that issue sustainability related financial products, manufacturers, suppliers, advertisers and others. NELA could not identify any examples of greenwashing education in Australia that provided practical guidance on:

- how to identify and avoid 'falling for' greenwashing tactics;
- critical thinking skills and tools to evaluate environmental claims; or
- Information on reliable sources, and certifications to guide decision making.

The principle of accountability requires members of the public to have access to reliable, relevant and timely information in appropriate forms to facilitate a good understanding of issues of harm or risks of harm to the environment. Transparency creates opportunities for individuals to change their behaviour and, as such, is a crucial prerequisite to the skills-based education for which NELA is advocating. Consumer protection depends on individuals being empowered to make informed decisions.

3.3 NELA submits that a comprehensive transparency regulatory regime for environmental disclosure should be created

NELA acknowledges that the Australian government has undertaken significant work to improve the regime for disclosure of climate-related financial risk. However, environmental and sustainability risks beyond climate include: pollution and contamination, habitat destruction and biodiversity loss, water scarcity and declining water quality, and the over-generation and mismanagement of waste (just to name a few). A transparency

¹ Australian Securities & Investments Commission, 'How to avoid greenwashing when offering or promoting sustainability-related products', ASIC (Website, June 2022) <<https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>>.

² Australian Competition and Consumer Commission, Green marketing and the Australian Green marketing and the Australian Consumer Law (Report, 2011) <<https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf>>.

mandate for all environmental risk offers a mechanism for protecting consumers from greenwashing by promoting accountability, verification and informed decision making.

NELA recommends that Australian regulators be required and equipped to implement best-practice disclosure legislation for environmental risks, similar to modern slavery legislation. This proposed legislation would require businesses to disclose information about how their business practices and supply chains create or are associated with environmental risks. This would involve mapping out the various stages of production and identifying potential environmental impacts at each stage. Such a mapping process will require comprehensive assessments of each business' environmental risks – including identifying and evaluating potential risks and impacts on ecosystems, biodiversity, air and water quality, and other environmental factors – and a disclosure regime that ensures that the findings are publicly accessible. This would present a significant step change that goes beyond the current Treasury exposure drafts empowering the AASB to deliver sustainability standards into the *Australian Securities and Investment Commission Act 2001*.

3.4 NELA submits that Director's duties should expressly include a requirement to consider the impact of a company's operations on the environment

Both companies and their directors can be held liable for greenwashing claims. Whilst Australia has only seen action brought against companies, to date, the pathway exists for directors to be sued in their personal capacity. However, whether Directors are obliged to consider environmental risk in their decision making is not resolved in Australian law. Directors and Corporate Officers are obliged to discharge their duties 'in good faith in the best interests of the corporation',³ but there has been no direct judicial consideration of how to interpret this. Nevertheless, inquiries into corporate governance indicate that the law is '*sufficiently permissive for Directors to take into account non-shareholder interests*'.⁴

Australia is lagging behind other jurisdictions in this respect, with some jurisdictions having begun to set clear and actionable expectations. For example, under the *Companies Act 2006* (UK), 'a director of a company must act in the way [they] considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to the impact of the company's operations on the community and the environment'.⁵

We submit that by amending the *Corporations Act 2001* (Cth) to include an express consideration of the impact of a company's operations on the environment, the Australian Government can create a duty that is not merely a passive constraint on conduct, but a proactive assessment of environmental risk, and a clearer cause of action for preventing and penalising greenwashing.

3.5 NELA submits that general deterrence against greenwashing across the main legislative instruments can be improved by aligning enforcement objectives and addressing inconsistencies in the application of penalties

The penalties that attach to the current Australian legislative regime in respect of conduct that is false, misleading and/or deceptive, are robust and more stringent than comparable jurisdictions. Whilst NELA supports the current penalties, it recommends reform for the purpose of providing a holistic approach to the general deterrence against greenwashing across the main legislative instruments, by addressing inconsistencies in the application of those penalties.

As it stands, Australia has no express regime for penalising greenwashing, but rather, expresses the conduct for which penalties ought to be imposed under the umbrella of provisions found in the *Australian Consumer Law*,⁶ the *Corporations Act 2001* (Cth)⁷ and the *Australian Securities and Investment Commissions Act 2001*

³ *Corporations Act 2001* (Cth) s 181(1) ('*Corporations Act*').

⁴ Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) 35(1) *University of New South Wales Law Journal* 300

<https://law.unimelb.edu.au/_data/assets/pdf_file/0010/1709605/38-Stakeholdersanddirectorsduties-lawtheoryandevidenceUNSWLJ20122.pdf>; Australian Securities & Investments Commission, 'How to avoid greenwashing when offering or promoting sustainability-related products', ASIC (Website, June 2022)

<<https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>>; Tony Feathersone, 'Shareholder versus stakeholder capitalism', Australian Institute of Company Directors (Website, 19 September 2019) <<https://www.aicd.com.au/good-governance/company-shareholders/primacy/shareholder-versus-stakeholder-capitalism-debate-hots-up.html>>.

⁵ *Companies Act 2006* (UK) s 172(1).

⁶ See *Competition and Consumer Act 2010* (Cth) ('*Australian Consumer Law*') sch 2 ss 29, 33, 34, 37, 151, 155, 156, 159.

(Cth).⁸ Each legislative instrument respectively addresses greenwashing from a consumer, corporation and financial services-based perspective. These statutes expand the scope for penalising contraventions, by virtue of the court's power to impose further penalties on *any person* who, amongst other things, aids, abets, includes, concerns with or conspires to commit a primary offence under each statute.⁹ Consequences for contraventions of these sections generally attract civil and pecuniary penalties; for example, the following provisions provide for substantive and robust penalties: s 224 of the *Australian Consumer Law*, s 1317E of the *Corporations Act* and s 12GBCA of the *ASIC Act*.

However, the regime would benefit from a holistic approach to general deterrence for greenwashing as established by the regime that crosses the instruments described above, by addressing inconsistencies in the approach to penalties, as follows:

- for individuals and body corporates, by aligning the maximum penalties in the *Corporations Act* and *ASIC Act* to that seen in the *Australian Consumer Law*; and
- for individuals, by aligning the penalty amount (of 3 times the value of the benefit derived and detriment avoided) in the *Australian Consumer Law* and *Corporations Law* with the lesser penalty seen in the *ASIC Act*;
- for body corporates, in respect of pecuniary penalties ordered by the Court in circumstances where the value of the benefit obtained directly or indirectly cannot be determined,¹⁰ by aligning the penalties in the *Corporations Act* and *ASIC Act* and *Australian Consumer Law* to either:
 - 10% of the *annual global* turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision;¹¹ or
 - 30% of the body corporate's adjusted global turnover during the breach turnover period for the act or omission, whichever is higher.

These proposed reforms not only amplify the level of deterrence to engage in greenwashing, but account for situations where greenwashing conduct might be particularly egregious, or where there is no benefit derived or detriment avoided, by virtue of a loss being incurred.

3.6 NELA submits that mechanisms to support civil claims against greenwashing should be improved

The market of private civil actions relating to greenwashing has yet to achieve maturity in Australia. Private parties with standing to commence greenwashing enforcement processes include individuals, activist groups, and members of a class in a class action. These private individuals can commence claims in their capacity as shareholders, or otherwise as consumers or competitors in the sale of goods or services.

Although the basis for claims exists, there are barriers to such actions commencing. NELA supports legal reform to streamline and clarify the process for initiating civil claims. The principle of shared responsibility promotes the idea that the protection of the environment is a shared responsibility, and as such, transformation of greenwashing risk will only be truly achieved when all levels of government, industry, business, communities and the people of Australia are empowered to participate and engage in environmental protection.

Mechanisms to implement this principle could include:

- altering the costs regime to reduce the current risk of significant adverse costs penalties if civil litigation fails;
- establishing an independent statutory decision-maker of 'first resort' - in a similar vein to statutory offices such as the Australian Office of the Information Commissioner or the Fair Work Commission – that would allow for fast tracking greenwashing claims, thereby reducing the time and cost of such actions; or
- tailoring the class action regime to make it more specific for greenwashing actions.

⁷ See *Corporations Act* ss 180, 181, 670A, 728, 1309.

⁸ See *Australian Securities and Investment Commissions Act 2001* (Cth) ('*ASIC Act*') ss 12DB, 12DF, 12GB.

⁹ See *Australian Consumer Law* s 224(1)(c)-(f) and *Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 3)* [2021] FCA 347; *Corporations Act* s 79; *ASIC Act* s 12GB.

¹⁰ See *Australian Consumer Law* ss 151(5)(c), 152(2A)(c), 155(3)(c), 224(3A)(c); *Corporations Act* ss 1317G(4)(c)(i) and *ASIC Act* ss 12GBCA(2)(c)(i).

¹¹ See for example, the proposed amendments to the *Competition Act 1998* (UK) and *Enterprise Act 2002* (UK) by the *Digital Markets, Competition and Consumers Bill 2023* (UK) s 150 and which includes a monetary penalty of 10% of the total value of global turnover of the relevant company for contravening *Competition Act 1998* provisions with respect to misleading representations <<https://publications.parliament.uk/pa/bills/cbill/58-03/0294/en/220294en.pdf>>.

There is also an option for non-judicial enforcement under the Australian National Contact Point (**AusNCP**), a complaints body responsible for overseeing compliance with Australia's implementation of the Organisation for Economic Co-operation and Development (**OECD**) Guidelines for Multinational Enterprises (**MNEs**).

Complaints can be brought to the AusNCP by any individual or group against any Australian MNE operating overseas, or foreign MNEs operating in Australia. Importantly, the AusNCP only has the power to make non-binding recommendations. ANZ has been subject to a greenwashing claim through this process.

NELA supports the use of AUSNCP as a mechanism for redress. However, we recognise its limitations and urge the Australian Government not to consider this option as the best, or only, solution to the challenges of greenwashing.

3.7 NELA submits that regulators should be equipped to assess and report on how the Australian regulatory environment supports or hinders transparency, and the potential for shortfalls in that regulatory environment to exacerbate the risk of greenwashing in future

Regulatory (e.g., Scope 3 carbon emissions) and market pressures (Life Cycle Assessment and Traceability initiatives) are requiring organisations to consider environmental impacts and openly share data between organisations to support regulatory attention on transparency for greenwashing. Improved environmental transparency can support stakeholders, including communities, policymakers, and regulators, to make informed decisions and more effectively manage the cumulative impacts on the environment.

However, competition law may create barriers to the sharing and disclosure of such information due to concerns related to competitive advantage, trade secrets, or the potential for collusion among industry participants. Companies may be reluctant to disclose detailed environmental impact data, including cumulative impacts, out of fear that it could be misused by competitors or lead to anti-competitive behaviour.¹² Additionally, competition law aims to prevent agreements or practices that restrict competition, such as price-fixing or market allocation. In some cases, collaboration among industry participants to address cumulative impacts could raise concerns under competition law if it leads to market distortion or restricts competition.

NELA submits that these limitations of the existing regulatory framework create an unacceptable emerging greenwashing risk, particularly as consumer expectations mature and potential litigants look further down supply chains to understand complex, longer-term environmental risks. NELA recommends the introduction of new mechanisms such as:

- an obligation on relevant regulators to review and adopt the recommendations of the OECD Environmental Considerations in Competition Enforcement;¹³
- the development of a collaborative regulatory, industry and community forum such as the Cooperative Research Centre for Transformation in Mining Economies, or the OECD Responsible Sourcing Framework, which could encourage transparency between groups and promote a 'ratcheting effect', increasing ambition and effecting change on global scales.

4. Conclusions

NELA advocates for strengthening greenwashing regulation activities to ensure the integrity of environmental protection initiatives. NELA highlights the need for integrity, accountability, and well-resourced enforcement to achieve positive outcomes for Australia's environment and communities.

¹² See examples in Natascha Sommer, 'Mine Dewatering in the Pilbara: A Legal Framework for Managing the Cumulative Impacts on Environmental Values and Indigenous Interests' (2012) 31(1) *Australian Resources and Energy Law Journal* 65, 65-90.

¹³ OECD (2021), Environmental considerations in competition enforcement, OECD Competition Committee Discussion Paper, <https://www.oecd.org/daf/competition/environmental-considerations-in-competitionenforcement.htm>.



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On behalf of the NELA Board

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