

# Greenwashing Policy Briefing in Victoria, AU

*Done for Collective Fashion Justice (CFJ)*

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## **Executive Summary**

The policy strategy outlined in this briefing attempts to bridge the gap in regulations on greenwashing in Victoria. Currently, Victoria has no policy addressing greenwashing, rather it defers matters of environmental claims to the ACCC via Schedule 2 (Australian Consumer Law) of the Competition and Consumer Act. Consequently, the regulatory state of greenwashing and expectations of the government are uncertain, causing more firms to greenwash. Therefore, the Victorian Government should create more explicit regulations on greenwashing by incorporating the United Nations Environmental Programme guidelines for greenwashing into a Victorian anti-greenwashing and -ethics-washing guide, enact textile labelling laws that improve consumer knowledge, and eventually sponsor an eco-label program.

By regulating greenwashing in Victoria, it is plausible to imagine that more explicit federal regulations would emerge from this. In addition, the presence of more explicit and certain regulations would result in less greenwashing from firms as a state of lax regulations is the key driver for greenwashing. Consumer confidence in green products would increase and the market for green products would not diminish. Additionally, by creating textile labelling laws and sponsoring eco-labels, the State could actively play a role in reducing the harm to people, animals, and the environment.

## Outline of the problem

Over the past few decades, societal interest in green products has greatly increased. In Australia alone, 90% of Australians “report an interest in environmental issues” and the market for “sustainable products and services surged from AU\$12 billion in 2007 to AU\$21.5 billion in 2010.”<sup>1</sup> In addition, a 2021 consumer survey by L.E.K. Consulting found that approximately half of Australians are willing to pay higher prices for more sustainable and environmentally-friendly products and services.<sup>2</sup>

However, as more people have become keen on spending their money on sustainable products and services or goods from sustainable brands, corporations have seized the opportunity to make environmental claims about their offerings. In essence, companies have increased their output of positive environmental marketing to highlight the “green-ness” of their product, service, or organisation. Oftentimes, this positive communication about environmental performance lacks backing as it intersects with the organisation’s poor environmental performance, a phenomenon known as greenwashing.<sup>3</sup>

In Australia, greenwashing is prevalent across many industries. The Australian Competition and Consumer Commissions (ACCC) recently published their findings of an internet sweep of environmental claims in a 2023 report in which they found that 57% of the 247 total businesses investigated raised concerns over greenwashing.<sup>4</sup> The industries with greatest proportions of greenwashing include cosmetics and personal care, textiles, garments and shoes,

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<sup>1</sup> Mobium Group, Green Market-State of Play-Research Project Summary–Australia (May 2011), [www.mobium.com.au](http://www.mobium.com.au).

<sup>2</sup> LEK Consulting, Special Report: Consumer Sustainability Survey (2022), 7.

<sup>3</sup> Magali A. Delmas and Vanessa Cuerel Burbano, “The Drivers of Greenwashing,” *California Management Review* 54, no. 1 (2011): <https://doi.org/10.1525/cm.2011.54.1.64>, 65.

<sup>4</sup> Australian Competition and Consumer Commission, “Greenwashing by businesses in Australia” (2023), 1.

and food and beverages which had greenwashing levels of 73%, 67%, and 65%, respectively.<sup>5</sup>

Given that greenwashing is occurring more often than not, it is clear that this abundance of false claims in Australia is a problem for consumers that are being deceived and misled.

The problem with greenwashing is not just that consumers are being deceived and misled, but that it can have a domino effect that affects the economy, the environment, and people.

Greenwashing causes confusion among consumers, leading to lower consumer/investor confidence in green products, services, and firms.<sup>6</sup> For example, confusion and concerns over misleading environmental claims has led to 60% of adult Australians to stop purchasing green products.<sup>7</sup> When consumers lack confidence in these products and refuse to purchase, the markets for green products/services and socially responsible investing diminish.<sup>8</sup> When these markets are diminished and consumers are reluctant to reward companies for good environmental performance, these organisations are incentivized to worsen their environmental behaviour, negatively impacting social welfare.<sup>9</sup> Similarly, as environmental consumerism is found across all socio-economic levels,<sup>10</sup> the prevalence of greenwashing hinders consumers from making economically efficient decisions.

In order to address the negative impacts of greenwashing, it is necessary to examine the key factors that cause greenwashing: external market and non-market, organisational, and individual drivers. Delmas and Burbano highlight that the root of greenwashing lies within a state of uncertain regulation. Corporations are enticed to convey positive environmental performance because there are limited punitive consequences and there is variation and

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<sup>5</sup> ACCC, "Greenwashing by businesses in Australia," 2.

<sup>6</sup> Delmas and Burbano, the Drivers of Greenwashing, 64-65.

<sup>7</sup> Mobium group, Green market summary.

<sup>8</sup> Delmas and Burbano, the Drivers of Greenwashing, 64-65.

<sup>9</sup> Ibid, 84.

<sup>10</sup> Engelhardt, Nancy Jane. *Environmental labeling and consumer products: A history of policy, regulation and usage, 1990-2000*. The University of Southern Mississippi (2002) 18.

complexity in cross-country practices, especially in determining what constitutes greenwashing.<sup>11</sup> As mentioned previously, the shift in consumer attitudes towards sustainability coupled with competition behaviour also influences when organisations greenwash. The structure, culture, communication, and characteristics of firms as well as the psychological decisions of individuals in the firms play a key role in increasing greenwashing levels.<sup>12</sup> However, the key driver of greenwashing that influences the other factors is both the existence of lax regulation and policy and the lack of explicit regulation.

As noted above, the textile, garment, and shoe (referred to as the fashion industry going forward) industry was found to be the industry with the second highest concerns of greenwashing. The importance of formulating greenwashing regulation continues to be overlooked while industries with the poorest sustainable performances continue to benefit from this. The fashion industry has been found to be the third largest contributor to water pollution and land use change and the fourth largest contributor to carbon emissions.<sup>13</sup> This industry produces 92 million tonnes of waste per year and consumes 79 trillion litres of water.<sup>14</sup> This industry not only affects the environment but directly harms people as well. 80% of garment workers are women<sup>15</sup> and 76% of workers face gender-based violence.<sup>16</sup> When greenwashing is allowed to occur, corporations are enabled to continue their cycle of harm against the environment, people, and the economy.

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<sup>11</sup> Delmas and Burbano, *the Drivers of Greenwashing*, 65-66.

<sup>12</sup> *Ibid*, 68.

<sup>13</sup> EU Strategy for Sustainable and Circular Textiles, COM(2022) 141, Section 1.

<sup>14</sup> Kirsi Niinimäki et al., “The Environmental Price of Fast Fashion,” *Nature Reviews Earth & Environment*, no. 4 (2020): 189–200, <https://doi.org/10.1038/s43017-020-0039-9>, 189.

<sup>15</sup> Clean Clothes Campaign, “Gender Discrimination” (2020), <https://cleanclothes.org/gender-discrimination#:~:text=An%20estimated%2060%20million%20workers,their%20basic%20rights%20at%20work.>

<sup>16</sup> Bangladesh Center for Workers Solidarity (BCWS), “Break the Silence, Stop the Violence” (2021), 5.

## Current role of the government

Currently, there are no regulations within the State used to govern greenwashing. Similarly, “there is no [federal] Australian legislation that specifically regulates greenwashing.”<sup>17</sup> Rather, there are three acts which the government has interpreted in order to broadly regulate greenwashing: Corporations Act 2001, Australian Securities and Investments Commissions (ASIC) Act, and the Competition and Consumer Act (2010).

### *Corporations Act 2001 Section 1041H*

Section 1041H of the Corporations Act 2001 states:

*A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.*<sup>18</sup>

Given that this act contains general prohibitions against misleading or deceptive conduct, it can be used to regulate greenwashing. When promoting or offering a sustainability product or service in the financial industry, the conduct of the corporation (such as the advertising) must abide by this section of the act. It is thus clear that s 1041H may regulate greenwashing in the financial services industry,<sup>19</sup> or it can even regulate the conduct associated with the finances of a company.<sup>20</sup>

### *Australian Securities and Investments Commissions (ASIC) Act (2001) Section 12DA*

Section 12DA of the ASIC Act states:

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<sup>17</sup> Marina Nehme and Michael Adams, “Section 18 of the Australian Consumer Law and Environmental Issues,” *Bond Law Review* 24, no. 1 (2012), <https://doi.org/10.53300/001c.5585>, 42.

<sup>18</sup> Corporations Act 2001 (Cth) s 1041H. Section 1041H.

<sup>19</sup> Nehme and Adams, “Section 18 of the ACL,” 48.

<sup>20</sup> *Ibid*, 49.

*A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.*<sup>21</sup>

This act, which is very similar to s 1041H of the Corporations Act, is less broad in that it is applicable only to conduct related to financial services in trade or commerce. Therefore, the opportunity to regulate greenwashing is much more limited.

### *Competition and Consumer Act (2010)*

The Australian Consumer Law (ACL) is within Schedule 2 of the Competition and Consumer Act which is the most recent policy used to regulate greenwashing. The main sections that are applicable to greenwashing are section 29 which deals with false or misleading representations about goods or services<sup>22</sup> and section 18 which states that:

*A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*<sup>23</sup>

Essentially, this act, which replaces section 52 of the Trade Practices Act (1974), allows the Australian Competition and Consumer Commission to regulate greenwashing. Using the ACL, and ASIC Act which guides the ACCC, the ACCC guides consumer law to minimise false and misleading claims. This body “accepts reports ... about possible misleading claims” and “can “require businesses to back up claims they make about their products or services.”<sup>24</sup> Although there is not an established fine for breaching the ACL, “injunctions, damages, and remedial orders may be granted by the court.”<sup>25</sup>

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<sup>21</sup> Australian Securities and Investments Commission Act 2001 (Cth) s 12DA(1).

<sup>22</sup> Brouwer, Anne. "Revealing Greenwashing: A Consumers' Perspective." International Association for Development of the Information Society (2016), 250.

<sup>23</sup> Competition and Consumer Act 2010 (Cth) s 18.

<sup>24</sup> Australian Competition and Consumer Commission, “False or Misleading Claims,” *Commonwealth of Australia* (2023).

<sup>25</sup> Nehme and Adams, “Section 18 of the ACL,” 44.

The ACL provides more clear regulation which grants the ACCC the ability to more effectively govern misleading and false claims, including greenwashing. Following the Competition and Consumer Act, the ACCC published *Green marketing and the Australian Consumer Law* which is essentially a guide for individuals and organisations to refer to when making environmental claims as it explains what environmental claims should and should not be.

## Issues with the current regulatory state and recent developments

With the passage of the Competition and Consumer Act, the ACL replaced the previous fair trade and consumer protection laws of Victoria, namely the Fair Trading Act 1999 (Vic) and the Trade Practices Act 1974 (Cth): Parts IVA, V, VA and VC,<sup>26</sup> meaning that the state of Victoria lacks regulation on greenwashing, especially with respect to the fashion industry. Not only is policy on greenwashing nonexistent in Victoria, the guides put out by the ACCC lack clarity and specificity. For example, in *Green marketing and the Australian Consumer Law*, the ACCC states that those making environmental claims should “exercise caution when making such claims, as you may be in breach of the law.”<sup>27</sup> The lack of clarity in what is greenwashing, and what is therefore deemed a breach, is a clear issue because it is uncertain regulation that most directly impacts the presence of greenwashing. Another concern regarding the state of policy is the lack of greenwashing regulation specific to the fashion industry. As examined earlier, this industry plays a large role in harming the environment and people. With current regulation, the ACCC does not accept reports on ethics-washing<sup>\*28</sup> in this industry.

The current regulatory state is clearly an issue given the aforementioned ACCC investigation results published two months ago. Finding that 57% of companies in the sweep committed greenwashing prompted the ACCC to state that it will issue “economy-wide guidance material” and it will investigate whether these claims are in breach of the ACL.<sup>29</sup> The issue at hand is that (1) there is no greenwashing policy in Victoria and (2) economy-wide guidance

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<sup>26</sup> Victorian Government, “Consumers and the ACL,” Australian Consumer Law, 2010, <https://consumer.gov.au/consumers-and-acl/other-consumer-protections/victoria>.

<sup>27</sup> Australian Competition and Consumer Commission. “Green marketing and the Australian Consumer Law,” (2011), 4.

<sup>28</sup> \*Ethics-washing incorporates humans and animals into greenwashing because humans and animals are a key part of sustainability and the environment is just one aspect that firms can communicate positively about.

<sup>29</sup> James Gray, Ayman Guirguis, and Jessica Mandla, “So You’re Green – Prove It or Be Prosecuted: ACCC Sweep Finds 57% of Green Claims ‘Concerning,’” JD Supra, (2023).

material will still result in lack of clarity and specificity with regards to what is considered greenwashing within each industry.

## **Proposed solutions**

### *Why regulate greenwashing?*

The following solutions are proposed in order to minimise the gap in regulation that directly addresses greenwashing. Creating explicit greenwashing regulations is crucial to protecting consumers and changing environmental behaviour in various industries. Poor environmental performance is difficult to change as the drivers are relatively fixed in the short term, therefore it is important to focus on the drivers of the communication of environmental performance as they develop and change in a shorter time frame.<sup>30</sup> When individuals and corporations are required to be transparent and eliminate misleading conduct surrounding green products/services, consumers are able to be more confident in their purchases and can influence the behaviour of these firms. Explicit regulations on communication can change behaviours and encourage better environmental performance.<sup>31</sup>

### *Guidelines from the Victorian Government*

It is suggested that the Victorian Government adopt the United Nations Environmental Programme (UNEP's) guidelines on greenwashing. The State should adopt UNEP's guidelines on greenwashing as anti-greenwashing and -ethics-washing guidelines. These guidelines not only provide a comprehensive guide to greenwashing and ethics-washing, but as they were developed by UNEP, the adoption of such guidelines would be beneficial to both corporations and consumers. The root cause of greenwashing is the uncertainty in regulation and the variation across international and territorial lines. Therefore, incorporating the guidelines set by UNEP

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<sup>30</sup> Delmas and Burbano, the Drivers of Greenwashing, 65.

<sup>31</sup> Ibid, 68.

into anti-greenwashing and -ethics-washing guidelines in Victoria, firms would be less likely to engage in this behaviour.

Adopting these guidelines could allow the Victorian Government to be a pioneer for regulations on greenwashing. The guidelines put forth by the State, which would be more explicit and beneficial to the producers and consumers, could be taken up by the ACCC. The phenomenon of state governments successfully influencing federal regulations on greenwashing is evidenced with the development of the U.S. Federal Trade Commission's (FTC) Green Guides. Numerous states in the U.S. created stricter revisions of the federal Green Guides which caused the FTC to revise the guides after public comment and hearings.<sup>32</sup>

#### *Increased transparency through labelling laws*

In order to further reduce the prevalence of greenwashing, it is suggested that the Victorian Government institute labelling laws for the fashion industry. Labelling laws are an effective way to reduce greenwashing by increasing transparency of the nature of the product by allowing the consumer to have more information. Labelling laws have been an effective tool for increasing consumer awareness of the goods they are purchasing. For example, Canada's textile Labelling Act explicitly delineates the information needed on labels (including specific information on fibre content and animal fibres) so Canadian consumers have more information on the products they are purchasing.<sup>33</sup> Currently, AS/NZS 2392:1999 only requires fibre content and country of origin on textile labels.<sup>34</sup> It is, therefore, suggested that the labelling laws require the following features to be made clear to the consumer:

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<sup>32</sup> Engelhardt, *Environmental labeling and consumer products*, 89.

<sup>33</sup> Competition Bureau, "Guide to the Textile Labelling and Advertising Regulations," Government of Canada (2000), Section VII.

<sup>34</sup> AS/NZS 2392:1999

- Composition specific labelling
  - E.g ‘polyester’ as compared to ‘synthetic’ or ‘faux fur’
  - Percentage breakdowns for blended materials and materials made of multiple materials.
- Species specific labelling
  - Rather than a label that says ‘leather,’ a label would say ‘cow leather,’ ‘goat leather,’ ‘pig leather,’ etc.
- Define labelling terms such as organic, recyclable, recycled, etc.
  - These definitions could be part of the guidelines.
- Labelling for products from slaughter supply chains
- Labelling for products likely to shed micro-fibres in the washing machine (with machine wash instructions).

*Further down the road: Eco-labels*

It is also suggested that the Victorian Government eventually incorporates state-sponsored eco-labels into their policy to regulate greenwashing in the fashion industry. Eco-labels have been regarded as highly effective tools that have been used internationally such as the ISO 14020s. A study on Australian consumer attitudes towards greenwashing found that eco-labels were found to be trustworthy and were able to change the buying behaviour in consumers.<sup>35</sup> Although the ISO 14020s can be used as a baseline, it is suggested that these are not the final standards adopted by the state of Victoria because the ISO 14020s have been found

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<sup>35</sup> Brouwer, “Revealing Greenwashing,” 249-250.

to allow too many labels which causes confusion with consumers.<sup>36</sup> In order to create effective eco-labels that benefit consumers, the State would need to form a commission with industry experts that can develop the guidelines for the eco-labels in an open political process that generates consensus. The European Union has begun to do this through the EU Strategy for Sustainable and Circular Textiles in which their “Commission [that] will also review the EU Ecolabel criteria.”<sup>37</sup> One method for eco-labels is to create a “green list” of behaviours that are conducive to total ethics fashion. When companies are able to show that they engage in these green behaviours, they are able to don an eco-label on their products. Given that Section 299(1)(f) of the Corporations Act requires directors to “report on their company’s environmental performance,”<sup>38</sup> the political infrastructure needed to verify a company’s claim is already in place. Having state-sponsored eco-labels would build upon this policy and the guidelines suggested previously in order to facilitate consumer protection and the consumer demand for verified green products and services.

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<sup>36</sup> Nikolay Minkov et al., “Characterization of environmental labels beyond the criteria of 120 14020 series,” *The International Journal of Life Cycle Assessment* 25 (2020): 840-855.

<sup>37</sup> EU Strategy for Sustainable and Circular Textiles, COM(2022) 141, Section 2.5.

<sup>38</sup> Geoffrey Frost and Linda English, “Mandatory Corporate Environmental Reporting in Australia: Contested Introduction Belies Effectiveness of Its Application,” *Australian Review of Public Affairs*, November 1, 2002, <http://www.australianreview.net/digest/2002/11/frost.html>.

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