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Section 18 of the Australian Consumer Law and Environmental Issues

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Section 18 of the Australian Consumer Law and Environmental Issues

Abstract

The market for 'green' products has expanded drastically over recent years in response to increased consumer concerns about environmental issues. However, such expansion has been accompanied by unsavoury conduct by some producers and marketers of green products. A number of corporations, for example, have sought to exploit their environmental and corporate social responsibility credentials to confuse, mislead or even defraud customers or clients by marketing so-called 'brown' (or non-green) products as green products. This practice has been referred to as 'greenwashing'. While Australia does not have specific legislation dealing with misleading environmental claims, it has developed a sophisticated approach to the regulation of misleading or deceptive conduct through the old s 52 of the Trade Practices Act 1974 (Cth), now s 18 of the Australian Consumer Law, and its many derivatives in other statutes. This article analyses the extent to which s 18 of the Australian Consumer Law and its federal statutory equivalents apply to the regulation of greenwashing.

Keywords

Section 18, Australian Consumer Law, environmental issues, green products

SECTION 18 OF THE AUSTRALIAN CONSUMER LAW AND ENVIRONMENTAL ISSUES

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The market for 'green' products has expanded drastically over recent years in response to increased consumer concerns about environmental issues. However, such expansion has been accompanied by unsavoury conduct by some producers and marketers of green products. A number of corporations, for example, have sought to exploit their environmental and corporate social responsibility credentials to confuse, mislead or even defraud customers or clients by marketing so-called 'brown' (or non-green) products as green products. This practice has been referred to as 'greenwashing'. While Australia does not have specific legislation dealing with misleading environmental claims, it has developed a sophisticated approach to the regulation of misleading or deceptive conduct through the old s 52 of the Trade Practices Act 1974 (Cth), now s 18 of the Australian Consumer Law, and its many derivatives in other statutes. This article analyses the extent to which s 18 of the Australian Consumer Law and its federal statutory equivalents apply to the regulation of greenwashing.

I INTRODUCTION

Around the world, consumers and citizens are increasingly concerned about environmental problems. As a consequence, they are becoming more and more conscious of the impact their purchasing decisions may have on the environment.¹ This has led to a considerable expansion of the 'green' market over the last few years. For instance, the Australian market for sustainable products and services surged

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¹ National Geographic, *Greendex 2010: Consumer Choice and the environment—A Worldwide Tracking Survey* (June 2010) <http://images.nationalgeographic.com/wpf/media-live/file/GS_NGS_Full_Report_June10-cb1275498709.pdf>; Amanda Bodger and Melissa Monks, 'Getting in the Red over Green: The Risks with 'Green' Marketing' (2010) 3(3) *Journal of Sponsorship* 284, 284.

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from AU\$12 billion in 2007 to AU\$21.5 billion in 2010. It has been predicted that, by the end of 2012, this market will be valued at AU\$27 billion.²

In recent times green marketing has become popular as it may attract environmentally conscious consumers to buy green products at a premium price. Green marketing may be defined as the ‘marketers’ attempt to develop strategies targeting the “environmental consumer”.³ Such marketing campaigns have been used to sway public opinion and to endorse the green credentials of an organisation. For instance, a number of businesses have been promoting their green credentials for everything from carbon neutral wines⁴ to green cars,⁵ green clothing,⁶ and even green financial services.⁷

With the expansion of the green market, it is crucial to ensure that green marketing is properly regulated and monitored. This is especially important as green marketing may be accompanied by ‘greenwashing’, where a manufacturer or retailer promotes the green credentials of a product but overstates the benefits to the environment, and thereby potentially misleads the consumer. To date, no legislation in Australia specifically regulates this particular area of concern. As a result, a review of the general laws regulating misleading or deceptive conduct is required to determine the extent to which these laws currently provide protection to environmentally conscious consumers.

A review of the law indicates that the last 40 years have seen the development of common law concepts such as negligence and misrepresentation.⁸ Further, legislative

² Mobium Group, *Green Market—State of Play—Research Project Summary—Australia* (May 2011) 4, <www.mobium.com.au>.

³ Stephen McDaniel and David Rylander, ‘Strategic Green Marketing’ (1993) 10(3) *Journal of Consumer Marketing* 4, 4.

⁴ Cullen Margaret River, ‘*The Low Carbon Economy: Cullen Wines*’, <<http://cullenwines-carbonneutral.com/>>.

⁵ An Australian Government Initiative, *Make a Smarter Choice*, <<http://www.greenvehicleguide.gov.au/GVGPublicUI/home.aspx>>.

⁶ BTCGroup, *Promotional Eco Friendly Clothing Provides Advertising on the Move* (19 May 2011) <<http://www.btcgroup.co.uk/articles/promotional-eco-friendly-clothing-provides-green-advertising-on-the-move-1594.html>>.

⁷ See UNEP FI North American Taskforce, *Green Financial Products and Services: Current State of Play and Future Opportunities* (October 2007) <http://www.unepfi.org/fileadmin/documents/greenprods_01.pdf>. Further, a number of financial planners provide ethical investment advice to clients: see, eg, Ethical Investment Services, <<http://www.ethicalinvestments.com.au/>>.

⁸ *Donoghue v Stevenson* [1932] AC 562; David Ash, ‘The Diamond Snail’ (2006/2007) *Journal of the NSW Bar Association* 84; Derek Chantler, ‘The Concept of Misrepresentation’ (1975-1976) 12 *University of Western Australian Law Review* 166; Bruce Fedthussen, *Economic Negligence*:

provisions dealing with misleading or deceptive conduct have been developed at both the Federal and State level. For example, the former *Trade Practices Act 1974* (Cth)⁹ (TPA) introduced a balance between the civil action of misleading or deceptive conduct in s 52 and the criminal action of false or misleading representations in s 75AZC.¹⁰ Due to the limitations imposed on federal powers in the Australian Constitution, each State and Territory had to adopt its own fair trading legislation to reflect the federal law.¹¹

The introduction in 2011 of the *Australian Consumer Law*¹² (ACL) brings all consumer protection law in Australia under the one umbrella. Today, s 18 ACL has replaced s 52 TPA. However, overlapping provisions regarding misleading or deceptive conduct in the financial services area also exist in the *Corporations Act 2001* (Cth)¹³ and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act).¹⁴

This article examines how s 18 ACL and its federal statutory equivalents deal with greenwashing. Part II of this article discusses the concept of greenwashing and the problems it raises. Part III focuses on s 18 ACL and its federal statutory equivalents to assess whether such provisions are able to regulate greenwashing and prevent it from occurring. Lastly, Part IV provides a brief overview of the civil and administrative enforcement powers of the Australian Competition and Consumer Commission (ACCC) in this area and discusses the strategies the ACCC may employ to regulate greenwashing.

II FROM GREEN MARKETING TO GREENWASHING: A COLLISION

The marketing carried out by an organisation was once directed solely at potential customers, in order to increase sales.¹⁵ However, such an approach is no longer

The Recovery of Pure Economic Loss (Thomson Carswell, 5th ed, 2008); Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (10th ed, Thomson Reuters, 2011) Parts 3 and 5.

⁹ The *Trade Practices Act 1974* (Cth) became the *Competition and Consumer Act 2010* (Cth) on 1 January 2011. The structure of the Act was changed as well as its name.

¹⁰ Section 75AZC was introduced after the Commonwealth *Criminal Code* was introduced in 2001. This section has now been replaced by s 151 ACL.

¹¹ For example, s 52 TPA was mirrored in *Fair Trading Act 1992* (ACT) s 12; *Fair Trading Act 1987* (NSW) s 42; *Consumer Affairs and Fair Trading Act 1900* (NT) s 42; *Fair Trading Act 1989* (Qld) s 38; *Fair Trading Act 1987* (SA) s 56; *Fair Trading Act 1900* (Tas) s 14; *Fair Trading Act 1985* (Vic) s 11; and *Fair Trading Act 1987* (WA) s 10.

¹² *Competition and Consumer Act 2010* (Cth) sch 2, which came into force on 1 January 2011.

¹³ *Corporations Act 2001* (Cth) s 1041H.

¹⁴ *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA.

¹⁵ Stanley Slater and John Naver, 'Market-Oriented is More than Being Customer-Led' (1999) 20 *Strategic Management Journal* 1165, 1165; George Day, 'The Capabilities of Market-Driven

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sufficient, as organisations today are expected to focus not only on their customers but also on stakeholder groups that may hold the corporation accountable for its actions.¹⁶ The view that the concept of marketing must be expanded to cover all relevant stakeholders¹⁷ has been adopted by a number of associations dealing with marketing around the world. For instance, the American Marketing Association defines marketing in the following manner: 'Marketing is the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large.'¹⁸ As a result of this approach to marketing, notions such as green marketing have become popular.¹⁹ At the same time, it has become increasingly the prevailing view that corporations should behave in a socially responsible manner.²⁰

A Corporate Social Responsibility and Green Marketing

A number of definitions of corporate social responsibility have been developed over the years. These have related to different stakeholders and have centred on some or

Organisations' (1994) 58 *Journal of Marketing* 37, 37; Tom Connor, 'Customer-Led and Market-Oriented: A Matter of Balance' (1999) 20 *Strategic Management Journal* 1157.

¹⁶ Courtney Brown, *Beyond the Bottom Line* (Macmillan Publishing, 1979) 20; Bryane Michael, 'Corporate social responsibility in international development: An overview and critique' (2003) 10(3) *Corporate Social Responsibility and Environmental Management* 115.

¹⁷ Stephen Vargo and Robert Lusch, 'Evolving to a New Dominant Logic for Marketing' (2004) 68 *Journal of Marketing* 1; Kathryn Kimery and Shelley Rinehart, 'Markets and Constituencies: An Alternate View of the Marketing Concepts' (1998) 43 *Journal of Business Research* 117, 123.

¹⁸ American Marketing Association, *The American Marketing Association releases New Definition for Marketing* (2008) 1, <<http://www.marketingpower.com/AboutAMA/Documents/American%20Marketing%20Association%20Releases%20New%20Definition%20for%20Marketing.pdf>>.

¹⁹ McDaniel and Rylander, above n 3, 4.

²⁰ Kathy Babiak and Sylvia Trendafilova, 'CSR and Environmental Responsibility: Motives and Pressures to Adopt Green Management Practices' (2011) 18 *Corporate Social Responsibility and Environmental Management* 11; Tracy Morgan and Gayle Avery, 'Corporate Social Responsibility Practices in the Australian Consumer Goods Industry: Preliminary Findings' (2008) 3(2) *Journal of Diversity Management* 9; Peggy Bronn and Albana Belliu Vroni, 'Corporate Social Responsibility and Cause-Related Marketing: An Overview' (2001) 20 *International Journal of Advertising* 207; Isabelle Maignan, OC Ferrell and Linda Ferrell, 'A Stakeholder Model for Implementing Social Responsibility in Marketing' (2005) 39 *European Journal of Marketing* 956.

all of the following five dimensions:²¹environmental; social; economic; stakeholder and voluntariness of actions and reporting.

Related concepts such as corporate citizenship²² and corporate social performance²³ have additionally been debated since the 1950s.²⁴ Highlighting the complexity of the concept, however, there is no consensus on the definition of corporate social responsibility.²⁵

Corporate social responsibility may be viewed as involving only corporations' purely voluntary acts. For instance, Manne and Wallich defined this term as 'a condition in which the corporation is at least in some measure a free agent. To the extent that any of the foregoing social objectives are imposed on the corporation by law, the corporation exercises no responsibility when it implements them'.²⁶

Alternatively, corporate social responsibility may be considered to be a business approach in which an organisation takes into account the manner in which its activities may impact upon different stakeholders.²⁷ The European Union Green Paper, for example, defined corporate social responsibility as 'a concept whereby companies integrate social and environmental concerns in their business operations

²¹ Alexander Dahsrud, 'How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions' (2008) 15(1) *Corporate Social Responsibility and Environmental Management* 1, 4.

²² Dirk Matten and Andrew Crane, 'Corporate Citizenship: Toward an Extended Theoretical Conceptualization' (2005) 30(1) *The Academy of Management Review* 166; Dirk Matten, Andrew Crane and Wendy Chapple, 'Behind the Mask: Revealing the True Face of Corporate Citizenship' (2003) 45 *Journal of Business Ethics* 109.

²³ Donna Wood, 'Corporate Social Performance Revisited' (1991) 16(4) *Academy of Management Review* 691; Max Clarkson, 'A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance' (1995) 20 *Academy of Management Review* 92.

²⁴ Howard R Bowen, *Social Responsibilities of the Businessman* (New York University Press, 1953), xi; Archie Carroll, 'Corporate Social Responsibility: Evolution of a Definition Construct' (1999) 38 (3) *Business and Society* 268, 269; Rob Briggs, 'Corporate Social Responsibility and Sustainability' in Tamara Gillis (ed), *The IABC Handbook of Organizational Communication: A Guide to Internal Communication, Public Relations, Marketing and Leadership* (John Wiley and Sons, 2nd ed, 2011) 79, 79-80. However, it is important to note that the concept of corporate social responsibility had been referred to as early as the 1930s; the publication of Bowen's book in 1953 led to the start of the modern era of corporate social responsibility: Archie Carroll, 'A Three-Dimensional Conceptual Model of Corporate Performance' (1979) 4(4) *Academy of Management Review* 497, 497.

²⁵ Briggs, above n 24, 79-80; Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report* (December 2006) 13.

²⁶ Henry G Manne and Henry C Wallich, *The Modern Corporation and Social Responsibility* (Washington American Enterprise Institute for Public Policy Research, 1973) 106.

²⁷ Corporations and Markets Advisory Committee, above n 25, 13.

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and in their interaction with their stakeholders on a voluntary basis'.²⁸ Similarly, the World Business Council for Sustainable Development stated that corporate social responsibility is 'the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large'.²⁹

In accordance with the last-mentioned interpretation of this notion, to be a socially responsible corporate entity, a corporation must go beyond the legal and economic requirements imposed on it. Such a corporation—one that takes into consideration the needs of its shareholders, suppliers, consumers, their communities and the planet—may, in fact, not only be motivated by altruism but also self-interest, as the adoption of such an approach may be advantageous to the corporation. For instance, it may benefit from being perceived as a socially responsible entity because this enhances its reputation.³⁰ A good corporate reputation may be viewed as an 'intangible asset' and a source of strategic advantage in improving the company's long term ability to create value.³¹ As a consequence, a number of businesses seek to improve their environmental performance, as there is evidence that suggests that such a strategy may build a corporation's reputation and thus improve its financial performance.³² This is especially true as consumers' interest in green products is on the rise.³³

²⁸ The European Commission, *Promoting a European Framework for Corporate Social Responsibility*, European Union Green Paper (July 2001) 8. This definition was reiterated in 2006: the European Commission, *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0136:EN:HTML>>.

²⁹ World Business Council for Sustainable Development, *CSR: Meeting Changing Expectations* (1999) 3, <<http://www.wbcds.org/DocRoot/hbdf19Txhmk3kDxBQDWW/CSRmeeting.pdf>>.

³⁰ Terry Leap and Misty Loughry, 'The Stakeholder-Friendly Firm' (2004) 47(2) *Business Horizons* 27; Bronn and Vrioni, above n 20, 209; Gordon Greenley and Gordon Foxall, 'Multiple Stakeholder Orientation in UK Companies and the Implications for Company Performance' (1997) 34 *Journal of Management Studies* 259; Suresh Kotha, Shibaram Rajgopal and Violina Rindova, 'Reputation Building and Performance: An Empiric Analysis of the Top 50 Pure Internet Firms' (2001) 19(6) *European Management Journal* 570.

³¹ Morgan Miles and Jeffrey Covin, 'Environmental Marketing: A Source of Reputational, Competitive and Financial Advantage' (2000) 23 *Journal of Business Ethics* 299, 300. However, this hypothesis has been challenged in the past: see, eg, Caspar Rose and Steen Thomsen, 'The Impact of Corporate Reputation on Performance: Some Danish Evidence' (2004) 22 *European Management Journal* 201.

³² Joan Magretta, 'Growth Through Global Sustainability: An Interview with Monsanto's CEO, Robert B. Shapiro' (January-February 1997) *Harvard Business Review* 78; Sandra Waddock and Samuel Graves, 'The Corporate Social Performance-Financial Performance

In Australia, for instance, the market for green products has expanded by 60%, with 90% of Australians now reporting an interest in environmental issues.³⁴ Similarly, in the United States of America, a 2007 study by AARP³⁵ Services Inc found that ‘there are 40 million “green boomers” in the United States today’, meaning that over half of the baby boomer generation in the United States is environmentally conscious and willing to buy green products.³⁶ Manufacturers and retailers feeling the pressure to fulfil their clients’ needs and expectations have, accordingly, promoted the environmental attributes of their products, to achieve more sales and attract more clients.³⁷

The reputation of a corporation is most likely to sway public opinion when the conduct of the company is communicated to stakeholders. Since advertising campaigns may impact upon the perceptions held by people in society,³⁸ a strategy of green advertising has proved very popular with all industries, even those industries with a low risk of polluting the environment. For instance, despite their selling intangible financial products, banks all over the world have been involved in green marketing. For example, Westpac Bank, one of Australia’s four big banks, advertised in 2008 that it had changed its car fleet to more environmentally friendly cars.³⁹ Advertising this fact boosted Westpac’s reputation for being the greenest bank in Australia.⁴⁰ Similarly, in 2010 Credit Agricole, France’s biggest bank and one of the world’s largest financial institutions, initiated an advertising campaign highlighting

Link’ (1997) 18(4) *Strategic Management Journal* 303; Robert Klassen and Curtis McLaughlin, ‘The Impact of Environmental Management on Firm Performance’ (1996) 42(8) *Management Science* 1199; Miles and Covin, above n 31, 308.

³³ Jennifer Woods, ‘Of Selling the Environment—Buyer Beware? An Evaluation of the Proposed FTC Green Guides Revisions’ (2008-2009) 21 *Loyola Consumer Law Review* 75, 75.

³⁴ Mobium Group, above n 2.

³⁵ AARP was formerly known as the American Association of Retired Persons.

³⁶ Focalyst (from AARP Services Inc and Milward Brown), *It’s Good to Be Green: Socially Conscious Shopping Behaviors Among Boomers* (December 2007) <<http://www.agingsociety.org/agingsociety/links/greenboomers.pdf>>.

³⁷ John Church, ‘A Market Solution to Green Marketing: Some Lessons from the Economics of Information’ (1994-1995) 79 *Minnesota Law Review* 245, 245.

³⁸ McDaniel and Rylander, above n 3, 4; Maignan, Ferrell and Ferrell, above n 20, 963.

³⁹ Westpac, *Westpac’s Commitment to a Better Future* (December 2008) Issue 8, 2, <<http://www.westpac.com.au/docs/pdf/aw/pactV8.pdf>>.

⁴⁰ Drew Turney, *Special Report: Green Marketing—Playing the Green Card* (May 2007) 24, <<http://www.flexicar.com.au/modules/uploader/images/uploaded/Playing%20the%20Green%20Card.pdf>>.

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its green credentials.⁴¹ In these instances green advertising was being relied on to boost the company's reputation and attract green consumers. Green marketing has consequently been deemed by some to be 'brand management', as it is considered that characterising a business as green will attract more clients in the long run.⁴²

B The Danger of Greenwashing: Good Intentions Gone Bad

While green advertising promotes the 'green' image of a business, in certain instances businesses have abused the notion of green marketing. This has led to the introduction of the concept of 'greenwashing'.

1 What Constitutes Greenwashing?

'Greenwashing' has become part of our day-to-day vocabulary and in 1990 the *Oxford English Dictionary* defined greenwashing to mean 'the creation or propagation of an unfounded or misleading environmentalist image'.⁴³

Greenwashing has elsewhere been defined as 'the advertising of a product as "environmentally friendly" when some aspect of the product (or its distribution) has, in fact, deleterious effects on the environment'.⁴⁴ Greenwashing may also be described as the 'act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service'.⁴⁵ In 2007 TerraChoice, an environmental consulting agency based in Canada, identified the following patterns—which it categorised as the six 'sins'⁴⁶ of greenwashing—from misleading environmental claims being made at the time for consumer products in the North American market:⁴⁷

- **Sin of the Hidden Trade-off:** this sin is committed when a product is marketed as green based on an 'unreasonably narrow set of attributes

⁴¹ Danny Fortson, 'French Bank Faces Broadside on Greenwash Ads', *Sunday Times* (online), 31 January 2010, <http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article7009626.ece>.

⁴² *Ibid* 24.

⁴³ Oxford English Dictionary (Online).

⁴⁴ David Hoch and Robert Franz, 'Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising' (1994) 58 *Albany Law Review* 441, 441.

⁴⁵ TerraChoice Environmental Marketing, *The Six Sins of Greenwashing: A Study of Environmental Claims in North American Consumer Markets* (2007) <http://www.terrachoice.com/files/6_sins.pdf>.

⁴⁶ The term 'sin' has been adopted by TerraChoice to refer to different types or categories of greenwashing.

⁴⁷ TerraChoice, *The Sins of Greenwashing: Home and Family Edition* (2010) 10, <<http://sinsofgreenwashing.org/>>.

without attention to other important environmental issues'. For instance, the big banks in Australia have been promoting themselves as being green because of various initiatives they have taken. For example, in 2009 ANZ Bank advertised its introduction of green products such as green loans.⁴⁸ In 2010 Greenpeace alleged that the big banks, including ANZ, lent more than six times the amount of money to coal mining and power stations than to renewable energy projects—yet this did not stop the banks from claiming to be promoting green living.⁴⁹ The claimed green perspective is narrow, as it was focused on a few practices of the bank and did not necessarily take into account the whole picture.⁵⁰

- **Sin of No Proof:** this sin is committed when an environmental claim cannot be proven. The ACCC has stated that a person should not claim that a particular product or service has certain environmental benefits if such claims cannot be proven.⁵¹ For example, in 2007-2008, Goodyear Tyres claimed that its tyres were 'revolutionary environmentally-friendly', 'designed for minimal environmental impact [and to] reduce carbon dioxide emissions'. However, there was no evidence to substantiate such claims.⁵²
- **Sin of Vagueness:** this sin is committed when an environmental claim is too broad or ill-defined. For example, products that claim to be 'all natural' may be misleading as there is no clear definition of what this term may mean. A manufacturer might add 5% natural ingredients to an otherwise synthetic product and this could allow them to describe the product as 'natural'.⁵³ The Log Cabin syrup, for instance, claims to be 'all natural' yet

⁴⁸ ANZ, *ANZ Green Loan*, <<http://www.anz.com/personal/personal-loans/existing-account-holder/green-loan/>>.

⁴⁹ Australian Associated Press, *Greenpeace Slams Banks for Greenwashing* (11 October 2010) <<http://www.eco-business.com/news/greenpeace-slams-banks-greenwashing/>>.

⁵⁰ For another example, see Jim McDowall and Clemence Siret, *Energy-Saving Batteries—Green or Greenwash*, <http://www.battcon.com/PapersFinal2009/McDowallPaper2009FINAL_2.pdf>.

⁵¹ ACCC, *Green Marketing and the Australian Consumer Law* (2011) 5, <<http://www.accc.gov.au/content/index.phtml/itemId/815763>>.

⁵² ACCC, *Enforceable Undertakings: GoodyearTyres Pty Ltd*, Document number D08/65865 (25 June 2008).

⁵³ Mike Kapalko, 'Avoid the Greenwashing Trap' (2010) 3(6) *Sustainability: The Journal of Record* 317, 318; Catherine Brake, 'Recognizing and Avoiding Greenwash' (An Honors Thesis, Ball State University Muncie, December 2009), 17; Amanda Mahony, *10 Reasons to Go All Natural* <<http://www.earthquest.com.au/all-natural.php>>.

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has only 4% maple in it.⁵⁴ A claim to be ‘all natural’ may therefore mislead consumers.⁵⁵ The ACCC has similarly observed that it is important to ensure that a green claim should not be vague or contain ambiguous wording, as such conduct may be misleading.⁵⁶

- **Sin of Irrelevance:** this sin is committed when the environmental claim that is made is true but is unimportant or irrelevant to consumers. For example, LG is selling a 48L bar fridge as ‘CFC-free’.⁵⁷ Such a claim, while true, is meaningless as CFC products have been banned in Australia since 1996 and all Australian products should be CFC-free.⁵⁸
- **Sin of the Lesser of Two Evils:** this sin is committed in instances where a product is advertised as green or organic when the entire product category ‘is of questionable environmental value’.⁵⁹ For example, American Spirit cigarettes (which are imported into Australia) have been advertised as ‘organic’. These cigarettes are targeted toward green consumers and attempt to offer reassurances to consumers since the term ‘organic’ implies some beneficial attributes.⁶⁰ However, while smoking organic cigarettes may be a more responsible choice for smokers than other types of cigarettes, they are still a harmful product. Consumers are better off not smoking.⁶¹

⁵⁴ Lisa Rathke, *Sticky Issue: All Natural Syrup Deemed Misleading* (9 October 2010) Associated Press, <<http://today.msnbc.msn.com/id/39094698/ns/today-food/t/sticky-issue-all-natural-syrup-deemed-misleading/>>.

⁵⁵ See, eg, ACCC, *Enforceable Undertaking: Natur-All Pty Ltd*, Document number D08/28149 (1 April 2008).

⁵⁶ ACCC, *Green Marketing and the Australian Consumer Law*, above n 51, 5.

⁵⁷ LG, *Now That’s Refreshing*, <<http://www.lg.com/au/kitchen-appliances/refrigerators/LG-bar-refrigerator-GR-051SS.jsp>>. CFC stands for chlorofluorocarbons.

⁵⁸ Azhar Uddin, Eric Kennedy, Hai Yu and Bogdan Dlugogorski, ‘Process for Conversion of Surplus Halons, CFCs and Contaminated HFCs Into Fluoroelastomer Precursors’ (Paper presented at 14th Annual International Halon Options Technical Working Conference (HOTWC 2004), Albuquerque, New Mexico 2004) 1, <<http://fire.nist.gov/bfrlpubs/fire04/PDF/f04084.pdf>>; Australian Government, Department of Sustainability, Environment, Water, Pollution and Communities, *Montreal Protocol on Substances that Deplete the Ozone Layer*, <<http://www.environment.gov.au/atmosphere/ozone/legislation/montp.html>>.

⁵⁹ TerraChoice, *The Sins of Greenwashing: Home and Family Edition*, above n 47, 4.

⁶⁰ Margaret Winstanley, *The Tobacco Industry in Australian Society*, Michelle Scollo and Margaret Winstanley (eds) *Tobacco in Australia: Facts and Issues* (3rd ed, 2008, Melbourne: Cancer Council of Victoria) [10.7.7], <<http://www.tobaccoaustralia.org.au/>>.

⁶¹ See, eg, ACCC, *Enforceable Undertaking: Philip Morris (Australia) Ltd*, Document number D05/23079 (10 May 2005).

- **Sin of Fibbing:** this sin is committed when a person makes an environmental claim that is false. For example, LG advertised a false energy consumption rating for some of its fridges. The ACCC found that one of the fridges had an energy consumption of 876 kilowatts hours (kWh) a year when it was advertised as being 738kWh.⁶²
- **Sin of Worshipping False Labels:** this sin is committed when the product advertising gives the impression of a third party endorsement when no such endorsement actually exists. For instance, Prime Carbon Pty Ltd claimed that the National Environmental Registry Pty Ltd, a company through which Prime Carbon Pty Ltd provides some of its services, was regulated by the Australian government and had entered into an arrangement with the Chicago Environmental Registry. This endorsement was false and, as a consequence, misleading.⁶³ The ACCC has stated that a person should not claim their organisation has the backing of another party when such backing does not exist.⁶⁴

As seen above, different types of greenwashing may take place. However, the common theme across the different categories is that consumers are being misled into buying a product that is not a green product.⁶⁵

2 *Greenwashing: A Growing Trend*

Time magazine has observed that 'companies are spending big sums to develop an earth-hugging image'.⁶⁶ For instance, a number of corporations consciously aimed to produce and market greener products.⁶⁷ This positive attitude was supported by consumers as they were willing to pay more to obtain environmentally sustainable

⁶² Melissa Singer, 'Green Fridge Labelled a Fraud' *Sydney Morning Herald* (online), 17 March 2010, <<http://www.smh.com.au/environment/green-fridge-labelled-a-fraud-20100316-qclx.html>>; ACCC, Enforceable Undertaking: LG Electronics Australia Pty Ltd, Document number D10/3677349 (15 September 2010).

⁶³ ACCC, 'Company Admits Misleading Consumers About Marketing Carbon Credits' (Media Release, NR 043/10, 11 March 2010) <<http://www.accc.gov.au/content/index.phtml/itemId/918242/fromItemId/621575>>.

⁶⁴ ACCC, *Green Marketing and the Australian Consumer Law*, above n 51, 5.

⁶⁵ David Gibson, 'Awash in Green: A Critical Perspective on Environmental Advertising' (2008-2009) 22 *Tulane Environmental Law Journal* 423, 424; John McDonnell and Jennifer Bartlett, 'Marketing to Change Public Opinion on Climate Change: A Case Study' (2009) 1(3) *The International Journal of Climate Change: A Case Study* 63, 63.

⁶⁶ Jerome Cramer, 'Eco-Commercialism; The Selling of the Green' *Time* (online), 16 September 1991, <<http://www.time.com/time/magazine/article/0,9171,973815,00.html>>.

⁶⁷ Hoch and Franz, above n 44, 441.

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products.⁶⁸ This led some people to view the cultivation of green credentials as the source of a competitive advantage. As a result, a number of corporations decided to take advantage of the green wave without modifying their strategic policies regarding the environment.⁶⁹ Instead, to give the appearance to the public that their organisation was a green corporation, they engaged in greenwashing.

Greenwashing is very common around the globe. For instance, TerraChoice stated in its 2010 report that while the green market is growing in North America, the number of corporations involved in greenwashing is very high. In its 2007 survey, less than 1% of the proportion of consumer products marketed as green surveyed did not make claims that were either false or risked misleading intended consumers. In its 2010 survey, this figure had risen to almost 4.5%. While this improvement in the percentage may be encouraging, it still leaves over 95% of products claiming to be green when they are not.⁷⁰ Similarly, a 2009 survey by TerraChoice in Australia found that greenwashing affected 98% of the products surveyed which claimed to be green products.⁷¹ Thus, according to these studies the overwhelming majority of products claiming to be green are either not green or not as green as claimed.

3 The Danger of Greenwashing: Negative Impact on the Sales of Genuinely Green Products

As a direct result of misleading green product claims, consumers have developed a cynical view toward green products.⁷² Consumers are starting to view green labels as 'window dressing'. For instance, in 2010, Greendex conducted a survey of consumers' views regarding the environment in 17 countries. While the study highlighted that there is an increase in the number of environmentally conscious

⁶⁸ Wendy Priesnitz, 'Greenwash: When Green is Just Veneer' *Natural Life Magazine* (online), May/ June 2008, <http://www.naturallifemagazine.com/0806/NaturalLife_Greenwashing.pdf>.

⁶⁹ Elizabeth Coppolecchia, 'The Greenwashing Deluge: Who Will Rise Above the Waters of Deceptive Advertising?' (2009-2010) 64 *University of Miami Law Review* 1353, 1356; Woods, above n 33, 75; Kristen Lyons, 'Corporate Environmentalism and Organic Agriculture in Australia: The Case of Uncle Toby's' (1999) 64(2) *Rural Sociology* 251, 256.

⁷⁰ TerraChoice, *The Sins of Greenwashing: Home and Family Edition*, above n 47, 6.

⁷¹ TerraChoice, *Study Finds Greenwashing Affects 98% of Products in Australia* (2009) <<http://www.terrachoice.com/files/Seven%20Sins%20of%20Greenwashing%20Release%20-%20June%2029%202009%20doc.pdf>>.

⁷² Adam Marciniak, 'Greenwashing as an Example of Ecological Marketing Misleading Practices' (2009) 12 *Comparative Economic Research* 49, 55.

consumers in countries around the world,⁷³ greenwashing is the main reason stopping consumers from buying green products.⁷⁴ Further, only 10% of consumers in the United States and the United Kingdom trust green information from government and businesses.⁷⁵ A recent study conducted by Mobium Group also highlights the scepticism of Australian consumers toward green claims made by manufacturers. According to the Mobium study, over 60% of adult Australians have stopped purchasing green products due to concerns that green claims were misleading.⁷⁶

As a consequence, greenwashing has a negative effect on consumers' perception of genuinely green products.⁷⁷ It also negatively impacts upon the producers of such products, as consumers are likely to suspect that the environmentally sustainable product claims are not genuine. This in turn has an effect on the profit margins of these corporations, as consumers will think twice before buying their genuinely green products.⁷⁸ Greenwashing is therefore a dangerous trend that has to be controlled by industry and regulators.

III SECTION 18 ACL AND ITS EQUIVALENTS: THEIR POSSIBLE APPLICATION TO GREENWASHING

There is no Australian legislation that specifically regulates greenwashing. The closest attempt to the introduction of such legislation occurred in 1991 when a Fair Trading (Environmental Labelling) Bill 1991 was introduced into the Victorian Legislative Assembly. This Bill proposed to include in the *Fair Trading Act 1985* (Vic) a provision that dealt specifically with environmentally misleading or deceptive

⁷³ Greendex, 'Greendex 2010: Consumer Choice and the Environment - A Worldwide Tracking Survey' (June 2010) 4, <http://images.nationalgeographic.com/wpf/media-live/file/GS_NGS_2010GreendexHighlights-cb1275487974.pdf>.

⁷⁴ Ibid 6.

⁷⁵ AccountAbility—Consumers International, *What Assures Consumers on Climate Change?* 64, <<http://www.consumersinternational.org/media/179823/what%20assures%20consumers%20ogfsr.pdf>>.

⁷⁶ Mobium Group, above n 2.

⁷⁷ Beatrice Parguel, Florence Benoit-Moreau and Fabrice Larceneux, 'How Sustainability Rating Might Deter "Greenwashing": A Closer Look at Ethical Corporate Communication' (2011) *Journal of Business Ethics*, 2.

⁷⁸ Bart King, *Survey Suggests Brands Risk Greenwashing Backlash*, <<http://www.matternetwork.com/2011/3/survey-suggests-brands-risk-greenwashing.cfm>>; Ed Gillespie, 'Stemming the Tide of Greenwash' (2008) 18(3) *Consumer Policy Review* 79, 81; Remi Bazillier and Julien Vauday, *The Greenwashing Machine: Is CSR more than Communication?* (2010) 39, <http://hal.archives-ouvertes.fr/docs/00/50/85/32/PDF/GW_44p10710.pdf>.

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conduct. Because of a change of government in 1992, however, the Bill was never enacted.⁷⁹

It is nevertheless the case that the existence of general provisions in different statutes may inhibit such conduct from occurring. The main provision that may deal with greenwashing is s 18 *ACL* and its predecessor, s 52 *TPA*.⁸⁰ This part will consider the application of s 18 and its federal statutory equivalents to greenwashing.

A *Section 18 ACL and Greenwashing*

One of the most developed areas of commercial law in Australia is the concept of misleading or deceptive conduct.⁸¹ Although at common law there are a number of principles that could be applied to misleading or deceptive conduct, such as the tort of passing-off or contractual action for misrepresentation, the growth has been in statutory protections. In fact, the legislative provisions have become so famous that the key section in the old *TPA*—s 52—has become synonymous with or at least a short-hand way of describing a legal action for misleading or deceptive conduct.⁸² While this paper focuses on civil actions under the statute, it is worth noting that the ACCC also has authority to bring criminal prosecutions against companies and individuals that make false representations.⁸³

Section 18 *ACL* replaced s 52 *TPA* from 1 January 2011, and provides that:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

⁷⁹ Stuart Thomas, 'Legal and Regulatory Considerations in Environmental Marketing: Finding Your Way Through the Green Marketing Jungle' (1995) 3 *Trade Practices Law Journal* 5, 9.

⁸⁰ Other provisions such as s 29(1)(g) *ACL*, for example, may also be used to stop greenwashing. Section 29(1)(g) provides that 'a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services: ... (g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, use or benefits'. However, this provision is beyond the scope of this article as the focus of the article is on s 18 *ACL*.

⁸¹ Allan Asher, 'A "Theory of Everything" for Consumer Protection?' (2006) 14 *Trade Practices Law Journal* 110, 110.

⁸² Weeliam Seah, 'Unfulfilled Promissory Contractual Terms and Section 52 of the Australian Trade Practices Act' (2000) 7(3) *Murdoch University Electronic Journal of Law* [1] <<http://www.austlii.edu.au/au/journals/MurUEJL/2000/33.html>>; Ian Tonking, 'Pitfalls in Pleading Section 52' (2009) 23(4) *Commercial Law Quarterly* 3, 3.

⁸³ See, eg, *Competition and Consumer Act 2010* (Cth) s 151.

Although s 18 is not the only section in the *ACL* that deals with misleading or deceptive conduct,⁸⁴ it provides the general prohibition regarding this matter and may capture a range of misleading conduct.⁸⁵ This provision, like its predecessor, may only lead to civil action.⁸⁶ While there is no fine imposed for a breach of s 18 *ACL*, injunctions,⁸⁷ damages⁸⁸ and remedial orders⁸⁹ may be granted by the court.

1 *The Difference between s 18 ACL and s 52 TPA*

A comparison of s 18 *ACL* and s 52 *TPA* reveals one key difference between the two provisions. The word ‘corporation’⁹⁰ in s 52 *TPA* has been replaced by ‘person’ in s 18 *ACL*. This means that unlike s 52 *TPA*,⁹¹ s 18 *ACL* will apply to individuals⁹² as well as to corporations⁹³ that may be involved in misleading or deceptive conduct.

Other than this difference, the meaning of s 18 *ACL* will be based on the existing jurisprudence that applies to s 52 *TPA*.⁹⁴ Consequently, s 18 is a very comprehensive

⁸⁴ See, eg, *Competition and Consumer Act 2010* (Cth) ss 29-38.

⁸⁵ Australian Government, *The Australian Consumer Law: A Guide to Provisions 4*, <http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_guide_to_provisions_November_2010.pdf>.

⁸⁶ *Competition and Consumer Act 2010* (Cth) s 217.

⁸⁷ *Ibid* s 232.

⁸⁸ *Ibid* s 236.

⁸⁹ *Ibid* s 239.

⁹⁰ Section 52 may also apply to interstate trade (s 51(i) of the *Australian Constitution 1900* (Cth)), the use of post, telephone and radio (s 51(v) of the *Australian Constitution 1900* (Cth); *Mackman v Stengold Pty Ltd* (1991) ATPR 41), conduct in a Territory (s 122 of the *Australian Constitution 1900* (Cth)), insurance (s 51(xiv) of the *Australian Constitution 1900* (Cth)) and external affairs (s 51(xxix) of the *Australian Constitution 1900* (Cth)): s 6 *TPA*. For discussion of the meaning of ‘corporation’ see, eg, Neil Francey, ‘Section 52: Its Rationale, Justification and Deficiencies—and Some Suggestions for its Improvement’ (1997) 5 *Trade Practices Law Journal* 162, 166.

⁹¹ For discussion of the application of s 52 *TPA* to corporations see, eg, Diane Skapinker, ‘Private Vendors of Land under Section 52 of the Trade Practices Act 1974’ (1991) 13 *Sydney Law Review* 169, 169-170.

⁹² The application of the section to individuals is possible as the States and Territories have enacted legislation that applies the *ACL* to individuals: *Fair Trading (Australian Consumer Law) Act 1992* (ACT) ss 6-7, 11; *Fair Trading Act 1987* (NSW) ss 27, 18, 32; *Consumer Affairs and Fair Trading Act* (NT) ss 26, 27, 30; *Fair Trading Act 1989* (Qld) ss 15-16, 20; *Fair Trading Act 1987* (SA) ss 13-14, 18; *Australian Consumer Law Act 2010* (Tas) ss 5-6, 10; *Fair Trading Act 1999* (Vic) ss 8-9, 13; *Fair Trading Act 2010* (WA) ss 18-19, 24.

⁹³ *Competition and Consumer Act 2010* (Cth) s 131(1).

⁹⁴ Australian Government, above n 85, 4.

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section with a wide impact, as ‘it does not adopt the language of any common law cause of action ... it establishes a norm of conduct’.⁹⁵

Over the last decade, s 52 TPA has been relied on in a number of actions to remedy misleading and deceptive conduct. This is illustrated in Table 1.

Table 1: Misleading conduct cases in Australia⁹⁶

Year	Total cases on misleading conduct (s 52 TPA)	Total reported cases	Total number of companies	Cases reported under Consumer Protection	Cases reported under Trade & Commerce	HCA decisions
2001	47	8,002	1,224,207	28	19	1
2002	47	8,071	1,251,237	34	13	1
2003	68	8,109	1,299,985	44	24	0
2004	73	7,949	1,359,305	35	38	1
2005	62	6,554	1,427,573	11	51	1
2006	37	4,504	1,411,421	0	37	0
2007	47	4,493	1,572,054	2	45	1
2008	55	5,452	1,668,610	2	53	0
2009	63	6,778	1,719,825	1	62	2
2010	72	7,595	1,778,933	2	70	1

It is expected that s 18 will be relied on to a similar extent to deal with misleading and deceptive conduct. The principles regarding the interpretation of s 52 have been discussed, analysed and evaluated over the last 36 years and, as such, the provision will only be considered in the context of greenwashing.⁹⁷

⁹⁵ *Brown v The Jam Factory Pty Ltd* (1981) 53 FLR 340, 348.

⁹⁶ The LexisNexis:Butterworths publication *Australian Current Law Reporter* records all superior court decisions under specific classifications. Classification 100 categorises cases under the heading ‘Consumer Protection’ and Classification 420 categorises cases under the heading ‘Trade and Commerce’. All reported misleading or deceptive conduct cases are recorded under these two classifications. We have examined every case in this service from January 2001 until December 2010, which are shown in Table 1. The High Court cases referred to in the table are included in the columns referring to the numbers of cases reported under the ‘Consumer Protection’ and ‘Trade and Commerce’ categories.

⁹⁷ A summary of these principles may be found in *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682, [10]; *National Exchange Pty Ltd v Australian Securities and Investments Commission* (2004) 49 ACSR 369, [18].

2 *The Application of s 18 to Greenwashing*

Legal actions under s 18 *ACL* require a person to have ‘engage[d] in conduct’, which can include remaining silent,⁹⁸ as well as doing or refusing to do an act.⁹⁹ Consequently, one of the many areas to fall under s 52 *TPA*—and now under s 18 *ACL*—is the area of advertising,¹⁰⁰ including environmental marketing.¹⁰¹ The limitation that exists is that the conduct has to take place ‘in trade or commerce’. ‘In trade or commerce’ covers trade or commerce ‘within Australia and places outside Australia’.¹⁰² As a result, the word ‘in’ means ‘within’ and does not include ‘in connection with’ or ‘in relation to’. This distinction is very important, as it limits the application of s 18 *ACL* to a certain extent. As such, the conduct under this section only refers ‘to the “central conception” of trade or commerce and not to the immense field of activities in which corporations may engage in the course of, or for the purpose of, carrying on some overall trading or commercial business’.¹⁰³

The advertisement of a green product will usually fall under conduct in trade or commerce, and may attract the application of s 18 *ACL* if the advertisement is misleading or deceptive.¹⁰⁴ While a degree of latitude is given to reflect the ‘puffery’ nature of marketing,¹⁰⁵ the ACCC has observed that environmental claims for products must:¹⁰⁶ be honest and truthful; detail the specific part of the product or process it is referring to; use language which the average member of the public may understand; explain the significance of the benefit; and be able to be substantiated.

⁹⁸ See, eg, *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; Frederika De Wilde, ‘The Less Said the Worse: Silence as Misleading or Deceptive Conduct’ (2007) 15 *Trade Practices Law Journal* 7.

⁹⁹ *Competition and Consumer Act 2010* (Cth) s 4(2).

¹⁰⁰ For discussion see Stephen Kapnoullas and Bruce Clarke, ‘Navigating “Muddied Waters”: The Regulation of Mass Marketing and Advertising by Section 52 of the Trade Practices Act’ (2008) 12 *University of Western Sydney Law Review* 103.

¹⁰¹ Thomas, above n 79, 7.

¹⁰² *Competition and Consumer Act 2010* (Cth) s 4(1).

¹⁰³ *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 92 ALR 193, 197. Some examples of conduct that was found not to be in trade or commerce may be seen in the following cases: *Commonwealth v Griffith* (2007) 245 ALR 172, 201; *Blackmagic Design Pty Ltd v Overliese* [2010] FCA 13, [100]; *Blackmagic Design Pty Ltd v Overliese* (2011) 276 ALR 646, 652. For further discussion see, eg, Skapinker, above n 91; Natalie Skead, ‘Casting the First Stone: Lawyers’ Liability Under Section 52’ (2008) 16 *Trade Practices Law Journal* 6, 8-15; Bernard McCabe, ‘Section 52 and the Regulation of Non-Commercial Speech’ (2010) 18 *Trade Practices Law Journal* 21, 21-3.

¹⁰⁴ *ACCC v Charishma Mohini Wickremesinghe Seneviratne* (2008) TAD34/2008.

¹⁰⁵ *Pappas & Anor v Soulac Pty Ltd & Anor* (1983) 50 ALR 231, 231.

¹⁰⁶ ACCC, *Green Marketing and the Australian Consumer Law*, above n 51, 7.

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As noted previously, a high percentage of green advertising arguably does not comply with these requirements and may therefore be deemed to contain false and misleading information.¹⁰⁷ Consequently, such advertising may attract the application of s 18 *ACL* as the environmental claims made may lead consumers and investors into error.¹⁰⁸ The strategies and enforcement powers of the ACCC regarding this matter are discussed in Part IV of this article. In the following paragraphs s 18 *ACL* is compared with similar provisions in other federal legislation.

B How Does s 18 ACL Compare with Provisions in Other Federal Legislation?

One of the most famous examples of the use of the former s 52 TPA was the demutualisation of the NRMA in New South Wales in 1995. The AU\$2 billion float was stopped because the NRMA used the words 'free shares' in its prospectus document. The Federal Court found that the prospectus was misleading under s 52 TPA. This meant that s 52 TPA could apply to prospectuses.¹⁰⁹ As a consequence, there was an overlap between the Corporations Law provisions and s 52 and this was identified as a grave concern.¹¹⁰ Following this case, the Federal Government amended the TPA so that it would not again be able to be applied to misleading or deceptive conduct relating to corporations and financial services.¹¹¹ Further, as a result of the Wallis report in 1998, financial services were removed from the TPA.¹¹² Like its predecessor, s 18 *ACL* cannot be applied in scenarios dealing with financial services.¹¹³ Accordingly, to deal with misleading or deceptive conduct relating to

¹⁰⁷ TerraChoice, *The Sins of Greenwashing: Home and Family Edition*, above n 47, 6.

¹⁰⁸ *Parkdale Custom Built Furniture v Puxu Pty Ltd* (1982) 149 CLR 191, 198.

¹⁰⁹ *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452. For discussion of this case see, eg, Michael Legg, 'Misleading or Deceptive Conduct in Prospectuses' (1996) 14 *Companies and Securities Law Journal* 47; Jon Webster, 'Directors' Duties' (1995) 13 *Companies and Securities Law Journal* 281; Brenda Marshall, 'Section 52 of the Trade Practices Act and the External Legal Order: Lessons from the NRMA Case' (1996) 4 *Trade Practices Law Journal* 126.

¹¹⁰ Greg Golding, 'Underwriters' Liability in Australian Securities Offerings' (1993) 11 *Company and Securities Law Journal*, 401, 431; William Koeck, 'The NRMA Cases' (1995) *Australian Company Secretary* 247, 247.

¹¹¹ Corporations Law Simplification Task Force, *Section 52 Trade Practices Act and Dealing in Securities* (September 1996) <<http://www.treasury.gov.au/documents/289/PDF/sectn52.pdf>>; TPA s 51AF.

¹¹² Stan Wallis, *Financial System Inquiry Final Report* (March 1997) 18; Michael Duffy, 'Overall Impression and Other 52 Insights—An Aid to PDS Disclosure or a Paradise for the Wisdom of Hindsight' (2008) 5 *Compliance & Regulatory Journal* 39, 41; *Financial Sector Reform (Consequential Amendments) Act 1998* (Cth) Sch 2; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2006) 169 ALR 616, 631.

¹¹³ *Competition and Consumer Act 2010* (Cth) s 131A.

financial services, provisions similar to s 52 TPA (now s 18 *ACL*) have been enacted in both the *Corporations Act 2001* (Cth)¹¹⁴ (*Corporations Act*) and the *ASIC Act*.¹¹⁵ Due to the fact that the scope of these sections is limited to financial services, fewer actions have been brought under them.

1 *Corporations Act*

Section 1041H of the *Corporations Act* states that:

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.

This provision is a gateway to civil liability under s 1041I of the *Corporations Act* for misleading or deceptive conduct in relation to financial services. However, it does not apply in the case of:¹¹⁶ misleading takeover documents under s 670A; misleading fundraising documents (prospectuses) under s 728; or misleading disclosure documents under ss 953A or 1022A.

A breach of s 1041H leads to civil liability. If a person is found to be involved in greenwashing or other misleading or deceptive conduct under s 1041H, the person may be: liable to pay damages under s 1041I; restrained, or required to act, by an injunction under s 1324; required to disclose information or publish advertisements, under s 1324B; and/or have such other orders made against the person as the court thinks appropriate to compensate for, or prevent or reduce, loss or damage under s 1325(1) and (2).

(a) *A comparison of s 18 ACL and s 1041H Corporations Act*

Section 1041H of the *Corporations Act* operates in a similar manner to s 18 *ACL*. For example, in *ASIC v Sunenergy Asia Pacific Pty Ltd*,¹¹⁷ the court applied the objective

¹¹⁴ *Corporations Act 2001* (Cth) s 1041H. Section 1041H commenced on 11 March 2002.

¹¹⁵ *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA. Section 12DA commenced on 1 July 1998: *Financial Sector Reform (Consequential Amendments) Act 1998* (Cth), Sch 2.

¹¹⁶ See *Corporations Act 2001* (Cth) s 1041H(3). Consequently, reference to the requirements of product disclosure statements under s 1013D(1) is not considered here, as the provision cannot be regulated by s 1041H. It is regulated by s 1022A. Section 1013D(1)(l) requires a product disclosure statement to note, among other things, the extent to which environmental or ethical considerations are taken into account if the product has an investment component.

¹¹⁷ [2011] FCA 275.

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test as explained in *Taco Co v Taco Bell*¹¹⁸ when determining if conduct is misleading or deceptive or likely to mislead or deceive.¹¹⁹ However, there are some important distinctions between the provisions.

One of the main differences between the two sections is that under s 1041H the conduct does not need to be 'in trade or commerce'. Further, unlike s 18 ACL, s 1041H requires that the conduct must be 'in relation to' a financial product or service.¹²⁰ The connection to financial services may be indirect or less than substantial, as the courts have broadly construed the meaning of the words 'in relation to'.¹²¹ This was deemed essential to fulfil the aim of the provision.¹²² The broad construction of s 1041H led to the decision in *ASIC v Cyclone Magnetic Engines Inc*¹²³ that even placing a film on a company's website was conduct in relation to the company's shares and thus within the meaning of the section. It is thus clear that s 1041H may regulate greenwashing in the financial services industry.

(b) Greenwashing and s 1041H

As noted previously, green practices may be found in the financial services industry. For instance, the socially responsible investment sector has seen dramatic growth over the last decade¹²⁴ and a number of organisations have been established in Australia to provide socially responsible investment services to clients. For example, 'Ethical Investment Services' is a financial planning firm that advises clients who wish to invest ethically.¹²⁵ Any misleading advertising by such a corporation regarding their financial products and services may be covered by s 1041H of the *Corporations Act*.

¹¹⁸ This is one of the significant cases that applied s 52 TPA: *Taco Co of Aust Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177.

¹¹⁹ *Australian Securities and Investments Commission v Sunenergy Asia Pacific Pty Ltd* [2011] FCA 275, [29]; Lesa Richards, 'Where to from Ingot Capital Investments v Macquarie Equity Capital Markets' (2010) 84 *Australian Law Journal* 645, 647.

¹²⁰ *Corporations Act 2001* (Cth) s 1041H.

¹²¹ *Australian Securities and Investments Commission v Sunenergy Asia Pacific Pty Ltd* [2011] FCA 275, [33]; *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 274 ALR 731, 763; *Klusman v ASIC* [2011] AATA 150, [15].

¹²² *Australian Securities and Investments Commission v Narain* (2008) 247 ALR 659, 662. (2009) 71 ACSR 1.

¹²⁴ William Ransome and Charles Sampford, *Ethics and Socially Responsible Investment: A Philosophical Approach* (Ashgate, 2010) 107; Marina Nehme and Claudia Wee, 'Tracing the Historical Development of Corporate Social Responsibility and Corporate Social Reporting' (2008) 15 *James Cook University Law Review* 129, 158.

¹²⁵ Ethical investment includes green investment: see Ethical Investment Services, <<http://www.ethicalinvestments.com.au/default.htm>>.

In addition, with the passage of the Carbon Credits (Consequential Amendments) Bill 2011 (Cth), 'carbon units' will be deemed to be financial products under the *Corporations Act*. Such green financial products must be regulated and monitored to ensure that the financial services providers are not involved in greenwashing. Due to the broad interpretation of the words 'in relation to',¹²⁶ s1041H will then play a key role in ensuring that the advertisement of green financial products and services is not misleading or deceptive. This is especially important as such conduct deals with financial services and thus falls outside the scope of s 18 *ACL*.

Another provision that deals with misleading or deceptive conduct by financial services providers is s 12DA of the *ASIC Act*.

2 *ASIC Act s 12DA*

Section 12DA(1) of the *ASIC Act* states that:

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.

As may be seen, s 12DA is very similar to both s 18 *ACL* and s 1041H of the *Corporations Act*.

(a) *A comparison of s 12DA ASIC Act and s 18 ACL*

Section 12DA of the *ASIC Act* is almost identical to s 18 *ACL*. The only difference between the two sections is that s 12DA applies 'in relation to financial services'¹²⁷ while s 18 *ACL* does not.¹²⁸ This ensures that there is no direct overlap between the sections.¹²⁹ Due to the similarity between the sections, the principles applicable to s 12DA are the same as those that apply to s 18 *ACL*.¹³⁰ As a consequence, a person making misleading environmental claims in relation to financial services may be liable under s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*.

¹²⁶ *Australian Securities and Investments Commission v Sunenergy Asia Pacific Pty Ltd* [2011] FCA 275, [33]; *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 274 ALR 731, 763; *Klusman v Australian Securities and Investments Commission* [2011] AATA 150, [15].

¹²⁷ *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA(1).

¹²⁸ *Competition and Consumer Act 2010* (Cth) s 131A.

¹²⁹ *Cassidy v Saatchi* [2004] FCAFC 34, [11]; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 177 ALR 329, 336.

¹³⁰ *Cassidy v Saatchi* [2004] FCAFC 34, [11] and [44]; *Australian Securities and Investments Commission v Cyclone Magnetic Engines Inc* (2009) 71 ACSR 1, 17; Damien Millen, 'Ad-Agent Provocateur: Can Advertising Agencies Be Liable as Principals for Creating Misleading Ads?' (2005) 13 *Trade Practices Law Journal* 102, 103.

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(b) A comparison of s 12DA ASIC Act and s 1041H Corporations Act

Section 1041H of the *Corporations Act* is modelled on s 12DA of the *ASIC Act*.¹³¹ As a consequence, the two provisions overlap as they both apply to misleading or deceptive conduct in relation to financial services.¹³² In addition, s 12DA has the same limitation as s 1041H, as it does not apply to:¹³³ misleading takeover documents under s 670A of the *Corporations Act*; misleading fundraising documents (prospectuses) under s 728; or misleading disclosure documents under ss 953A or 1022A.

As is the case with a breach of s 1041H of the *Corporations Act*, a breach of s 12DA leads to civil liability. If a person is found to be involved in greenwashing or other misleading or deceptive conduct under s 12DA, the person may be: liable to pay damages under s 12GF; restrained, or required to act, by an injunction under s 12GD; have 'non-punitive' orders (including orders to disclose information or publish advertisements) made against the person under s 12GLA; and/or have such other orders made against the person as the court thinks appropriate to compensate for, or prevent or reduce, loss or damage under s 12GM(1) and (2).

As may be seen, these remedies are similar to those that apply if a contravention of s 1041H has occurred.

There are, however, two main differences between the sections:

- Section 12DA applies 'in trade or commerce',¹³⁴ while s 1041H does not have such a constitutional limitation.¹³⁵ As seen previously, the fact that s 1041H applies to all conduct relating to financial products and services while s 12DA only applies to such conduct in trade or commerce means that the prohibition in s 1041H has a broader application than that in s 12DA.

¹³¹ Rhys Bollen, 'Research analysis and the Australian insider trading and misleading or deceptive conduct regimes' (2003) 21 *Companies and Securities Law Journal* 430, 434.

¹³² In a number of cases a person may be sued for breaching s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) and s 1041H of the *Corporations Act 2001* (Cth): see, eg, *Australian Securities and Investments Commission v Cyclone Magnetic Engines Inc* (2009) 71 ACSR 1.

¹³³ *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA(1A).

¹³⁴ The definition of 'in trade or commerce' for the purpose of s 12DA is found under s 12BA. The definition is identical to the one found under the *Australian Consumer Law*.

¹³⁵ See, eg, *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

- While both sections apply to financial services, there are minor differences in the meaning of ‘financial services’ under the *Corporations Act*¹³⁶ and the *ASIC Act*.¹³⁷ Some of the exclusions present under s 765A of the *Corporations Act* do not apply under s12BAA of the *ASIC Act*. For instance, reinsurance is excluded from the definition of financial products in s 765A and as such s 1041H does not apply to misleading conduct regarding reinsurance. However, reinsurance is not excluded under s 12BAA of the *ASIC Act* and therefore action may be taken under s 12DA if there is misleading conduct regarding reinsurance.¹³⁸

As a consequence, while in the majority of situations ss 12DA and 1041H overlap, there are instances where the overlap does not occur.

3 Sections 18, 1041H and 12DA: A Persisting Link?

Section 18 *ACL* and its federal statutory equivalents, ss 1041H *Corporations Act* and 12DA *ASIC Act*, do not overlap as s 18 *ACL* does not apply to financial services.¹³⁹ However, this has not prevented a number of lawsuits from referring to ss 1041H *Corporations Act* and 12DA *ASIC Act* and the predecessor of s 18 *ACL*—s 52 TPA—in legal actions for misleading or deceptive conduct.¹⁴⁰ As a result, in certain instances the distinction between the provisions becomes blurred as s 18 *ACL* is used as a backup to ss 1041H *Corporations Act* and 12DA *ASIC Act* in cases where the courts may deem that the conduct in question does not fall under financial services. For example, in *ASIC v Fortescue*,¹⁴¹ ASIC took action under s 1041H *Corporations Act* and s 52 TPA to cover the possibility that the court might find that some of the allegedly misleading statements made by Fortescue were not ‘in relation to a financial product or a financial service’.¹⁴²

¹³⁶ *Corporations Act 2001* (Cth) ss 766A, 763A, 764A and 765A.

¹³⁷ *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAB and 12BAA.

¹³⁸ For detailed discussion of these matters, see Stanley Drummond, ‘Misleading or Deceptive Conduct in Insurance’ (2002) 14 *Insurance Law Journal* 1.

¹³⁹ *Klusman v Australian Securities and Investments Commission* [2011] AATA 150, [15].

¹⁴⁰ See, eg, *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* [2011] FCAFC 19, [10]; *Sons of Gwalia Ltd (Subject to Deed of Company Arrangement) v Margaretic* (2007) ALR 232; *Australian Securities and Investments Commission v MacDonald and Others* (No 11) (2009) 256 ALR 199, 214.

¹⁴¹ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 274 ALR 731.

¹⁴² *Ibid* 745.

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**IV THE ACCC'S CIVIL AND ADMINISTRATIVE ENFORCEMENT
POWERS AND STRATEGIES FOR DEALING WITH GREENWASHING**

Over the years, the ACCC has 'ramped up its green compliance activities with a combination of business and consumer educative initiatives and targeted enforcement action'.¹⁴³ Some of the guides the ACCC has issued in this area are 'Green Marketing and the Australian Consumer Law'¹⁴⁴ and 'Carbon Claims and the Australian Consumer Law'.¹⁴⁵

The move to regulate and monitor this area is not a new one. For example, the ACCC has been monitoring environmentally misleading claims since 1992 when (as it then was) the Trade Practices Commission¹⁴⁶ issued an industry guideline for environmental claims made in marketing.¹⁴⁷ One of the first actions in relation to misleading environmental marketing claims was in 1993. The Trade Practices Commission suspected that Continental Cup Company Ltd was involved in misleading or deceptive conduct regarding environmental claims it had made that its 'Home Brand' poly coated paper cups were recyclable. The claim may have misled the public as there were no recycling facilities in Australia for poly coated paper. To deal with the matter, the Trade Practices Commission entered into an enforceable undertaking with the company whereby the company agreed to stop making the allegedly misleading claim.¹⁴⁸

¹⁴³ ACCC, 'ACCC Scrutinises "Green" Marketing' (Media Release, MR 289/07, 26 October 2007) <<http://www.accc.gov.au/content/index.phtml/itemId/802028/fromItemId/2332>>.

¹⁴⁴ ACCC, *Green Marketing and the Australian Consumer Law* (2011) <<http://www.accc.gov.au/content/index.phtml/itemId/815763>>.

¹⁴⁵ ACCC, *Carbon Claims and the Australian Consumer Law* (2011) <<http://www.accc.gov.au/content/index.phtml/itemId/833279>>.

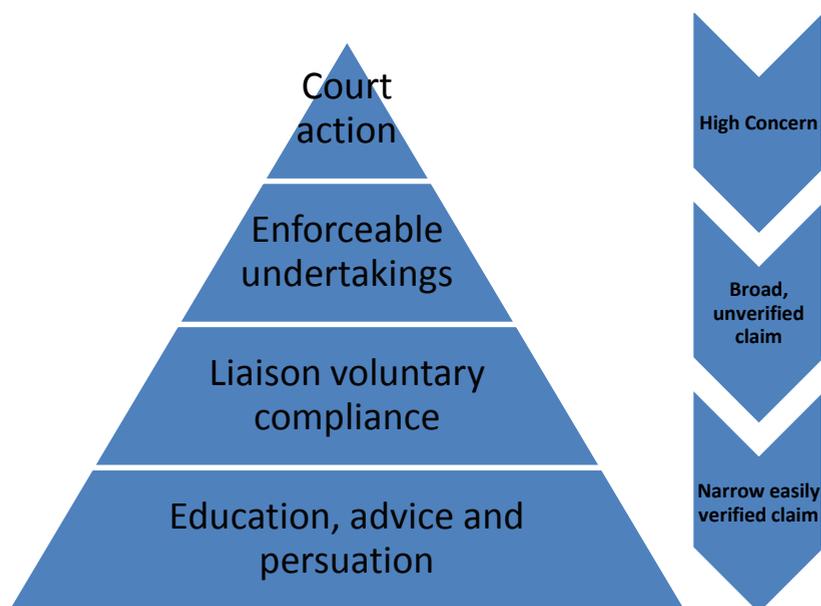
¹⁴⁶ The Trade Practices Commission was the regulator responsible for monitoring and enforcing the provisions in the *Trade Practices Act 1974* (Cth). In 1995, it was replaced by the ACCC: ACCC, *Annual Report 1995-1996*.

¹⁴⁷ John Martin (ACCC), 'Environmental Claims and the Trade Practices Act' (Paper presented at Annual National Air Conditioning and Energy Forum, 21 September 2005, Sydney) 2, <<http://www.accc.gov.au/content/index.phtml/itemId/708904>>.

¹⁴⁸ ACCC, *Enforceable Undertaking: Continental Cup Company Ltd*, Document number D99/11296 (9 August 1993). The company agreed, among other things, to stop printing the words 'Environmentally Friendly ... Recyclable' or similar on its cups until such time as a viable recycling facility was available where the cups were intended to be sold, to stop distributing cups so printed, and to recall any such cups from wholesalers or resellers.

Under current legislation that may apply to greenwashing, there are both formal and informal ways to deal with such breaches using s 18 *ACL*.¹⁴⁹ The ACCC has applied a pyramid of enforcement to stop misleading or deceptive environmental claims.¹⁵⁰

Figure 1: ACCC's Enforcement Pyramid¹⁵¹



The width of each layer of the pyramid ideally represents the proportion of enforcement and compliance activities that should be conducted at that level. If a regulator can plausibly threaten to match any non-compliance by moving successfully up the pyramid, then most of its work will be done effectively at the bottom layers of the pyramid. The lighter sanctions will dissuade a regulated entity from continuing its illegal activities because it will not want the regulator to use the stronger sanctions available to it. Further, the severity of the breach by a regulated

¹⁴⁹ Other sections in the *ACL* may also apply to deal with misleading or deceptive conduct: see, eg, *ACL* ss 29(1)(g), 151(1)(g). A breach of s 151 may result in criminal action and that may be an incentive for corporations to ensure that their claims are not misleading.

¹⁵⁰ Louise Sylvan (ACCC), 'Green Marketing and the ACCC' (Paper presented at National Product Liability Association, 8 May 2008, Melbourne) 7, <<http://www.accc.gov.au/content/index.phtml/itemId/826938>>.

¹⁵¹ This pyramid is based on Braithwaite and Ayres' pyramid of enforcement: Ian Ayres and John Braithwaite, *Responsive Regulation* (Oxford University Press, New York, 1992) 35-6; and Sylvan, above n 150, 7.

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entity is directly related to the response that the regulator will choose. Serious cases, for instance, cannot be easily remedied via administrative processes and ultimately lead to court action. This will especially happen in situations where the greenwashing is found to be deliberate.¹⁵² By employing a pyramid strategy of enforcement, the ACCC can most effectively use its resources and achieve compliance.¹⁵³

A similar enforcement strategy may be applied by ASIC, as its enforcement tools for dealing with misleading or deceptive conduct are similar to those of the ACCC. As illustrated in Figure 1, examples of the civil and administrative enforcement tools of the ACCC are court action and enforceable undertakings respectively. These tools are discussed briefly below.

1 *High Concern Breaches: Statutory Action*

The ACCC has previously commenced civil litigation under s 52 TPA against companies for greenwashing, as Table 2 reveals.

Table 2: Litigation involving the ACCC from 2001 to 2010¹⁵⁴

Financial Year	Total number of litigations involving the ACCC ¹⁵⁵	Litigations dealing with misleading or deceptive conduct (s 52 TPA)	Litigations dealing with misleading environmental claims (s 52 TPA)
2001-2002	101	43	4
2002-2003	119	48	2
2003-2004	95	52	8
2004-2005	75	35	2
2005-2006	53	23	3
2006-2007	58	16	5
2007-2008	71	25	4
2008-2009	80	32	3
2009-2010	65	26	2
Total	717	300	33

¹⁵² Sylvan, above n 150, 7.

¹⁵³ Ayres and Braithwaite, above n 151, 35-36.

¹⁵⁴ These figures are taken from the ACCC's Annual Reports which have been issued from 2001 to 2010.

¹⁵⁵ The numbers in this table include litigation the ACCC commenced during the year and also litigation continuing from previous years.

In the past decade, 41.8% of litigation involving the ACCC was in relation to misleading or deceptive conduct. Of the misleading or deceptive conduct cases, 11% related to greenwashing. One such case is *ACCC v Charishma Mohini Wickremesinghe Seneviratne*,¹⁵⁶ in which action was taken against SeNevens International Ltd for misleading or deceptive conduct under s 52 after the company advertised that its 'Safeties Nature Nappy' products were '100% biodegradable'. Justice Marshall found that the biodegradability claims were false and misleading as the product contained certain substances that were not capable of being biodegraded.¹⁵⁷ In another case, a claim regarding the environmental benefits of Earthstrength plastic kitchen, garbage and freezer bags was found by the Federal Court to be misleading or deceptive under s 52 TPA as there was no scientific evidence to support the claim.¹⁵⁸ In this instance the ACCC took the opportunity to renew its warning that, when a company is making an environmental claim, the claim needs to be scientifically tested and substantiated.¹⁵⁹

Where an environmentally misleading claim is made in the area of financial services, ASIC may take similar civil action against the person under s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*. As the trend to market green products in the financial services industry is only a recent one, no such actions have yet been initiated. Another common tool that the ACCC and ASIC may use to deal with greenwashing is the enforceable undertaking.

2 Enforceable Undertakings

An enforceable undertaking is an administrative sanction available to both the ACCC¹⁶⁰ and ASIC¹⁶¹ for any breach of the laws these regulators enforce and may be described as a promise enforceable in court.¹⁶² It takes the form of a settlement in

¹⁵⁶ (2008) TAD34/2008.

¹⁵⁷ *ACCC v Charishma Mohini Wickremesinghe Seneviratne* (2008) TAD34/2008; ACCC, 'Nappy Biodegradability Claims Declared False and Misleading' (Media Release, MR 342/08, 3 December 2008) <<http://www.accc.gov.au/content/index.phtml/itemId/851993/fromItemId/621575>>. Another instance of similar conduct, where a company advertised that its bags were biodegradable when they were not, may be found in ACCC, 'Misleading Conduct in Relation to Goody Plastic Bags' (Media Release, NR 003/11, 5 January 2011) <<http://www.accc.gov.au/content/index.phtml/itemId/966069>>.

¹⁵⁸ ACCC, 'Environmental Bag Claims "Misleading"' (Media Release, MR 087/04, 25 May 2004) <<http://www.accc.gov.au/content/index.phtml/itemId/534928/fromItemId/622035>>.

¹⁵⁹ ACCC, *Green Marketing and the Australian Consumer Law*, above n 51.

¹⁶⁰ *Competition and Consumer Act 2010* (Cth) s 218.

¹⁶¹ *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA, 93A.

¹⁶² Marina Nehme, 'Justice to Outsiders Through Undertakings' (2009) 9(1) *QUT Law and Justice Journal* 85, 86; Marina Nehme, 'The Use of Enforceable Undertakings by the

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which the alleged offender (who may be called the ‘promisor’) and the regulator (the ACCC or ASIC) negotiate in relation to the alleged breach.¹⁶³ Following this negotiation, the promisor undertakes to comply with the law, to take the necessary steps to prevent future breaches of the law from occurring, and to implement corrective action in case the alleged breach has affected outsiders.¹⁶⁴ As with other forms of settlement, the breach of an enforceable undertaking is not considered contempt of court. However, the regulator has the power to enforce an undertaking in court.¹⁶⁵ If the court orders the promisor to comply with its undertaking, any breach of such an order constitutes contempt of court. An enforceable undertaking is usually accepted by the regulator in instances where the regulator believes that the sanction will provide a more appropriate outcome than court action.¹⁶⁶

The ACCC has regularly relied on enforceable undertakings to deal with alleged misleading or deceptive conduct as characterised in Table 3, and is likely to use enforceable undertakings to deal with greenwashing. In fact, one of the first enforceable undertakings entered into after the sanction was introduced was in relation to allegedly misleading environmental claims by Continental Cup Company Ltd.¹⁶⁷

Australian Competition and Consumer Commission’ (2008) 27(2) *The University of Tasmania Law Review* 197, 197.

¹⁶³ Christine Parker, ‘Restorative Justice in the Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings’ (2004) 67 *The Modern Law Review* 209, 213.

¹⁶⁴ Marina Nehme, ‘Enforceable Undertakings: A New Form of Settlement to Resolve Alleged Breaches of the Law’ (2007) 11 *University of Western Sydney Law Review* 104, 117.

¹⁶⁵ *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA(3),93A(3); ACL. s 218(3)

¹⁶⁶ ACCC, *Section 87B of the Trade Practices Act* (2009) 3, <<http://www.accc.gov.au/content/index.phtml/itemId/263958>>.

¹⁶⁷ ACCC, *Enforceable Undertaking: Continental Cup Company Ltd*, Document number D99/11296 (9 August 1993).

Table 3: *Enforceable undertakings accepted by the ACCC from 2001 to 2010*¹⁶⁸

Year	Total number of enforceable undertakings accepted by ACCC	Enforceable undertakings regarding misleading or deceptive conduct (s 52 TPA)	Enforceable undertakings regarding misleading environmental claims (s 52 TPA)
2001	61	28	3
2002	41	17	0
2003	28	15	6
2004	51	26	5
2005	75	56	18
2006	55	32	18
2007	94	20	7
2008	89	42	8
2009	126	45	6
2010	76	22	8
Total	696	303	79

In the past decade, 43.5% of all undertakings entered into by the ACCC were aimed at dealing with allegedly misleading or deceptive conduct. Of these undertakings, 26% related to greenwashing. One such example is the enforceable undertaking accepted from LG Electronics Australia. In this instance the ACCC was concerned that LG Electronics was involved in misleading or deceptive conduct regarding a representation it had made that its washing machines were '4A Rated' by Water Services Association of Australia. As the machines were not certified at the time of sale, the claim was false. In its undertaking, the company promised to issue a corrective notice advising consumers of its conduct, and agreed to review and implement a compliance program regarding the issue of promotional material to ensure that similar conduct would not occur in the future.¹⁶⁹

ASIC may similarly enter into enforceable undertakings regarding breaches of s 12DA of the *ASIC Act* and s 1041H of the *Corporations Act*. Although ASIC has previously entered into enforceable undertakings to deal with alleged misleading conduct under these sections, none of these undertakings were in relation to greenwashing. This is not surprising, however, since while green product claims are rife in many industries, such claims are only recently being made in the financial

¹⁶⁸ ACCC, *Enforceable Undertakings Register*, <<http://www.accc.gov.au/content/index.phtml/itemId/815599>>.

¹⁶⁹ ACCC, *Enforceable Undertaking: LG Electronics Australia Pty Ltd*, Document number D10/3677349 (15 September 2010).

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services sector. In view of the growth in green financial products, it is important to ensure that greenwashing is combatted in that industry.¹⁷⁰

V CONCLUSION

This article has drawn together some key aspects of the issues relating to environmental advertising, and drawn attention to the unnecessary overlap of misleading or deceptive conduct provisions in several federal statutes. Today, there is a real practical danger that greenwashing will actually deter consumers from selecting or purchasing green products or services, because they feel unable to trust the assertions made by manufacturers and retailers about those products and services. This could stifle the development and marketing opportunities for genuinely green businesses.

A bigger regulatory question is whether there is a need for more regulation, or if the existing laws are sufficient to cover the practice of greenwashing. If the State of Victoria had successfully introduced provisions dealing with environmentally misleading conduct in 1991, this may have sent a strong message to Australian businesses that greenwashing will not be tolerated. However, any such new law or regulation must be considered carefully as it comes at a cost, including the compliance and regulatory burden it imposes on all entities.

An examination of s 18 *ACL* and its federal statutory equivalents indicates that both the ACCC and ASIC are equipped under the legislation with the necessary tools to deal with greenwashing. While ASIC has not initiated any actions in this area, the ACCC has been taking civil and administrative action to stamp out and prevent the spread of greenwashing. Section 18 *ACL* and its federal statutory equivalents have a broad scope and, as a result, can be used to regulate and mitigate greenwashing as well as other misleading behaviour. Consequently, it is our opinion that the existing laws are adequate to cover the broad issues of greenwashing and there is no need for additional laws.¹⁷¹ For the effective encouragement of environmental products and services, however, there should be continued active enforcement of the existing laws by the ACCC and other agencies.

¹⁷⁰ North American Task Force of the United Nations Environment Programme Finance Initiative, *Green Financial Products and Services—Current Trends and Future Opportunities in North America*, <http://www.unepfi.org/fileadmin/documents/greenprods_01.pdf>.

¹⁷¹ This is especially true as there are other provisions in the *ACL* that may also be used to deal with greenwashing, including *Competition and Consumer Act 2010* (Cth) ss 29(1)(g) and 151(1)(g).