

# **The Greenwashing Trap: A Comparative Analysis of Corporate Climate Liability and the "Anti-ESG" Backlash in the EU, US, and Australia**

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## **Abstract**

The rapid ascendancy of Environmental, Social, and Governance (ESG) criteria has transformed corporate reporting from a voluntary exercise in public relations to a minefield of legal liability. As capital markets increasingly price "green premiums," corporations face intense pressure to embellish their sustainability credentials—a practice known as "greenwashing." This article provides a critical comparative analysis of the regulatory and litigious responses to greenwashing in three distinct jurisdictions: the European Union, the United States, and Australia.

The article contrasts the EU's prescriptive, taxonomy-based approach (via the CSRD and SFDR) with the polarized, politicized landscape of the United States, where the SEC's Climate Disclosure Rule faces constitutional challenges. It further examines Australia's aggressive enforcement strategy, where regulators have successfully litigated against "net zero" claims as misleading conduct. The paper argues that the divergence in legal standards is creating a phenomenon of "Greenhushing," where corporations, fearful of liability, retreat into silence, paradoxically undermining the market transparency the laws were designed to achieve.

## **I. INTRODUCTION: THE SUSTAINABILITY PARADOX**

We are witnessing the "financialization" of climate change. What was once the domain of environmental treaties is now the domain of securities regulation. Investors, driven by both ethical mandates and the search for long-term alpha, are demanding that corporations disclose their exposure to climate risk. In response, the global market for "Green Bonds" and "ESG Funds" has ballooned into the trillions.

However, this capital shift relies on a fragile commodity: **Truth.**

If a corporation claims its new factory is "carbon neutral" but relies on dubious carbon offsets from a non-existent forest in Brazil, the market mechanism fails. This is "greenwashing"—the intersection of marketing puffery and securities fraud.

The legal response to greenwashing is currently one of the most dynamic areas of corporate law, yet it is characterized by profound fragmentation.

1. **The European Union** views greenwashing as a market distortion that requires a massive, bureaucratic classification system (The Taxonomy) to solve.
2. **The United States** is trapped in an ideological war. While federal regulators (SEC) attempt to standardize disclosures, state-level attorneys general are penalizing companies for being *too* green (the "Anti-ESG" movement).
3. **Australia** has emerged as a "litigation laboratory," with its regulator (ASIC) successfully suing pension funds and investment managers for overstating their green credentials, setting global precedents.

This article asks a central comparative question: **Which legal model best protects the integrity of the market without chilling the very transition efforts we seek to encourage?**

## **II. THEORETICAL FRAMEWORK: INFORMATION ASYMMETRY AND THE "LEMONS" MARKET**

To understand the legal architecture of greenwashing, we must revisit George Akerlof's "Market for Lemons." In a market where the seller (the corporation) knows the true environmental quality of its product/asset, but the buyer (the investor) cannot verify it cheaply, bad products drive out good ones.

### **A. The Definition of Greenwashing**

Legally, greenwashing is not a single tort. It manifests in three distinct legal categories:

1. **Misrepresentation/Fraud:** Making factually false claims (e.g., "Our diesel engines are clean," as in *Volkswagen*).
2. **Omission:** Failing to disclose material climate risks (e.g., an oil major failing to disclose that its assets might become "stranded" by future regulation).
3. **Aspirational Ambiguity:** Making vague future promises (e.g., "Net Zero by 2050") without a credible plan to achieve them. This is the new frontier of liability.

## B. The "Materiality" Debate

The central legal concept separating these jurisdictions is "Materiality."

- **Single Materiality (US/Australia):** Information is material only if it affects the *financial value* of the company. Does climate change hurt the bottom line?
- **Double Materiality (EU):** Information is material if it affects the company's value OR if the company's activities impact the *world* (impact materiality).

This theoretical divergence explains why an EU company must disclose its impact on biodiversity, while a US company might only need to disclose if biodiversity loss threatens its revenue stream.

## III. THE EUROPEAN UNION: THE TAXONOMY AND THE "TRUTH" REGIME

The European Union has adopted the most ambitious regulatory framework in history to combat greenwashing. It rejects the "buyer beware" philosophy in favor of a state-sanctioned definition of "green."

### A. The Taxonomy Regulation (EU) 2020/852

The EU Taxonomy is essentially a dictionary. It defines exactly what economic activities qualify as "environmentally sustainable."

For a corporate activity to be Taxonomy-aligned, it must:

1. Contribute substantially to one of six environmental objectives.
2. **Do No Significant Harm (DNSH)** to the other five objectives.
3. Meet minimum social safeguards (labor rights).

This removes the ambiguity. A cement company cannot simply claim to be "eco-friendly" because it installed LED lights. It must prove its cement production meets the specific emissions threshold (kgCO<sub>2</sub>e/t) set by the Taxonomy.

### B. The SFDR and "Article 9" Funds

The **Sustainable Finance Disclosure Regulation (SFDR)** applies to financial market participants (asset managers). It categorizes funds into three buckets:

- **Article 6:** No sustainability scope.
- **Article 8 ("Light Green"):** Promotes environmental characteristics.
- **Article 9 ("Dark Green"):** Has sustainable investment as its *objective*.

**The Greenwashing Trap:** In 2023, a wave of asset managers (including Amundi and BlackRock) massively downgraded their funds from Article 9 to Article 8. Why? Because the regulatory bar for "Dark Green" was clarified to be nearly 100% sustainable assets. They realized that maintaining the "Article 9" label exposed them to massive liability for

misclassification. This "Great Reclassification" proved that the regulation was effectively piercing the greenwashing veil.

### **C. The Corporate Sustainability Reporting Directive (CSRD)**

Replacing the older NFRD, the CSRD (effective 2024/2025) mandates that large companies report sustainability data with the *same rigor* as financial data.

- **Audit Requirement:** Crucially, CSRD reports must be audited (limited assurance initially).
- **Standardization:** Companies must use the European Sustainability Reporting Standards (ESRS).

**Legal Implication:** By forcing sustainability claims into the audited annual report, the EU elevates greenwashing from a marketing issue to an accounting fraud issue. Directors sign off on these reports, attaching personal liability to the veracity of the carbon footprint data.

## **IV. THE UNITED STATES: THE POLARIZED BATTLEGROUND**

In stark contrast to the EU's technocratic consensus, the US approach to climate liability is characterized by political fragmentation and constitutional litigation.

### **A. The SEC's Climate Disclosure Rule (2024)**

After years of delay, the Securities and Exchange Commission (SEC) released its final rule on climate disclosure. It mandates:

1. Disclosure of material climate risks (physical and transition).
2. Disclosure of Scope 1 and Scope 2 emissions (for large filers, if material).
3. **The Scope 3 Retreat:** In a significant concession to industry lobbyists, the SEC dropped the requirement to disclose Scope 3 (supply chain) emissions.

**The Legal Challenge:** Immediately upon release, the rule was stayed by the Fifth Circuit Court of Appeals. Petitioners argue that the SEC lacks the statutory authority to regulate environmental issues (the "Major Questions Doctrine" invoked in *West Virginia v. EPA*). Furthermore, they argue that compelling companies to discuss climate change violates the First Amendment (compelled speech).

### **B. The "Anti-ESG" Backlash**

While the SEC tries to compel disclosure, Republican-led states (e.g., Texas, Florida) are penalizing it.

- **Blacklisting:** States have passed laws barring state pension funds from investing with asset managers who "boycott" fossil fuel companies.

- **Antitrust Investigations:** Attorneys General have launched antitrust probes into the "Climate Action 100+" alliance, arguing that asset managers colluding to force companies to decarbonize constitutes an illegal restraint of trade.

**The Corporate Dilemma:** This places US corporations in a "**Double Bind.**"

- If they disclose too much to satisfy global investors/EU rules, they risk being sued by "Anti-ESG" states or losing state contracts.
- If they disclose too little, they risk securities fraud suits from shareholders or investigation by the SEC.

This uncertainty forces US corporate counsel to adopt a defensive crouch, heavily lawyering every sentence of a sustainability report to strip it of actionable meaning.

### **C. Private Litigation: The "Fraud on the Market"**

Despite the regulatory gridlock, the US remains the epicenter of private class-action litigation. Recent cases (e.g., against *Danone* for "Carbon Neutral" water bottles, or against *Delta Airlines* for "Carbon Neutral" flights) rely on consumer protection laws.

**The "Offset" Vulnerability:** A key trend is challenging the validity of carbon offsets. If a company claims "Net Zero" based on buying cheap offsets that turn out to be fraudulent (e.g., protecting forests that weren't in danger), plaintiffs argue this is false advertising. The US courts are increasingly willing to hear these "Greenwashing 2.0" cases, which scrutinize the *methodology* behind the claim, not just the slogan.

## **V. AUSTRALIA: THE LITIGATION LABORATORY**

While the EU regulates and the US argues, Australia has quietly emerged as the world's most active enforcement jurisdiction for greenwashing. The Australian Securities and Investments Commission (ASIC) has adopted a "litigation-first" strategy that serves as a warning shot for global directors.

### **A. The "Misleading and Deceptive" Standard**

Australia relies heavily on Section 12DB of the *ASIC Act 2001* and Section 18 of the *Australian Consumer Law*, which prohibit "misleading or deceptive conduct" in trade or commerce. Unlike the specific climate rules of the EU or US, this is a broad, principles-based prohibition.

- **The Mercer Precedent:** In 2023, ASIC launched a landmark civil penalty proceeding against *Mercer Superannuation*. Mercer had marketed a "Sustainable Plus" investment option that excluded companies involved in alcohol, gambling, and carbon-intensive fossil fuels.

- **The Breach:** ASIC alleged that, in reality, the fund was invested in 15 companies involved in the extraction or sale of carbon-intensive fossil fuels (including heavyweights like BHP and Glencore) and 15 alcohol/gambling stocks.
- **The Outcome:** In 2024, the Federal Court ordered Mercer to pay an \$11.3 million penalty. This was the first major judicial confirmation that "**greenwashing is not just marketing spin; it is financial misconduct.**"

### **B. The Vanguard Case and the "Screening" Fallacy**

ASIC followed up by suing Vanguard Investments Australia. The issue here was an "Ethical Bond Fund" that claimed to track an index excluding issuers with significant fossil fuel activities.

- **The Reality:** A significant portion of the bonds in the index were issued by entities that *did* have fossil fuel ties, because the screening process was applied only to the *issuers* of the shares, not the *subsidiaries* or specific bond tranches.
- **Legal Implication:** This case established that **strict liability** effectively applies to the mechanics of ESG screening. If a compliance team fails to catch a "dirty" asset in a "clean" fund due to complex index methodology, the claim is misleading. "It was complicated" is not a defense.

### **C. The Rise of "Greenhushing"**

The ferocity of ASIC's crackdown has led to a demonstrable shift in corporate behavior known as "Greenhushing."

- **Definition:** Corporations, fearing regulatory reprisal for overstating their credentials, choose to say nothing at all about their sustainability goals.
- **The Australian Context:** Recent surveys indicate that Australian directors are scrubbing "Net Zero" commitments from websites and annual reports, not because they have abandoned the goals, but because they cannot legally substantiate the "reasonable grounds" for achieving them 30 years in the future.
- This creates a **Policy Paradox:** The crackdown on fake green claims is inadvertently silencing the genuine ones, reducing the flow of information to the market.

## **VI. COMPARATIVE SYNTHESIS: THE SEARCH FOR A GLOBAL BASELINE**

The divergence between the EU, US, and Australia reveals a fractured global order for corporate climate liability.

### **A. The "Brussels Effect" vs. The "Texas Effect"**

For the multinational corporation, these regimes are in direct conflict.

- **Scenario:** A global bank wants to stop financing coal projects.
- **In the EU:** This is required to meet "Article 9" fund standards and taxonomy alignment.
- **In the US:** This invites an antitrust investigation from Texas or Florida for "boycotting" the energy sector.
- **In Australia:** If the bank announces the policy but fails to execute it perfectly across every subsidiary, it faces an ASIC lawsuit.

This regulatory incoherence creates massive transaction costs. Legal teams are forced to draft three versions of the same annual report: a "maximalist" version for Europe, a "minimalist" version for the US, and a "hyper-cautious" version for Australia.

### **B. The ISSB as the Savior?**

The best hope for harmonization lies with the **International Sustainability Standards Board (ISSB)**, launched at COP26. The ISSB has released IFRS S1 (General Requirements) and IFRS S2 (Climate-related Disclosures).

- **Adoption:** The EU has aligned its standards (ESRS) closely with the ISSB. Australia is moving to mandate ISSB-aligned reporting for large firms starting 2025.
- **The Outlier:** The US remains the outlier. By rejecting Scope 3 disclosures and facing domestic political gridlock, the US risks becoming a "disclosure haven"—a jurisdiction where capital flees to avoid transparency, or conversely, where capital avoids because the data is untrusted.

### **C. The Future of Liability: From Disclosure to Performance**

The next frontier of liability is shifting from *disclosure* ("You didn't tell us about the risk") to *performance* ("You failed to hit the target").

In the case of *Milieudefensie v. Royal Dutch Shell* (Netherlands), the court ordered Shell to reduce its emissions by 45%. This moves beyond greenwashing laws (which police speech) to a **Duty of Care for the Climate** (which polices conduct). While this is currently an EU phenomenon, plaintiffs in Australia and the US are looking for ways to import this "duty to mitigate" logic.

## **VII. TABLES OF COMPARISON**

The following tables synthesize the divergent regulatory landscapes and the taxonomy of greenwashing claims.

Table 1: Comparative Regulatory Architecture for Greenwashing

Feature	European Union	United States	Australia
<b>Primary Philosophy</b>	<b>Prescriptive Taxonomy:</b> "We define what Green is."	<b>Disclosure-Based:</b> "Tell us if it's financially material."	<b>Enforcement-Led:</b> "If you say it, you better prove it."
<b>Key Regulations</b>	Taxonomy Reg; SFDR; CSRD; Green Claims Directive.	SEC Climate Rule (Stayed); FTC Green Guides.	<i>ASIC Act</i> (s 12DB); <i>Corporations Act</i> .
<b>Scope Emissions</b>	<b>Mandatory</b> (under CSRD).	<b>Excluded</b> (from final SEC Rule).	<b>Mandatory</b> (proposed for large entities).
<b>Enforcement Style</b>	<b>Bureaucratic:</b> Pre-market verification & audit.	<b>Polarized:</b> SEC vs. State AGs; Class Actions.	<b>Aggressive:</b> Regulator (ASIC) actively litigates.
<b>Primary Risk</b>	<b>Reclassification Risk:</b> Having to downgrade funds (Art 9 §to§ 8).	<b>Political Risk:</b> Being sued for being "Woke" or "Fraudulent."	<b>Civil Penalty Risk:</b> Multimillion-dollar fines for misleading conduct.

Table 2: The Taxonomy of Greenwashing Liability Claims

Type of Claim	Legal Theory	Example Case	Comparative Vulnerability
<b>The "Clean" Product</b>	<b>Misrepresentation:</b> The product does not meet the environmental standard claimed.	<i>Volkswagen</i> (Dieselgate); <i>Keurig</i> (Recyclability).	<b>High Everywhere:</b> Factually false claims are illegal in all 3 jurisdictions.

Type of Claim	Legal Theory	Example Case	Comparative Vulnerability
The "Net Zero" Promise	<b>Aspirational Ambiguity:</b> Making future promises without a "reasonable basis" or present plan.	<i>ClientEarth v. TotalEnergies</i> (France); <i>Santos</i> (Australia).	<b>High in EU/Aus;</b> Lower in US (often protected as "puffery" or forward-looking statements).
The "Green" Fund	<b>Labeling Fraud:</b> An investment fund claiming ESG status while holding non-ESG assets.	<i>ASIC v. Mercer</i> (Aus); <i>SEC v. DWS Group</i> (US).	<b>High:</b> Financial regulators are prioritizing this above all else.
The "Offset" Illusion	<b>Quality of Verification:</b> Claims relying on carbon offsets that are technically flawed or impermanent.	<i>Delta Airlines</i> (US Class Action regarding "Carbon Neutral" labeling).	<b>Rising:</b> Courts are beginning to question the <i>validity</i> of the underlying offset certification.

## VIII. CONCLUSION

The era of "cost-free" environmental marketing is over. For decades, corporations treated sustainability reports as glossy brochures—detached from the balance sheet and immune from legal scrutiny. The convergence of the EU's regulatory tsunami, the US's class-action culture, and Australia's enforcement aggression has fundamentally altered this calculus.

This article concludes that while the **European Union** offers the most comprehensive solution to the information asymmetry problem via the Taxonomy, its complexity risks creating a "compliance check-box" mentality. The **United States**, paralyzed by the "Anti-ESG" culture war, is failing to provide the regulatory certainty businesses need, leaving the field to expensive and unpredictable private litigation. **Australia** demonstrates that existing consumer protection laws, when vigorously enforced, can be a powerful tool against greenwashing, but risks chilling the very speech required for the transition.

For the corporate practitioner, the advice is clear: Treat a "Net Zero" pledge with the same rigor as an earnings forecast. If you cannot audit it, do not say it. The gap between "marketing ambition" and "operational reality" is where the liability lies, and that gap is closing fast.

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