

The Australian Securities and Investments Commission (ASIC) has taken its first action for greenwashing against ASX-listed company Tlou Energy Limited (Tlou). On 27 October 2022, ASIC announced that Tlou had paid a total of AU\$53,280 to comply with four infringement notices issued by ASIC over concerns about alleged false or misleading sustainability-related statements made by the company in two announcements to the ASX.

ASIC asserted that it had reasonable grounds to believe that Tlou contravened the relevant infringement notice provisions (as discussed further below) in two ASX announcements, as set out in a company presentation dated 21 October 2021 (clean energy presentation) and a quarterly market update dated 25 October 2021 (operations report), that alleged:

- Electricity produced by Tlou from the outset of power generation would be carbon-neutral due to "carbon sequestration technology", which amounted to a carbon neutrality representation
- Tlou had environmental approval for 20MW gas-fired power and 20MW of solar power
- Tlou had a low-emission gas-to-power project
- Tlou was equally concerned with producing clean energy through the use of renewable sources as it was with developing its gas-to-power project

ASIC had concerns that Tlou either did not have a reasonable basis upon which to make the representations or that the representations were factually incorrect. Tlou was issued with a notice on 6 September 2022 that ASIC had commenced an investigation into the above statements.

On 18 October 2022, ASIC issued four infringement notices under section 12GX of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act). The notices were issued in relation to contravention of section 12DB(1)(a) of the ASIC Act.

Section 12DB(1)(a) of the ASIC Act 2001

ASIC notified Tlou that it had reasonable grounds to believe that Tlou had contravened section 12DB(1)(a) of the ASIC Act by, in trade or commerce in connection with the supply or possible supply of financial services or in connection with the promotion by any means of the supply or use of financial services, making false or misleading representations with respect to the standard, quality, value or grade of services.

Alleged False or Misleading Representation One

ASIC alleged that the diagram included in Tlou's operations report and clean energy presentation arguably presented that all electricity generated at the Lesedi power station would be carbon-neutral via sequestration. ASIC asserted that this representation was allegedly false or misleading because, at the time of publication, Tlou had, among other things:

- Not commenced necessary modelling of the likely carbon dioxide emissions that would be generated by the Lesedi project
- Not investigated or obtained studies in relation to whether it would be feasible to use carbon sequestration to attain carbon neutrality (including cost or time frame for doing so), and whether it was possible to obtain carbon credits or offsets in relation to the sequestration activities
- Not undertaken investigations of the feasibility of the Lesedi project producing carbon-neutral electricity via sequestration

Alleged False or Misleading Representation Two

ASIC alleged that in Tlou's clean energy presentation, Tlou made the representation that it had obtained environmental approval to generate up to 20MW of electricity through gas-fired power and a solar farm development. Additionally, Tlou represented it would be capable of generating up to 10MW of electricity using solar generation from around the same time that the Lesedi project started selling electricity generated from natural gas. This representation was allegedly false or misleading because, at the time of publication, Tlou:

- Did not have environmental approval to construct a 20MW solar farm
- Did not have a generation licence and had not acquired or installed the required solar power infrastructure
- Did not plan to generate electricity from solar power until after it was selling electricity generated from natural gas

Alleged False or Misleading Representations Three and Four

ASIC also alleged that in Tlou's clean energy presentation, Tlou asserted that its low-emission gas-to-power strategy was steadily progressing and included a diagram asserting that it was equally concerned with clean energy as it was with developing its gas-to-power project. This representation was allegedly false or misleading because at the time of publication:

- Tlou's primary asset was a project based on the exploitation of natural gas reserves
- Tlou's plan to develop clean energy in the form of solar and hydrogen was at an arguably early stage
- Tlou had not undertaken a greenhouse gas assessment; therefore, it had limited evidence to support its assertion that its gas-to-power project would be "low emissions"

Outcome

In its response to ASIC's allegations, Tlou agreed to pay a fine on a "no-admission" basis. In doing so, it stated that "[i]t did not accept that it contravened any provision of the Corporations Act 2001 (Cth) or the Australian Securities and Investments Commission Act 2001, but agreed to pay the infringement notice to bring this matter to an end and focus the company's resources on development of its power projects."

ASIC has advised Tlou that it will not take any further enforcement action arising from its investigation.

Key Takeaways

There has been a growing increase in investor demand for sustainability-related financial products and business practices. However, greenwashing can erode investor confidence in the market for these products and practices and attract regulatory implications. This comes as a well-timed reminder for companies to ensure that they avoid the risk of greenwashing and subsequent regulatory action.

There are differing opinions as to what constitutes greenwashing. The term itself is used in a broad number of contexts. Having said that, it is important to go back to basics and follow the rule of thumb that all claims must be substantiated.

To avoid greenwashing, it is important to have an understanding of the current regulatory setting for communications about sustainability-related products. The Corporations Act 2001 (Cth) and the ASIC Act contain general prohibitions against a person making statements that are false or misleading or engaging in dishonest, misleading or deceptive conduct in relation to a financial product or service. Therefore, companies must comply with these prohibitions when promoting or offering sustainability-related products or practices.

ASIC has recommended companies look to the Task Force on Climate-Related Financial Disclosures for guidance on how to improve the quality of disclosure. Additionally, in March 2022, the International Sustainability Standards Board published standards on climate-related disclosures and general sustainability-related disclosures, which can also be used as a reference point.

Sarah Court, ASIC deputy chair, stated that "it is imperative that as entities promote sustainability and green practices as part of their value proposition, they must ensure they can support those statements and have reasonable basis for doing so." To avoid greenwashing practices, companies should consider whether there is truth in promotion and clarity in communication.

Questions that companies can ask themselves in order to facilitate truth in promotion and clarity in communication include:

- **Have you used vague terminology?** – Avoid using general, unsupported sustainability-related statements. It is recommended that companies sufficiently explain sustainability-related terminology when using it. Where necessary, appropriately define or qualify terminology, and it may be necessary to engage experts to provide a basis for the appropriate terminology. There may also be instances where certain terms are too uncertain or vague or have different meanings, such as "eco-friendly," "green" or "sustainable," and in these circumstances, the language should be modified to avoid their use.
- **Are your headline or diagrammatic claims potentially misleading?** – Headlines or diagrams will not always include all necessary information; however, it is important that they do not include any misleading statements. It is a common trap to try to summarise the main point; however, the headline or diagram itself will not communicate the necessary qualifications. It may be necessary to use longer headlines with sufficient detail or appropriate qualifications in diagrams.
- **Have you explained how sustainability-related factors are incorporated into investment decisions and stewardship activities?** – Disclose and clearly explain the methodology or policy for sustainability-related considerations into investment decisions.
- **Do you have reasonable grounds for a stated sustainability target? Have you explained how this target will be measured and achieved?** – In order to avoid breaching the misleading statement prohibitions, companies should explain what the sustainability target is, how and when they expect to meet the target, costs associated, how they will measure progress, and any assumptions to be relied upon when setting that target or measuring progress.
- **Is it easy for investors to locate and access relevant information?** – Provide investors with sufficient information that is concise and clear so that investors understand the sustainability-related considerations.

In Light of These Findings

Despite the relatively minor fine issued by ASIC, the extent of the regulatory implications of greenwashing are yet to be seen. ASIC Chair Joe Longo stated in March 2022 that improving the standard of climate change governance practices is a core focus for ASIC.

ASIC has stated that it is currently investigating a number of listed entities, superfunds and managed funds in relation to their green credential claims. ASIC and the Australian Competition and Consumer Commission (ACCC) is actively monitoring the market for potential greenwashing and will take enforcement action, including court action, for serious breaches. In addition to potential regulatory action by ASIC, 'greenwashing' also opens the company to action by the ACCC for providing false or misleading information under the Competition and Consumer Act 2010.

Other jurisdictions around the world have also taken steps to enforce restrictions on greenwashing. Ultimately, the action against Tlou highlights the need for companies to remain up to date with developments in this evolving space and disclosure standards for sustainability-related products and practices in order to avoid regulatory action.

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