

Corporate culture and social expectations of corporate business practice have shifted since the mid-2000s. Shareholders and the broader community now expect businesses to operate in a manner that takes account of the broader public interest (as opposed to solely the profit motive).

The reality that exists in today’s community is that a failure to act in accordance with environmental, social and governance (ESG) obligations and principles poses significant corporate risk in many areas of business operation.

This note highlights Australian regulators’ recent attention to ESG statements generally but, in particular, the environmental space, and the steps businesses may take to ensure that their ESG claims are less susceptible to challenge, and the financial and reputational consequences that may flow from ESG challenges through litigation.

## **Environmental Claims**

Environmental and sustainability claims can, and currently do, significantly influence consumer and investor behaviour. There are clear investor and consumer concerns that some businesses are falsely promoting their environmental or “green” credentials.

As a result, Australian regulators have become particularly interested in businesses’ ESG claims and have placed the business community on notice that they are actively investigating and targeting sustainability and climate change-related claims.

Given this focus, businesses are on notice that they should be very careful in ensuring they have a proper basis for all ESG claims. Otherwise, there will be a significant risk of future shareholder and regulatory action against them.

Globally, ESG claims are also becoming increasingly scrutinised by overseas regulators, investors and consumers. The EU regulator has recently stepped up efforts to investigate and prosecute businesses engaging in greenwashing.

In particular, businesses must ensure sustainability-related claims are clearly defined, have a reasonable basis (particularly if they are forecasted or future claims), and explain how sustainability-related considerations are integrated into business decisions.

## **What Is Greenwashing?**

Greenwashing is defined as conveying a false or misleading representation regarding a business’s operational environmental impact.

Usually, the term refers to a business understating its environmental impact, or proposing a course of action to mitigate against its environmental impact that the business’s directors/officers know (or ought to know) will not achieve the stated desired environmental outcome.

## **Examples of Actions Relating to Alleged Greenwashing**

This is a live and current issue. It is reported that at least 95 ASX200 companies have announced net-zero environmental claims and targets.<sup>1</sup>

It is for this reason (among others) that greenwashing is particularly on the Australian Securities and Investments Commission’s (ASIC) and the Australian Competition and Consumer Commission’s (ACCC) radars. The ACCC previously released a guide on greenwashing, ASIC released a regulatory guide on greenwashing in June 2022, and the ACCC’s deputy chairperson recently addressed a House of Representatives Committee on 20 September 2022 on greenwashing specifically, stating that there were several investigations already underway into potential greenwashing claims in relation to goods and services.

In October 2022, the ACCC launched two internet sweeps of at least 200 company websites across a range of targeted sectors, including energy, vehicles, household products and appliances, food and drink packaging, cosmetics, clothing and footwear.

On 27 October 2022, ASIC announced that it took its first action against Tlou Energy Limited (TEL) for TEL’s alleged greenwashing in relation to the statements made to the ASX in October 2021.<sup>2</sup> TEL paid AU\$53,200 pursuant to infringement notices issued by ASIC. That said, pecuniary civil penalties and damages could easily have been hypothetically much more substantial.

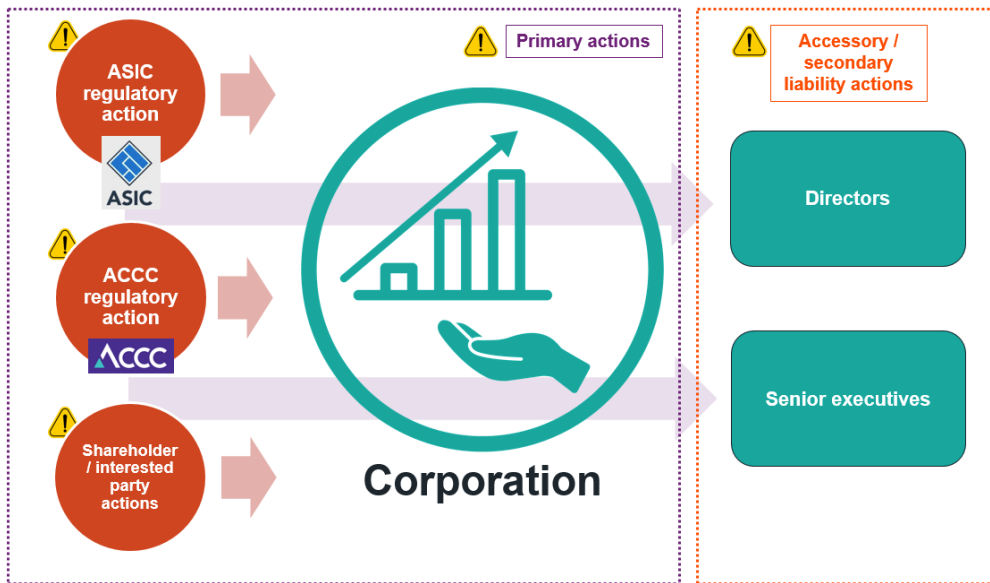
<sup>1</sup> Promises, pathways & performance Climate change disclosure in the ASX200, July 2022: <https://acsi.org.au/media-releases/asx-climate-ambition-encouraging-but-action-must-follow-acsi-research/#:-:text=New%20research%20from%20the%20Australian,covers%20by%20net%20zero%20commitments.>

<sup>2</sup> [https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-294mr-asic-acts-against-greenwashing-by-energy-company/.](https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-294mr-asic-acts-against-greenwashing-by-energy-company/)

Common examples of potential legal action include:

- Actions by ASIC for misleading or deceptive statements by a listed corporation to the ASX under the corporation's continuous disclosure obligations
- Actions by ACCC for misleading or deceptive conduct under the Australian Consumer Law (ACL)<sup>3</sup>
- Class actions by shareholders for material misstatements to the market in ASX announcements/misleading or deceptive conduct
- Where statements made to a regulator to obtain a statutory licence are incorrect, false and/or misleading, a party may seek to judicially review the decision for the grant of the licence

Further, the involvement of directors in greenwashing may potentially expose those directors to liability legal risks and legal action. This is the case where it can be demonstrated someone knew, or ought to have known, of a contravention of the law and/or through an action for breach of directors' duties built on a company's breach of the law.



Businesses should draft statements about current and future environmental performance assuming that they will be analysed and potentially challenged by regulators or investor/shareholder groups.

Significant penalties can be sought by regulators for making misleading statements, with a recent example being where the Federal Court of Australia ordered Volkswagen AG to pay AU\$125 million in penalties, after it declared by consent that Volkswagen breached the ACL by making false representations about compliance with Australian diesel emissions standards.<sup>4</sup>

### Minimising the Legal Risk

The nature of ESG commitments is that they are often forward-looking (or future-facing) commitments. There are wide and varied options available to businesses that want to plan and take steps to decarbonise their future operations; however, the real-life application of science to decarbonise businesses in different industries is often unclear. As a result there are many potential issues a business may face in actually achieving its ESG commitments even with the most thoroughly thought-out plans.

The key factor businesses ought to keep in mind is that even though a commitment is forward-looking, the business must have a reasonable basis for making the commitment at the time it is made (and on an ongoing basis if the commitment is maintained and/or subsequently repeated). This means having an objectively reasonable basis to say that the commitment can be reached. In this regard, businesses are now often reaching out to certifying organisations to vet or certify their plans.

When detailing an ESG plan or making a statement about a business's ESG activities, it is important to seek to understand what an ordinary person will understand the claim to mean in the context in which it is given. Businesses should carefully disclose and carefully explain the methodology or policy, what assumptions lie behind the commitments and any factors that might influence whether the commitment is met.

<sup>3</sup> Schedule 2 of the Competition and Consumer Act 2010 (Cth), which is reproduced in other state and territory jurisdictions.

<sup>4</sup> *ACCC v. Volkswagen Aktiengesellschaft* [2019] FCA 2166; *Volkswagen Aktiengesellschaft v. ACCC* (2021) 284 FCR 24; [2021] FCAFC 49.

Given the level of regulator and investor focus on this area, it is often prudent to obtain independent external legal advice before statements are made. Sometimes false or misleading claims are made inadvertently, resulting from a limited understanding of the supply chain, a lack of due diligence before making marketing claims, or poor reporting practices. Careful and independent advice will ensure that a business properly understands the risks and can take steps to ensure that its commitments are the type the regulators are encouraging businesses to make.

We are a strongly integrated global firm that has over 40 offices across four continents. We often provide advice across jurisdictions on advertising, ESG and greenwashing issues.

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