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ASIC's Fourth Infringement Action for Alleged "Greenwashing"

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The Australian Securities and Investments Commission (ASIC) has marked the new year with its first regulatory "greenwashing" scalp.

ASIC successfully pursued Black Mountain Energy Limited, an energy company listed on the Australian Securities Exchange (ASX), for alleged false or misleading "greenwashing" representations that ASIC alleged arose from three of the company's ASX announcements in 2021 and 2022.

This represents ASIC's fourth infringement notice for alleged "greenwashing practices" in the last three months. ASIC's eagerness to take companies to task on their environmental credential claims is consistent with the regulator's publicly stated aim of cracking down on corporations making unsubstantiated or false environmental credential claims.

ASIC asserted that Black Mountain had contravened the relevant infringement notice provisions (discussed further below) in three ASX announcements, which comprised an investor presentation dated 23 December 2021, an investor update dated 27 May 2022, and a presentation on the Good Oil Conference dated 8 September 2022.

Specifically, ASIC alleged that the announcements conveyed two false or misleading representations, being:

- **First** – Black Mountain was creating a natural gas development project (known as "Project Valhalla") with "net-zero carbon emissions"
- **Second** – The greenhouse gas emissions associated with Project Valhalla would be "net-zero"

ASIC alleged that Black Mountain either lacked a reasonable basis to make the representations, or, alternatively, that the representations were factually incorrect.

On 20 December 2022, ASIC issued four infringement notices under section 12GX of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act), reflecting ASIC's position that the alleged representations made in Black Mountain's ASX announcements contravened section 12DB(1)(a) of the ASIC Act.

The Prohibition Against False or Misleading Representations in Connection With Financial Services

Section 12DB(1)(a) of the ASIC Act prevents a person from 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 Representations

As described in ASIC's infringement notices issued to Black Mountain, ASIC alleged that the representations contained in the ASX announcement were false or misleading because, at the time of publication:

- Black Mountain had not progressed any specific, substantive or meaningful works related to its net-zero aim and had not allocated funding for such works
- Black Mountain had not progressed any specific, substantive or meaningful works regarding how it would design Project Valhalla to minimise or eliminate carbon dioxide emissions or attain net-zero carbon emissions and had not developed a detailed plan for how it would achieve this aim
- Black Mountain had not undertaken any specific or substantive modelling of carbon dioxide emissions that were likely to be generated by, or might be expected to arise from, the production of gas from Project Valhalla, that would be required to be offset in order to achieve carbon neutrality
- Black Mountain had not undertaken any substantive modelling of the likely cost involved in offsetting any carbon dioxide emissions from Project Valhalla
- Black Mountain's net-zero emissions target would only apply if Black Mountain was able to progress to production and was not intended to apply in relation to any exploratory or development activities
- Black Mountain did not have a credible or feasible plan for an "unconventional drilling" approach or any other approach that would produce carbon neutral natural gas
- Black Mountain had no credible basis for asserting that the natural gas it produced would be carbon neutral
- Further and accordingly, Black Mountain had no reasonable grounds for making the representations regarding net-zero carbon emissions from Project Valhalla

Outcome

In response to ASIC's allegations of greenwashing, Black Mountain agreed to pay ASIC a combined fine of AU$39,960 on a "no-admission" basis.

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 capable of substantiation if subsequently challenged by a regulator.

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 steer clear of 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 helpful reference point for companies making these claims.

To avoid greenwashing, companies should consider whether there is truth in promotion and clarity in communication. This was particularly demonstrated in the greenwashing infringement action against Black Mountain, which emphasised the importance of particularising sustainability statements (including any limits on their application) and the need to substantiate the claims with a reasonable basis. 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 and stick to particularised and narrow statements that can be easily verified. 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 advise on 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. The methodology must be sufficiently robust and defensible.
- **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 contravening 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.
- **Have you undertaken specific or substantive modelling to substantiate your claims?** – In order to further substantiate the basis for such claims, it is important for companies to undertake some form of predictive modelling, which should include a financial component. Obviously, the more detail, the better.
- **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.

Prior Infringement Action by ASIC

ASIC's greenwashing infringement action against Black Mountain follows the issue of similar infringement notices to Diversa Trustees Limited on 22 December 2022, Vanguard Investments Australia Limited on 1 December 2022, and Tlou Energy Limited on 25 October 2022 in response to ASIC's concerns about alleged greenwashing.

ASIC Deputy Chair Sarah Court said, "ASIC issued eight infringement notices for alleged greenwashing in 2022 and has started the year with further action against a listed company. ASIC will continue to closely monitor sustainability claims and take action where we consider representations cannot be substantiated or are factually incorrect."

Diversa Trustees Limited

On 23 December 2022, ASIC announced that superannuation trustee Diversa Trustees Limited (Diversa) had paid a total of AU$13,320 to comply with an infringement notice issued by ASIC over concerns about overstating exclusions (otherwise known as investment screens) on the website of one of its superannuation products, Cruelty Free Super (CFS). In these statements, ASIC alleged that CFS claimed to prevent investment in companies involved in:

- "Polluting and carbon intensive activities"
- "Financing or support of activities that cause environmental and social harm"
- "Poor corporate governance"

ASIC alleged that while some investment screens were applied by CFS, they were more specific and implemented on a more limited basis than CFS' website had suggested, demonstrating first-hand how broad statements can potentially mislead customers and lead to regulatory action.

Vanguard Investments Australia Limited

On 2 December 2022, ASIC announced that investment manager Vanguard Investments Australia Ltd (Vanguard) had paid a total of AU$39,960 to comply with three infringement notices issued by ASIC over concerns about overstating an investment screen in the product disclosure statements for the Vanguard International Shares Select Exclusions Index Funds (Vanguard Funds), which claimed to prevent investment in companies involved in significant tobacco sales.

ASIC alleged that the Vanguard Funds were structured to exclude certain investments in tobacco (including manufacturers of cigarettes and other tobacco products); however, it did not exclude companies involved in the sale of tobacco products, illustrating the extension of greenwashing beyond environmental claims to misleading ethical propositions (including investments). This case also demonstrated that statements, whilst they may be approved at the investor level, must be able to be substantiated by the entity making the statement.

Tlou Energy Limited

On 27 October 2022, ASIC announced that ASX-listed company Tlou Energy Limited (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, being:

- 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 20 MW of gas-fired power and 20 MW of solar power
- Tlou had a low-emission gas-to-power project
- Tlou was equally as concerned with producing clean energy through the use of renewable sources as it was with developing its gas-to-power project

This case illustrates the importance of being able to substantiate sustainability claims (including those presented in a visual format, such as a diagram) on a reasonable basis, and the ramifications of having inadequate evidence to support a company's representations in respect of its sustainability products and practices. It also emphasises the need for each individual representation to stand true and correct, without requiring additional context (such as surrounding statements).

In Light of These Findings

It is clear from the recent influx of regulatory action for suspected instances of greenwashing that the standard of climate change governance practices in Australia is a core focus for ASIC. It is also worth noting that in addition to potential regulatory action by ASIC, greenwashing also opens the door for potential action by the Australian Competition and Consumer Commission (ACCC) for providing false or misleading information under the Competition and Consumer Act 2010 (Cth). ASIC and the ACCC are actively monitoring the market for potential greenwashing and will take enforcement action, including court action, for serious breaches.

Other jurisdictions around the world have also taken steps to enforce restrictions on greenwashing. Ultimately, the greenwashing infringement action against Black Mountain emphasises the need for companies to be able to substantiate their claims in relation to their sustainability products and practices, in order to avoid regulatory action.

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