

On 27 February 2023, the Australian Securities and Investments Commission (ASIC) commenced its first court action for alleged greenwashing conduct by commencing civil penalty proceedings in the Federal Court of Australia against Mercer Superannuation (Australia) Limited (a superannuation company) (Mercer). The action is particularly significant noting that Mercer is reported to manage AU\$27.5 billion in superannuation assets.

ASIC alleges that Mercer made misleading statements about the sustainable nature and characteristics of some of its superannuation investment options.

This is a timely reminder of the need for companies to be able to substantiate their sustainability claims and ensure that there is truth in promotion and clarity in communication in relation to their sustainability-related practices. As detailed in [our 13 January 2023 note](#) relating to ASIC's regulatory action against ASX-listed Black Mountain Energy Ltd, ASIC is increasingly taking companies to task regarding their environmental and sustainability claims, and companies should be on notice.

Given ASIC warned in October 2022 that it was investigating superannuation funds for greenwashing, ASIC has shown its willingness to follow through with its statements that targeting greenwashing activity is at the top of its agenda.

Background

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.

Greenwashing was a major focus of ASIC and the Australian Competition and Consumer Commission (ACCC) in 2022, and will remain so in 2023. Since October 2022, ASIC has issued infringement notices for alleged greenwashing totalling over AU\$140,000 to Tlou Energy Limited, Diversa Trustees Limited, Vanguard Investments Australia Limited and Black Mountain Energy Limited.

However, this is the first time ASIC has launched court action for misleading or deceptive conduct relating to the sustainability/environmental-related claims by a corporation. ASIC's Deputy Chair Sarah Court said, "This is the first time ASIC has taken an Australian entity to court regarding alleged greenwashing conduct, and it reflects our continuing efforts to ensure sustainability-related claims made by financial institutions are accurate."

Further, this is the first time ASIC has launched court action following the Financial Services Royal Commission-inspired legislative amendments, which ultimately boosted ASIC's ability to take action against a broader range of superannuation trustee conduct.

The Allegations

ASIC alleges that Mercer allowed its members to select their own "Sustainable Plus Investment Options," using marketing ploys to entice members who were "deeply committed to sustainability." ASIC notes that these Sustainable Plus Options promoted that they were suitable for sustainability-conscious investors as they excluded investments in companies involved in carbon-intensive fossil fuels, alcohol production and gambling.

Further, ASIC alleges that members who opted for the Sustainable Plus Options had investments in industries that Mercer stated were excluded. In particular, 15 companies were involved in the extraction and sale of carbon-intensive fossil fuels, 15 companies were involved in the production of alcohol, and 19 companies were involved in gambling.

In asserting that these Sustainable Plus Options excluded these three industries, ASIC alleges that Mercer made false or misleading statements and engaged in conduct that could mislead the public. Sarah Court noted, "There is increased demand for sustainability-related financial products, and with that comes the growing risk of misleading marketing and greenwashing. If financial products make sustainable investment claims to investors and potential investors, they need to reflect the true position. If investments in certain industries like fossil fuels are said to be excluded, this promise must be upheld."

ASIC has taken the decision not to issue infringement notices (unlike in its previous regulatory action detailed in our previous note) given, in the regulator's view, Mercer's conduct was of "critical concern." This indicates that ASIC will assess the egregiousness of the contraventions of a company in determining whether to pursue court proceedings to enforce Australian law.

Potential Outcome

Although the date for the first case management hearing is yet to be scheduled, ASIC is seeking declarations and pecuniary penalties from the court. ASIC is also seeking injunctions preventing Mercer from continuing to make the potential greenwashing statements online and orders requiring the company to make publicly available any contraventions found by the court. Significant penalties can be sought by regulators for making misleading statements, so this will be a case to follow to see how the regulatory implications of greenwashing are realised in Australian courts.

Key Takeaways

A key factor for businesses to keep in mind is that it is paramount for companies to be able to substantiate their claims in relation to their sustainability products and practices in order to avoid regulatory action. To avoid greenwashing, it is important to understand the current regulatory setting for communications about sustainability-related products. Some factors that companies can consider in order to facilitate truth in promotion and clarity in communication include avoiding general and unsupported sustainability-related statements, refraining from using potentially misleading headlines or diagrammatic claims, and detailing or referring to the methodology or policy for sustainability-related considerations in investment decisions.

It is also worth mentioning that in addition to regulatory action by ASIC, greenwashing opens the door for potential action by the Australian Competition and Consumer Commission (ACCC) for misleading or deceptive conduct under the Competition and Consumer Act 2010 (Cth).

The regulatory action surrounding greenwashing reaffirms that greenwashing is certainly one of ASIC's enforcement priorities for 2023. It is often crucial to obtain independent external legal advice before potentially misleading sustainability-related statements are made.

Authors



Ashley Rose

Partner, Sydney
T +61 2 8248 7879
E ashley.rose@squirepb.com



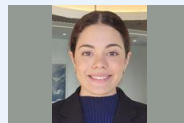
Graeme Slattery

Partner, Sydney
T +61 2 8248 7876
E graeme.slattery@squirepb.com



Jon Baker

Senior Associate, Perth
T +61 8 9429 7618
E jon.baker@squirepb.com



Georgia Mateer

Paralegal, Sydney
T +61 2 8248 7893
E georgia.mateer@squirepb.com