SQUIRE PATTON BOGGS

Why the Construction Industry Needs to Be Worried About "Greenwashing"

Australia – August 2023

It is reported that globally the construction industry is responsible for almost 25% of greenhouse gas emissions, 40% of total energy production, 16% of total water consumption and 30% to 40% of all solid waste.[1]

Growing environmental awareness and activism means it is likely that industries with a large carbon footprint and environmental impact, such as the construction industry, will face increasing scrutiny of their "green" claims.

Managing the risk of greenwashing is challenging and complex. While at its core it is a matter of "doing what you say you are doing, or are going to do", in practice it is far from that simple.

The Rise of Greenwashing

Greenwashing is not new. There are examples of prosecutions for greenwashing as far back as at least 1993.[2] However, it has recently escalated as a business risk due to:

1. The dramatic increase in the number of statements being made regarding a business's environmental credentials or impact
2. The ACCC and ASIC having declared it to be a current compliance and enforcement priority

We have previously discussed the potential legal consequences of greenwashing, such as the possibility of enforcement action being taken by ASIC or the ACCC, consumer claims and shareholder class actions (see our article What Is All This Fuss About "Greenwashing"?). Of course, greenwashing also exposes businesses to reputational risk.

While the ACCC and ASIC's focus is presently on greenwashing in sectors such as energy, clothing and footwear, and vehicles, that does not mean the construction industry is immune from prosecution or that the focus of regulators will not shift in the near future. There are also related risks that arise in the construction sector, such as potential claims of breach of contract by principals if their environmental requirements are not met.

Greenwashing in the Construction Sector

Given the construction sector's significant environmental impact, it is natural that construction companies would wish to reduce their impact, and to be seen to be doing so. Such "green credentials" are also becoming increasingly important for tenders and work winning.

Web searches reveal numerous examples of construction companies making statements regarding their environmental initiatives – for example, claims that the business will be "net zero" by a certain year, that waste and materials are recycled, and that "best practice" environmental management or "clean energy" is used. Environmental ratings and accreditations are also relied upon.

However recent ASIC prosecutions indicate that such statements may constitute greenwashing if they are overstated or unsubstantiated (see our previous updates ASIC Launches First Court Proceedings Alleging Greenwashing and ASIC's Fourth Infringement Action for Alleged "Greenwashing"). An extreme example of greenwashing in the construction context is that of the Zhengzhou-Wanzhou High-speed Railway project in China where it was claimed that "green construction" was implemented. In reality, however, there were repeated warnings with regard to serious environmental vandalism.[3]

Key Risk Management Strategies

In our update ASIC's Fourth Infringement Action for Alleged "Greenwashing", we discussed the importance of ensuring that environmental claims have a reasonable basis and can be substantiated. For example, this could require detailed modelling to verify statements before they are made. It is also important to avoid vague terminology, and to take care when using headings and diagrams. Further guidance has now been provided by the ACCC in its "Environmental and sustainability claims – Draft guidance for business", which we discuss in our most recent update ACCC issues new guidance on environmental and sustainability claims.

1 Qinghua He, et al, "To be green or not to be: How environmental regulations shape contractor greenwashing behaviors in construction projects", *Sustainable Cities and Society*, Volume 63, December 2020, https://www.sciencedirect.com/science/article/abs/pii/S221067072030682X (we note that a number of different statistics are reported in this regard).

2 When the predecessor to the ACCC took enforcement action against the Continental Cup Company Ltd in relation to misleading statements regarding the recycling of its poly coated paper cups.

3 Qinghua He, et al, "To be green or not to be: How environmental regulations shape contractor greenwashing behaviors in construction projects", Sustainable Cities and Society, Volume 63, December 2020, https://www.sciencedirect.com/science/article/abs/pii/S221067072030682X.

Additional complexities arise for construction companies, as the risk of greenwashing usually emerges at both the overall business operation level and the individual project level. This means that environmental impacts must not only be managed for the business as a whole, but also across a number of temporary project sites involving various participants, and site- and project-specific issues.

Principal's Environmental Requirements

While meeting certain environmental requirements may be self-imposed, in many cases it may – or may additionally – be imposed contractually by the principal. This is because the principal may have made its own public statements regarding the environmental impact of the project, or have contractual obligations to meet in this regard (for example, a future tenant may have environmental requirements for the construction of a commercial building).

It is therefore important to ensure that the principal's environmental requirements are well understood and achievable, and that steps are taken throughout the life of the project to ensure that those requirements are met. A detailed assessment may be required prior to contract, with the aid of appropriate environmental impact consultants.

As with other risks arising on a construction project, the terms of the contracts will be one of the easiest ways to manage greenwashing risk and the risk of breaching the contract with the principal. The roles of the various parties involved in the project, such as the principal, architect, engineer, contractor, subcontractors and consultants, should be precisely defined in the contracts so that each knows what they are responsible for. Clear drafting also makes it easier to determine where responsibility for any failures lie, should a dispute arise.

Supply Chain Emissions

Of course, consideration must be given to the entire supply chain when making environmental claims. For example, greenhouse gas emissions generated by a business are generally divided into the following categories:[4]

1. Direct emissions from owned or operated assets
2. Indirect emissions from purchased energy
3. Indirect emissions from events occurring along the supply (or value) chain

While indirect emissions from the supply chain are usually more difficult to measure, they can represent a large proportion of the emissions of a business or project.

A thorough supply chain analysis should therefore be undertaken to ensure that supply chain emissions (as well as energy, water and material use, and other environmental impacts) are properly accounted for in any statements made. Naturally, careful consideration of the accuracy and reliability of environmental claims made by subcontractors and suppliers is needed.

Supplier and Subcontractor Risks

A significant risk is that suppliers or subcontractors will fail to deliver on their promises, which results in breach of the contract with the principal, or the contractor being prosecuted for greenwashing. For example, "green" materials that a subcontractor intended to use may become unavailable in the time required, so they decide to use standard materials to avoid causing delay to the project. Or perhaps the cost of green materials has escalated, so they use standard materials to avoid incurring those increased costs. Subcontractor-caused delays to a project may also result in increased carbon emissions or other environmental impacts.

Supplier and subcontractor contracts should therefore clearly state objective and measurable environmental requirements that must be met. Mechanisms to address failures to meet those requirements should also be included in contracts, ideally allowing for corrective action to be taken by the subcontractor or supplier so that the project can still satisfy overall environmental requirements. Indemnities for claims made by principals or others due to breaches by a supplier or subcontractor (as well as liability for consequential loss suffered due to such breaches) may also assist, although of course it is preferable to avoid any such claims arising in the first place.

Providing incentives to suppliers and subcontractors for emission reductions or other environmental initiatives may also help boost the environmental credentials of a project.

Statements Regarding Projects

The making of "green" statements in relation to an entire project should be avoided where a contractor is only working on – and therefore only has control over or information concerning – one part of it. As a general rule, unless statements can be verified, they should not be made.

It may also be necessary to temper or qualify certain statements. For example, it may be better to say an application for Green Star certification will be made, rather than that a building "will be" Green Star certified once complete. However, care should be taken when using "small print" to clarify or qualify statements made, as that may give a misleading impression.

Final Thoughts

This update provides a mere snapshot of some of the risks that arise when construction companies make environmental claims and contractual promises. Given the scope and complexity of the issues that arise, it is usually prudent to obtain early legal advice on proposed environmental statements and draft contracts so as to reduce the risk of prosecution or other negative repercussions.

Authors

Angela Radich
Director, Sydney
T +61 2 8248 7874
E angela.radich@squirepb.com

Eden Lim
Associate, Sydney
T +61 2 8248 7832
E eden.lim@squirepb.com

4 GHG Protocol Corporate Accounting and Reporting Standard.