Article Information

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Behind the green curtain: Understanding and mitigating greenwashing risks

Greenwashing penalties are skyrocketing as regulators get serious. We break down the enforcement wave and what companies and directors need to know to stay compliant.

Since November 2022, the Australian Securities Investments Commission (**ASIC**) has included in its enforcement priorities, a focus on greenwashing and misleading conduct involving environmental and sustainability claims. ASIC considers greenwashing to be 'the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical.'[1] Whilst there is no offence specifically for greenwashing, ASIC derives its powers from a number of provisions in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) which prohibits false or misleading statements relating to financial products.

Following its inclusion in ASIC's enforcement priorities, ASIC has commenced and successfully prosecuted the following civil penalty proceedings in respect of claims of greenwashing:

1. *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd* [2024] FCA 1086 (Vanguard) whereby orders for an aggregate pecuniary penalty of $12.9 million and a written adverse publicity notice were made;
2. *Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited* [2024] FCA 850 (Mercer) whereby orders for an aggregate pecuniary penalty of $11.3 million and a written adverse publicity notice were made; and
3. *Australian Securities and Investments Commission v LGSS Pty Ltd (No 3)* [2025] FCA 205 (LGSS) whereby orders for an aggregate pecuniary penalty of $10.5 million and a written adverse publicity notice were made.

ASIC has also commenced multiple quasi-enforcement activities relating to greenwashing by issuing multiple infringement notices and corrective disclosures. Since 2022, ASIC has issued 19 infringement notices and 50 corrective disclosures. The Australian Competition and Consumer Commission (**ACCC**) has also taken action within the greenwashing sphere, having previously commenced proceedings against Clorox Australia Pty Ltd (Clorox).[2] Recently, the Federal Court of Australia ordered Clorox to pay a total pecuniary penalty of $8.25 million for making false or misleading representations to consumers.

This article seeks to clarify the penalties a company may face if a claim of greenwashing is successfully prosecuted, other consequences that may impact a company board or director following a successful prosecution and the likelihood of class actions arising out of enforcement proceedings.

Potential Penalties

Adverse Publicity Orders

In the civil penalty proceedings that ASIC has pursued to date, adverse publicity orders have been made. The court is empowered by the ASIC Act to make an adverse publicity order requiring the person or company to publish adverse information about the offence and penalty in the terms and manner as the order requires.[3]

The Court has established that there are three purposes of such orders. Firstly, as the name suggests, one of the purposes is punitive.[4] The second is to deter and provide a fitting response to the contravening conduct.[5] The third is to protect the public interest in dispelling incorrect or false impressions created by contravening conduct, alert the consumer to the fact of the contravening conduct, aide the enforcement of primary orders and prevent the repetition of contravening conduct.[6]

Companies that are at risk of a greenwashing claim need to be aware of potential adverse publicity orders and their resulting impact on the general public's perception of the company.

Pecuniary Penalties

The relevant regulatory bodies can also seek pecuniary penalties under sections 12GBA(1)(a) and 12GBB(3) of the ASIC Act. In ordering the appropriate penalty, it is to be fixed at a level that ensures that neither the contravener, nor would-be contraveners would regard it as an acceptable cost of doing business.[7] The Court must have regard to:

1. the nature and extent of the contravention;
2. any loss or damage suffered because of the contravention;
3. the circumstances in which the contravention took place;
4. whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct; and
5. in the case of a contravention by the trustee of a registrable superannuation entity, the impact that the penalty under consideration would have on the beneficiaries of the entity.[8]

The Court may impose a penalty in respect of each act or omission that constitutes a contravention.[9] It is accepted that the purpose of imposing a pecuniary penalty is deterrence which is two-fold; the need to deter repetition of the contravening conduct by the contravener and to deter others who might by tempted to engage in similar contraventions.[10] The Court in *Vanguard* considered that there were certain factors of the contravening conduct that increased the need for deterrence, namely where the contravening conduct:

1. is serious;
2. continued for a considerable length of time;
3. concerned a substantial investment fund (i.e., 1.1 billion) with thousands of investors;
4. were engaged in with reckless disregard to the accuracy of the information conveyed; and
5. had senior employees involved.[11]

Conversely, the Court in *Vanguard* and *LGSS*[12] also considered that the following factors decreased the need for deterrence:

1. where some attempt was made to ensure that specific representations were accurate;
2. the steps taken once an entity becomes aware of the inaccuracies;
3. cooperation with ASIC; and
4. steps taken by the entity to improve its compliance procedures to avoid any repetition of the contravening conduct in the future.[13]

Notably, while the court in *Mercer* noted that the size of a corporation does not by itself justify a higher penalty than might otherwise be imposed, it may be relevant in determining the value of the pecuniary penalty that would operate as an effective specific deterrent.[14] *Mercer* also noted that the amount required to achieve deterrence will be larger for a company with significant resources.[15] This was also the position of the Court in *LGSS* where it was held that a greater financial penalty will be necessary to persuade a well-resourced contravener to abide by the law (as compared to a poorly resourced contravener).[16]

In the civil penalty proceedings prosecuted by ASIC to date, the pecuniary penalties ordered have been significant, ranging from $10.5 to $12.9 million. The penalty in *Vanguard* included a 25% discount due to the Court recognising Vanguard's high level of cooperation during the investigations and proceedings.[17] But, it is worth noting that half of Vanguard's profits was considered to be the appropriate penalty for the greenwashing conduct.

Further consequences of an adverse greenwashing finding

Directors

A company board or director may suffer damage to their reputation and be exposed to penalties if an adverse finding of greenwashing is made against their company. Reputational consequences could range from loss of investor confidence to loss of employee morale. There may also be additional financial consequences (other than penalties) such as loss of

shareholder value, costs associated with a legal defence and paying the regulator's legal costs.

Risk of potential class actions

The risk of class actions arising out of a successful prosecution of a greenwashing claim in respect of investment products is at the moment uncertain. This is due to it being difficult or in some cases, outright impossible, to identify the financial loss suffered. This was confirmed in *Mercer* where the Court held that it was not possible to quantify the financial harm suffered by individual consumers because it was not known which consumers invested on the basis of the representations, what alternative choices the investors would have made had they known the true position and the difference in performance of any alternative funds.[18]

In *Vanguard*, the Court held it was not demonstrable that any investor suffered financial loss by Vanguard's misleading conduct.[19] Instead, with respect to loss, the Court only trivially noted that investors lost the opportunity to invest in accordance with their investment values.[20]

Despite this, as greenwashing claims are a developing area, greenwashing class actions may arise in the near future. Given a lack of judicial precedent in respect of greenwashing relating to consumer goods, it is possible that consumer goods could receive different treatment when quantifying loss.

Steps to mitigate risk of action of a regulator

What should a director do to protect themselves and their company where the organisation is looking to offer a "green product"? It's essential you build a clear paper trail which explores and confirms the "green" aspects of your product's claim. We recommend taking the following steps to mitigate the risk of greenwashing enforcement action by a regulator by:

1. thoroughly conducting due diligence and investigating the evidence behind every green claim looking to be made to consumers;
2. obtaining legal advice on proposed green claims to assist in forming the requisite "reasonable grounds" for announcing claims and future representations if questioned by a regulator;
3. regularly revisiting and monitoring the evidence in respect of every green claim;
4. keeping concrete records of documents supporting the underlying green claims; and
5. encouraging external audits and certifications.

At Piper Alderman, we are ready to assist you with any questions you may have about greenwashing, including from the planning stage of your product, the rollout and marketing terms of that product, to providing advice on regulatory communications, investigations and enforcement actions.

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[1] ASIC, "How to Avoid Greenwashing When Offering or Promoting Sustainability-related Products" (Information Sheet 271, June 2022).

[2] *Australian Competition and Consumer Commission v Clorox Australia Pty Ltd* [2025] FCA 357.

[3] s 12GLB of *ASIC Act*.

[4] *LGSS*, at [143].

[5] Ibid.

[6] Ibid.

[7] *LGSS*, at [75].

[8] s 12GBB of *ASIC Act*.

[9] *Vanguard*, at [33].

[10] Ibid, at [34].

[11] Ibid, at [113].

[12] *LGSS*, at [137].

[13] *Vanguard*, at [114].

[14] *Mercer*, at [134].

[15] Ibid.

[16] *LGSS*, at [80].

[17] *Vanguard*, at [118].

[18] *Mercer*, at [132]

[19] *Vanguard*, at [111]

[20] Ibid.