Article Information

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ASIC launches proceedings against superannuation firm for greenwashing

In an Australian first, the Australian Securities and Investments Commission (ASIC) has launched court action against alleged greenwashing conduct for misleading statements about the sustainable nature and characteristics of certain investment options.

Background

ASIC launched proceedings in the Federal Court of Australia against Mercer Superannuation (Australia) Limited (**Mercer**) for allegedly making misleading statements about the sustainable nature of the "Sustainable Plus" investment option offered by the Mercer Super Trust (of which Mercer is a trustee).

What is "greenwashing" in investments?

In relation to investments, ASIC defines 'greenwashing' as the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical. ASIC has stated that 'greenwashing' is of concern as it distorts relevant information that a current or prospective investor may require to make an informed investment decision. It also erodes investor confidence in the market for sustainability-related products.

What representations were made by Mercer?

The investment option in question was marketed by Mercer as being suitable for members who "are deeply committed to sustainability" because they excluded investments in companies involved in carbon-intensive fossil fuels, alcohol production and gambling.

However, ASIC alleges that investments were in fact made in industries that were purported to be excluded by the investment option, with the ASIC media release specifically calling out the following:

- 15 companies involved in the extraction or sale of carbon intensive fossil fuels (including AGL Energy Ltd, BHP Group Ltd, Glencore PLC and Whitehaven Coal Ltd);
- 15 companies involved in the production of alcohol (including Budweiser Brewing Company APAC Ltd, Carlsberg AS, Heineken Holding NV and Treasury Wine Estates Ltd); and
- 19 companies involved in gambling (including Aristocrat Leisure Limited, Caesar's Entertainment Inc, Crown Resorts Limited and Tabcorp Holdings Limited).

ASIC is seeking declarations and fines from the Court. ASIC is also seeking injunctions preventing Mercer from continuing to make any of the alleged misleading statements on its website, and an order requiring Mercer to publicise any contraventions found by the court.

Greenwashing a key focus of regulators

ASIC

Action against greenwashing is one of ASIC's 2023 Enforcement Priorities. Recently, ASIC has issued a number of infringement notices in response to concerns about alleged greenwashing, including to Tlour Energy, Vanguard Investments Australia, Diversa Trustees Limited and Black Mountain Energy. The proposed action against Mercer will be the first court action in this regard.

This proceeding is also the first time ASIC has used its enhanced powers to take action regarding a broader range of superannuation trustee conduct following legislative amendments, arising from the Financial Services Royal Commission. Under the reforms, ASIC can enforce multiple prohibitions on false or misleading statements, and engaging in dishonest or deceptive conduct in relation to a financial product or financial service under the *Corporations Act 2001* (Cth) and *Australian Securities and Investment Commission Act* 2001 (Cth).

In respect of responsible entities of managed funds, corporate directors of corporate collective investment vehicles, and trustees of registrable superannuation entities, ASIC has published guidance on *"How to avoid greenwashing when offering or promoting sustainability-related products"*. Key questions outlined in the guidance are:

1. Is your product true to label? While there is no standardised labelling for sustainability-related products, product labels should not be misleading and care should be taken when using absolute terms.
2. Have you used vague terminology? Avoid using broad, unsubstantiated sustainability-related statement or 'jargon' without providing clarifying information. Examples include "socially responsible", "ethical investing" and "impact investing".
3. Are your headline claims potentially misleading? headlines on communications and disclosures containing sustainability-related matters should not in itself be misleading, and exceptions or qualifications should not be used to clarify the claim.
4. Have you explained how sustainability-related factors are incorporated into investment decisions and stewardship activities? It is not appropriate for an issuer's disclosure to state that it 'considers', 'integrates', or 'takes into account' sustainability-related factors when assessing new and existing investments, but does not explain how.
5. Do you have any influence over the benchmark index for your sustainability-related product? If you do, is your level of influence accurately described? An issuer of sustainability-related products should not state that it is passively managed when, in substance, it has a degree of active management over the investment decision-making process.
6. Have you explained how you use metrics related to sustainability? Companies that rely on sustainability-related metrics (such as ESG scores) should implement and follow robust verification processes to ensure that its sustainability statements can be substantiated, including through documentation procedures and obtaining legal advice where appropriate.
7. Have you explained how you use metrics related to sustainability? Companies that rely on sustainability-related metrics (such as ESG scores) should have a robust verification process to ensure sustainability statements can be substantiated.
8. Do you have reasonable grounds for a stated sustainability target? Have you explained how this target will be measured and achieved? If an issuer provides a sustainability target (like net zero carbon emissions) the issuer must provide information on how and when it expects to reach this target.
9. Is it easy for investors to locate and access relevant information? Issuers should ensure that all information published that is relevant to an investment decision regarding a particular sustainability-related product is easy to locate and readily available, particularly when this information is made available through a website.

ACCC

The ACCC announced that it is prioritising consumer and fair-trading issues in relation to environmental and sustainability claims as part of the 2023-4 Compliance and Enforcement Priorities.

Early this month, the ACCC announced that it will be investigating a number of businesses for potential 'greenwashing' following an 'internet sweep' which found that more than half of the businesses reviewed made concerning claims about their environmental or sustainability practices. The cosmetic, clothing and footwear and food and drink sectors were found by the ACCC to have the highest proportion of concerning claims.

In the regulator's March report *"Greenwashing by businesses in Australia: findings of the ACCC's internet sweep of environmental claims"* the ACCC highlights a variety of greenwashing practices that it found businesses to be engaging in, including:

- making vague and unqualified claims about their produces to be 'green', 'kind to the planet', 'eco-friendly' or 'sustainable';
- unqualified claims like products are made of sustainable materials, or that packaging contain 'post-consumer recycled plastic';
- claims relating to emissions reduction, offsets or carbon neutrality that were not qualified.
- absolute claims such as 100% plastic free, 100% recyclable, 100% carbon positive or zero emissions. Such claims must be backed up by robust evidence;
- exaggerating sustainability benefits (or omitting negatives attributes); and
- claiming affiliation with environmental certification schedules, and in some instances creating their own certification schemes.

The ACCC has stated that it will be conducting further analysis of these issues and will undertake enforcement, compliance and education activities where appropriate.

Key Takeaways

Greenwashing is a key enforcement priority for regulators, with a number of infringement notices already having been issued by ASIC recently. Companies regulated under the Corporations Act and the ASIC Act should be aware of their legal obligations and statutory prohibitions against misleading or deceptive conduct or making false or misleading statements when offering or promoting sustainability-related products.