ESG & Greenwashing

What are the risks and how to avoid them

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Contents

Greenwashing defined

Greenwashing – what is it?

Definitions in different contexts

Consumer context:

Greenwashing is generally defined as unsubstantiated or misleading claims regarding a company's environmental performance or the environmental performance of a product or service.

Reporting context:

Greenwashing can also describe the selective disclosure of positive environmental or social impacts of a company's business practices, without complete disclosure of negative impacts

Investments context:

Greenwashing is the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical.

Greenwishing is the well-intended hope (without a clear plan) that voluntary sustainability efforts are much closer to achieving the necessary change than they actually are.

Dominic Powell (The Age)

Greenwashing – what is the relevant law?

Greenwashing – what is the relevant law?

The law – duties to consider and act on climate change, but also duties not to make false or misleading claims and to have a reasonable basis for future claims

Directors Duties
Duty of care and diligence imposed upon company directors by s 180(1) of the *Corporations Act 2001* (Cth) now widely accepted to include a positive duty to respond to climate change risks.
(Hutley SC Opinion)

Consumer protection & financial regulation laws:
Corporations Act 2001 and *Australian Securities and Investments Commission Act 2001* and *The Australian Consumer Law* contain general prohibitions against:

- making statements (or disseminating information) that are false or misleading, or
- engaging in dishonest, misleading or deceptive conduct
- making representations about future conduct or matters without a reasonable basis (eg such as Net Zero claims).

Product Disclosure Statements:
PDS for a sustainability-related products must comply with the disclosure obligations that apply to financial products, including sustainability-related products including:

- section 1013D(1)(l) of the Corporations Act - must include in the PDS the extent to which labour standards or environmental, social or ethical considerations are taken into account in selecting, retaining or realising an investment
- guidelines in Regulatory Guide 65 *Section 1013DA disclosure guidelines* (RG 65).

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Greenwashing litigation – what are the risks?

Hutley SC –

"The increasing prevalence of net zero commitments amplifies the risk of greenwashing."

Types of greenwashing litigation

Cases challenging descriptions of product's ESG attributes

ACCC v Holden [2008]

GM Holden published ads promoting its range of Saab vehicles with claims that:

1) the vehicles were carbon neutral across the whole range, and
2) 17 native trees were planted for every Saab vehicle purchased to offset carbon emissions for the life of the vehicle.

The ACCC instituted proceedings in the Federal Court against GM alleging contravention of s52 and s53(c) of the *Trade Practices Act 1974.*

Held:

1) Carbon emissions would **<u>not</u>** be neutral over the life of the vehicle, and
2) The tree planting regime would not offset emissions for more than a single year of the vehicle's operation.

Order:

- Declarations. Correction notices. Costs

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Types of greenwashing litigation

Cases challenging Corporate Climate / ESG commitments

Australian Centre for Corporate Responsibility v Santos (2021)

ACCR argues the claims contained in the company's 2020 Annual Report constitute misleading or deceptive conduct under the *Corporations Act 2001* and the *Australian Consumer Law*.

Claim 1 – That Santos' claim that it will achieve net-zero emissions by 2040 is misleading because the company is relying on projected carbon capture and storage technology that either does not exist or has not been disclosed.

Claim 2 - That Santos' representations that natural gas is a clean energy misrepresent the environmental impact of natural gas by products released in extraction and burning.

Claim 3 - Santos failed to disclose that it has firm plans to *increase* its greenhouse gas emissions by developing new or existing oil and gas project including the Barossa, Dorado and Narrabri LNG projects

Status: Case management. Latest orders requiring filing of Concise Statement and Evidence

Types of greenwashing litigation

Cases challenging disclosure of investments & financial risks & alignment with Paris Agreement

Abrahams v Commonwealth Bank **(2021)**

CBA annual report made a commitment that its business policies would support the responsible transition to a net zero emissions economy by 2050. CBA had also implemented an E&S Policy

Application in the Federal Court seeking access to internal company documents under section 247A of the *Corporations Act* 2001 (Cth) which allows shareholders to apply to the Court to inspect the books of a company.

Documents sought in relation to 7 projects in the context of the E&S Policy about how the CBA had assessed the environment, social and economic impacts of the projects and their alignment with Paris Agreement commitments.

Status:

- Initial hearing to confirm that the application was made in *"good faith and for a proper purpose:"*
- March 2022 - Court ordered CBA to provide initial documents about seven oil and gas projects.
- 9 August 2022 Order - Abrams to nominate further documents

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How to avoid greenwashing claims

Hutley SC –

Risks relating to greenwashing do not mean it is safer for directors to avoid making net zero commitments.

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How to avoid 'greenwishing' claims

Net Zero Strategies & Science Based Targets– Noel Hutley SC Opinion, Governance Institute Guides, SBTi Net Zero Standard

Hutley SC Opinion

1. **Develop an integrated Net Zero strategy**
    - Integrate the strategy with operational strategy
    - Document the drivers of the ability to decarbonise
    - Consider assumptions underpinning that strategy.
    - Directors need to supervise the strategy and the grounds on which it is based
    - Ensure adequate resources allocated to implement
2. **Clearly explain the emissions** that are encompassed in the strategy and relevant time-frame.
    - For example, are scope 3 emissions included ?
    - How will you work with supply chain to reduce scope 3?
3. **Regularly review** the strategy and if intervening circumstances mean that it needs to be updated, update it and disclose amendments promptly.
    - E.g. if the strategy relies on CCS but technology doesn't materialise; or
    - if Offsets prove difficult or more expensive to obtain.

Creating a Transition Plan

- Ensure you have a cross-functional team
- Consider both risks and opportunities from different scenarios
- Consider plausible scenarios as well as extreme scenarios to test resilience given uncertainties
- Consideration the implications of plan on competitiveness, reputation, and profitability.
- Use the Science Based Targets Initiative to set short-term targets as well as long term goals
- Consider opportunities and collaborate with partners in your supply chain or with similar organisations
- Use a long-term risk lens when thinking about climate investments
- Adopt a staged & iterative approach & communicate timeframes to stakeholders clearly
- Report on your plan using appropriate framework (TCFD)
- Disclose promptly if assumptions change or targets not met

How to avoid greenwashing claims

ASIC Info 271, ACCC Green marketing and the Australian Consumer Law, Task Force on Climate Related Financial Disclosures (TCFD), EU Sustainable Finance Disclosure Regulation (SFDR)

1. Is your product true to label?

- Claims on a label must be accurate and able to be substantiated.

2. Is the language plain?

- Terms such as ‘socially responsible’, ‘ethical investing’, and ‘impact investing’ can mean different things to different people.
- Claims should be specific, not unqualified.
- Claims should be in plain language.

3. Are headline claims potentially misleading?

- A headline claim should not be misleading. Don’t rely on qualifications to rectify.
- Qualifications contained in another document or website may not be sufficient to correct a misleading or deceptive impression.
- Claims should only be made for a real benefit.
- Claims must not overstate any benefits and should consider the whole product lifecycle.

4. Have you explained how sustainability-related factors are incorporated into investment decisions and stewardship activities?

- For example, stating that a product ‘takes into account sustainability factors’ without saying ***how***, is inadequate.
- Provide a description of how the weighting approach is determined and applied. Claims should consider the whole product life cycle.

5. Have you explained investment screening criteria including any exceptions or qualifications?

- Disclosures should enable investors to fully understand the product’s sustainability-related investment screening criteria.
- Where a screen applies to part of the portfolio, the percentage covered by the screen should be disclosed.
- Any screening exceptions or qualifications, including thresholds, should also be disclosed.

How to avoid greenwashing claims

ASIC Info 271, ACCC Green marketing and the Australian Consumer Law, Task Force on Climate Related Financial Disclosures (TCFD), EU Sustainable Finance Disclosure Regulation (SFDR)

6. Do you have any influence over the benchmark index?

- If so, accurately described your influence
- Investors or consumers may be misled into wrongly estimating the issuer's actual influence.

7. Have you explained how you use any metrics related to sustainability?

Disclose the following:

- extent to which the metrics are used to evaluate your investment objective or strategy;
- the sources of your sustainability-related metrics;
- a description of the underlying data used to calculate your sustainability-related metrics; and
- limitations arising from your reliance on the metrics.

8. Do you have reasonable grounds for a stated sustainability target and explained how it will be measured and achieved?

Clearly explain:

- what your target is;
- how and when you expect to meet your target;
- how you will measure your progress or milestones; and
- any assumptions you have relied on when setting that target or when measuring your progress.

If you have adopted a stewardship investment approach to achieve your sustainability-related targets, you should:

- explain the rationale for engaging with particular companies to influence changes in their corporate behaviour; and
- provide regular updates on your progress with those companies

9. Is it easy for investors & consumers to locate and access relevant information?

- Information that is relevant to an investor's investment decision should be easy to locate and readily available.
- Information should be consistent across all mediums, including regulated documentation, voluntary disclosures, and social media. Information dispersed across various platforms may not be helpful to investors.

Thank you!