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Australia's Securities and Consumer Protection Regulators Pursue Alleged Greenwashing

March 7, 2023



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On February 28, 2023, Australia's securities regulator, the Australian Securities and Investments Commission (ASIC), **announced** that it had commenced "civil penalty proceedings" in federal court against Mercer Superannuation (Australia) Limited (Mercer) for "making misleading statements about the sustainable nature and characteristics" of some of its investment options.

ASIC accused Mercer of making misleading statements about the sustainability of seven of its so-called Sustainable Plus investment options, which Mercer describes as suitable for investors who are "deeply committed to sustainability" by virtue of the fact that they prohibit investments in companies involved in carbon intensive fossil fuel extraction, alcohol production and gambling. However, ASIC alleges that the Sustainable Plus funds had in fact invested in companies involved in those industries, including Australian mining, metals and natural gas company, BHP Group Ltd, Budweiser Brewing Company and hotel and casino group, Caesars Entertainment Inc. In total, the regulator identified 49 such companies—15 fossil fuel extraction companies, 15 alcohol production companies and 19 gambling companies.

According to ASIC, taking action against greenwashing is one of its key 2023 enforcement priorities. ASIC has recently issued a number of infringement notices in connection with greenwashing allegations, **including in December 2022** against a large U.S.-based asset manager, which was fined nearly A\$40,000 in connection with three funds that were set up to exclude certain tobacco investments but excluded only manufacturers of cigarettes and related products, not companies involved in the sale of such products. We also reported on the penalty imposed against **Black Mountain Energy**, an upstream oil and gas company and a similar fine

for **Tru Energy Limited** “over concerns about alleged false or misleading sustainability-related statements.”

Taking the Temperature: ASIC’s action against Mercer is one of several developments in Australia related to greenwashing. On March 2, 2023, the country’s competition regulator, the Australian Competition and Consumer Commission (ACCC), announced that it “will be investigating a number of businesses for potential ‘greenwashing’, following an internet sweep which found more than half” of the businesses surveyed made questionable statements regarding their sustainability practices. According to the ACCC, the “cosmetic, clothing and footwear and food and drink sectors were found to have the highest proportion of concerning claims among the industries targeted in the operation.” ACCC Deputy Chair Catriona Lowe added that “our sweep indicates a significant proportion of businesses are making vague or unclear environmental claims” at a time when consumers are “more than ever, making purchasing decisions on environmental grounds. Unfortunately, it appears that rather than making legitimate changes to their practices and procedures, some businesses are relying on false or misleading claims. This conduct harms not only consumers, but also those businesses taking genuine steps to implement more sustainable practices.” We have commented earlier and in a companion piece today on the increasing regulatory enforcement and civil litigation activity focused on sustainability issues. The developments in Australia underscore the global nature of this trend.