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Australian Regulator Emphasizes Focus on Greenwashing Claims

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In a **speech** delivered at the Australian Finance Review's ESG summit on June 5, 2023, the Australian Securities and Investments Commission's (ASIC) Chair, Joe Longo, warned companies that greenwashing is an ongoing concern for the regulator. Longo also highlighted the ASIC's focus on the practice of not reporting or underreporting ESG credentials or initiatives due to uncertainty around emerging reporting frameworks – so-called "greenhushing."

While Australia is yet to enact legislation specific to greenwashing, the ASIC greenwashing enforcement actions to date have been conducted under existing securities laws, which contain general, broad prohibitions against misleading and deceptive statements and conduct. ASIC has **published guidelines** for companies on how to avoid greenwashing under existing securities law, identifying **four main categories** of "problematic behavior:" unfounded net zero statements and targets; misleading terms like 'carbon neutral', 'clean' or 'green'; overstatement or inconsistent application of sustainability-related investment screens; and inaccurate labelling or vague terms in sustainability-related funds. ASIC also emphasized that, in order to avoid greenwashing and to prepare for ESG reporting, companies need to integrate sustainability considerations into their governance structures and address questions about the integration of sustainability and financial reporting, cohesion in sustainability-related claims, and board confidence in the information being disclosed.

In his speech, Longo stated that ASIC is aware that some companies may be tempted to engage in "greenhushing," i.e. ceasing or reducing disclosure in response to increased regulatory scrutiny of greenwashing. In a **study** conducted by carbon finance consultancy company South Pole in 2022, nearly a quarter of the 1,200 companies surveyed had elected not to publish information about their progress towards net zero. Longo acknowledged that the

Australian Government's sustainable finance agenda, which includes mandatory climate disclosure and a sustainability taxonomy, is not yet "fully enacted." However, he warned that ASIC is preparing to police disclosure obligations and "will not hesitate to enforce the existing legal obligations as they stand."

ASIC's latest greenwashing action was against superannuation fund promoter Future Super Investment Services Pty Ltd (Future Super). ASIC issued an **infringement notice** on May 2, 2023 due to concerns that a Facebook post by Future Super "overstated the positive environmental impact of the Fund." ASIC alleged that the post -- "Naysayers don't join together and move nearly $400 million out of fossil fuels" – conveyed to readers that nearly $400 million had been moved out of fossil fuels, but Future Super did not have evidence to substantiate the statement. ASIC's Deputy Chair, Sarah Court, emphasized that the action against Future Super "sends a message that ASIC is continuing to focus on greenwashing broadly," including social media promotions.

Taking the Temperature: The speech delivered by Longo demonstrates ASIC's ongoing focus on scrutinizing climate-related risk disclosures and potentially misleading statements. Between July 2022 and March 2023, ASIC reportedly resolved 23 corrective disclosure matters, issued 12 infringement notices, and commenced one civil penalty proceeding relating to companies' sustainability statements. The key takeaway for companies is that the ASIC is actively investigating greenwashing in all its forms. In the absence of mandatory disclosure, no enforcement action has been taken against greenhushing but ASIC clearly is focused on this as a future area for potential enforcement activity.

The Australian regulator continues to aggressively pursue greenwashing enforcement actions. Recent examples include a civil proceeding against Mercer Super in March for allegedly misleading statements about the sustainability of seven of its so-called Sustainable Plus investment options and the issuance of infringement notices to: the oil and gas company Black Mountain Energy in January for claiming that it "was creating a natural gas development project with 'net-zero carbon emissions'," and that the greenhouse gas emissions associated with the project would be net zero; the Australian unit of asset manager Vanguard in December 2022 for allegedly overstating the exclusion criteria meant to prevent investments in companies involved in significant tobacco sales; and the energy company Tlou in November 2022 for allegedly incorrect claims regarding its natural gas-fired power plant in Botswana.

Similar developments can be observed in Europe and the UK. Earlier this year the European Securities and Markets Authority announced the launch of a common supervisory action in partnership with EU Member State national competent authorities, which will cover the application of MiFID II (Markets in Financial Instruments Directive) disclosure rules to marketing communications for financial products across the EU. The UK Financial Conduct Authority is expected to introduce a Policy Statement later this year addressing greenwashing in response to the Sustainable Disclosure Requirements and investment labels consultation. And, we recently reported on the UK Advertising Standards Authority banning ads by three different energy companies touting certain sustainability efforts on the grounds that they were misleading (even though factually accurate) in the context of the companies' overall business operations.