

Navigating 'greenwashing' risks

What you need to know, what is coming and
how best to prepare

July 2023 update

Greenwashing supplementary guide

Greenwashing is not a new source of legal and reputational risk for business. However, with the sharp evolution of sustainability (and climate change in particular) into a material financial issue, greenwashing has now become an acute source of legal risk for both commercial corporations and financial institutions.

In our previous publication, [*The rising tide of greenwashing: Navigating 'greenwashing' risks in climate change targets & sustainability credentials \(December 2022\)*](#), we explored greenwashing trends, shared insights from regulatory investigations and greenwashing litigation in Australia and globally. In this constantly evolving risk landscape, this publication provides an update on key regulatory developments in the first half of 2023 and provides practical steps to reduce legal and reputational exposures for companies and boards.

Refresher: What is 'greenwashing'?

'Greenwashing' is when a company or institution misrepresents its sustainability-related risks, business credentials, strategies or those of its products or services. If those misrepresentations are made in annual reports or market filings, they may fall foul of the misleading disclosure provisions under Part 7 of the Corporations Act, or Part 2D of the ASIC Act. If they are made in trade or commerce, they may contravene the general prohibition on conduct that is misleading or deceptive (or likely to mislead or deceive) under section 18 of the Australian Consumer Law, or the specific prohibitions against misrepresentations in the supply of goods or services under Part 3.1 of that Law.

Misleading or deceptive conduct

'Greenwashing' claims are increasingly common in four main contexts.



Greenhouse gas emissions reduction targets

Commercial corporations and financial institutions are scrambling to meet heightened market expectations on 'net zero' emissions by 2050, in line with the Paris Agreement goals. This includes setting interim targets over the short and medium-term. There is now elevated pressure to set broader nature-related targets, such as biodiversity targets. **Such targets may be misleading if they have no reasonable basis, there is no genuine intention to pursue them, or there are no credible efforts towards implementation.**



'Truth to label'

Companies and financial institutions alike are being held to tighter account in their use of terms such as 'sustainable' or 'green'. **These terms have moved from being amorphous (and thus broadly defensible) to imply a more defined – and much higher – standard of conduct.**



Enterprise branding

Consumer protection regulators are increasingly scrutinising **greenwashing in advertising campaigns**. This includes those that seek to associate corporate brands with sustainable practices.



Financial reporting

Both baseline expectations and the frontier of best practice on sustainability-related financial reporting continue to elevate. Domestically and internationally, **investors and value chain stakeholders are demanding better quality, comparable disclosures**. This includes information on material impacts on financial prospects (in the directors' report or Operating and Financial Review), as well as financial position and performance (in the financial statements).



Key developments in the first half of 2023

1. The ACCC releases its long awaited draft guidance on environmental and sustainability claims

- On 14 July 2023, the Australian Competition and Consumer Commission (ACCC) released draft guidance on environmental and sustainability claims. This follows the ACCC's warning that environmental and sustainability claims are a key priority area and the ACCC's recent internet sweep findings, which identified 57% of the 247 businesses reviewed as having made concerning claims about their environmental credentials (findings released in March 2023).
- The ACCC has outlined eight practical principles that businesses can use to mitigate risk when making environmental and sustainability claims. The ACCC suggests using these principles when making environmental claims to help businesses comply with obligations under the Australian Consumer Law (ACL) (Schedule 2 of the Competition and Consumer Act 2010 (Cth)).
- The ACCC specifically cautions against using broad and unqualified claims such as 'green', 'environmentally friendly', 'Eco-friendly' or 'sustainable'. These terms convey sweeping benefits that can mean different things to different consumers.
- Without further qualification or clarification, consumers can easily be misled that the product, service or business is better for the environment than it actually is.
- The draft guidance makes clear that appropriate transparent information supporting environmental claims is crucial to mitigate the risk of misleading consumers. The ACCC flagged that it will consider the scope and extent of due diligence undertaken by a business to verify the claims when determining whether to take enforcement action.
- Importantly, the ACCC provides commentary on its compliance and enforcement approach, foreshadowing the potential use of Section 155 notices, substantiation notices, infringement notices and penalty proceedings for false or misleading representations or engaging in misleading or deceptive conduct.
- Submissions are sought on the guidelines with the consultation period open until 15 September 2023.
- Please refer to the following article for further information:
 - [*ACCC releases long awaited draft 'green' claims guidelines*](#)

Eight principles for trustworthy environmental and sustainability claims

1. Make accurate and truthful claims
2. Have evidence to back up claims
3. Do not leave out or hide important information
4. Explain any conditions and qualifications
5. Avoid broad and unqualified claims
6. Use clear and easy-to-understand language
7. Ensure that visual elements do not give the wrong impression
8. Be direct and open about the sustainability transition





Key developments in the first half of 2023

2. ASIC issues first greenwashing proceedings

- Since publishing Information Sheet 271 'How to avoid greenwashing when offering or promoting sustainability-related products' in June 2022, ASIC has ramped up its scrutiny of sustainability-related claims as foreshadowed. So far, ASIC has issued 11 infringement notices against five different entities and required numerous organisations to amend disclosures in PDS documents, market announcements and on company websites.
- In **February 2023**, ASIC commenced its first greenwashing civil penalty proceeding in the Federal Court against Mercer Superannuation (Australia) Limited. In **July 2023**, it commenced greenwashing proceedings against Vanguard Investments Australia Ltd, sending a clear signal to the market that if financial products make sustainable investment claims, they need to reflect the true position.
- This level of scrutiny shows no sign of waning, with an additional \$4.3 million of funding specifically allocated to ASIC to continue its greenwashing surveillance and enforcement work in 2023-2024.
- In addition to these being ASIC's first greenwashing proceedings, it is also the first time that ASIC has brought proceedings following the legislative amendments arising from the Financial Services Royal Commission, which bolstered ASIC's capacity to take action regarding a broader range of superannuation trustee and investment fund conduct.

Mercer greenwashing proceeding details:

- ASIC is alleging that Mercer Superannuation (Australia) Limited made misleading statements about the sustainable nature and characteristics of seven 'Sustainable Plus' investment options.
- ASIC alleges that Mercer made statements on its website marketing the Sustainable Plus investment options to members who are 'deeply committed to sustainability', on the basis that these options excluded investments in companies involved in alcohol production, gambling and carbon intensive fossil fuels such as thermal coal.
- ASIC alleges that in doing so, Mercer made false and misleading statements and engaged in conduct that could mislead the public given members who took up the Sustainable Plus options did have investments in companies involved in these industries, despite the website statements indicating that they were excluded.

Vanguard greenwashing proceeding details:

- ASIC is alleging that Vanguard Investments Australia Ltd engaged in misleading conduct by representing that all securities in its 'Ethically Conscious Global Aggregate Bond Index Fund' (Fund) were screened against ESG criteria using the 'Bloomberg Barclays MSCI Global Aggregate SERI Exclusions Float Adjusted Index' (Index) to exclude businesses with significant involvement in a range of activities, including fossil fuels.
- ASIC alleges that Vanguard marketed the Fund via 12 Product Disclosure Statements as well as additional media releases towards investors seeking an ethically conscious screening.
- However, ASIC alleges that ESG research was not conducted over a significant proportion of issuers of bonds in the Index, resulting in the inclusion of a number of issuers that violated the applicable and represented ESG criteria. ASIC is therefore alleging that Vanguard made false and misleading statements and engaged in conduct liable to mislead the public regarding the Fund's exclusions.
- ASIC has previously issued three infringement notices to Vanguard in respect of alleged greenwashing separate to these proceedings.

Key developments in the first half of 2023

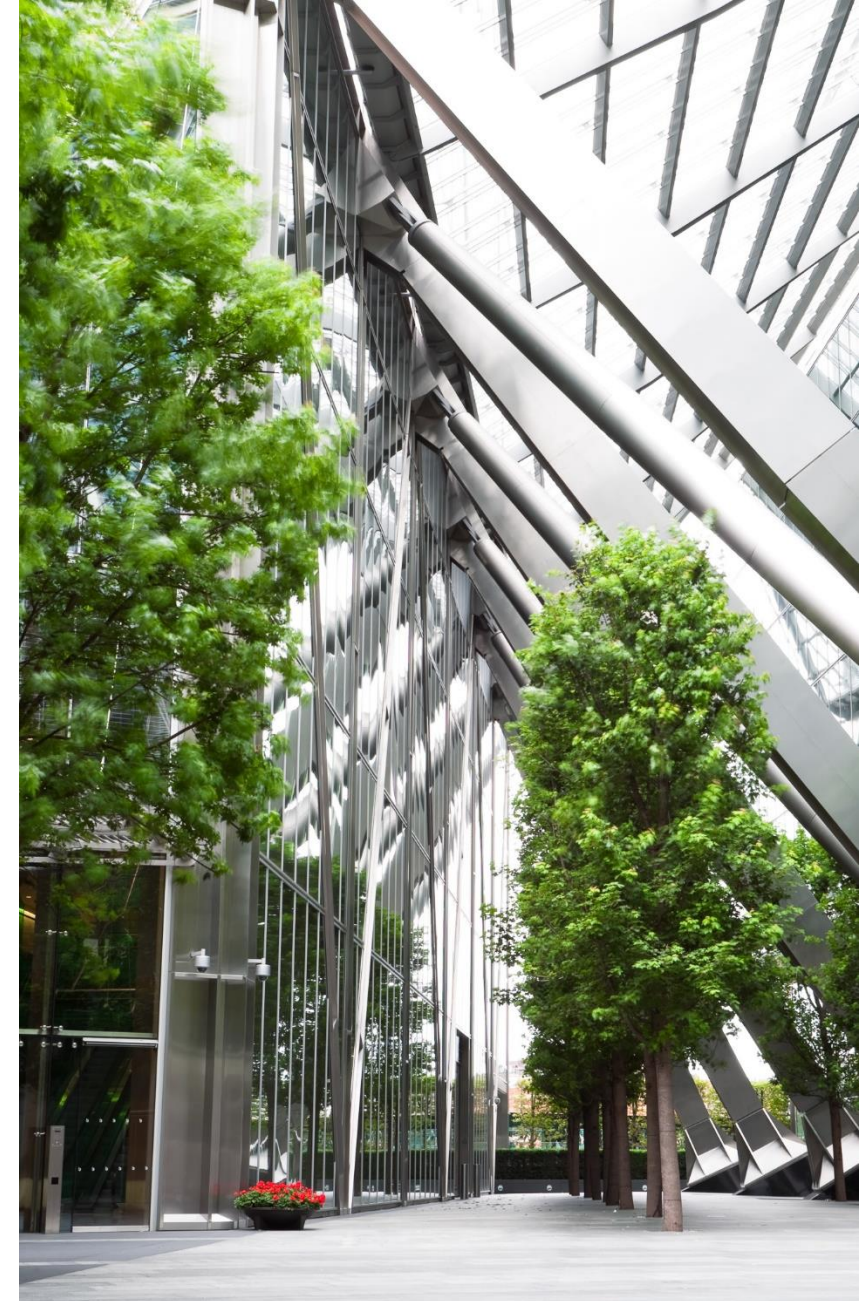
3. The ISSB releases its global sustainability standards, signalling an impending 'seismic shift' to Australian sustainability-related financial disclosure requirements over the next two years

- On 26 June 2023, the International Sustainability Standards Board (ISSB) released its final IFRS Sustainability Disclosure Standards S1 (General Requirements for Disclosure of Sustainability-related Financial Information) and S2 (Climate-related Disclosures).
- These Standards are a key aspect of what ASIC Chair Joe Longo has described as 'the biggest changes to financial reporting and disclosure standards in a generation', on par with the introduction of the GST.
- The Australian Accounting Standards Board (AASB) has publicly stated its view that the ISSB Standards would be most appropriate to use as a baseline for its work on mandatory sustainability-related financial reporting, with appropriate modifications for Australian matters and requirements where necessary to meet the needs of Australian stakeholders.
- Accordingly, the applicability of these Standards to Australian organisations is not a matter of 'if' but rather 'when' and 'to whom'.
- On 27 June 2023, the Australian Treasury promptly released its second consultation paper seeking feedback on a number of proposals regarding proposed mandatory climate-related disclosure requirements which it envisions commencing for the largest entities from 2024/25 – a relatively short time horizon. Especially given these Australian Standards will likely be considered a floor, rather than a ceiling, in the context of market expectations.

- To access our coverage of the International Financial Reporting Standards (IFRS) and The Australian Treasury's approach, please refer to the following articles:
 - [*Moving closer to introducing internationally-aligned climate reporting requirements in Australia: Initial consultation launched*](#)
 - [*Step change in sustainability reporting: First two ISSB standards released*](#)
 - [*Introduction of mandatory climate reporting in Australia: Second round of consultation launched*](#)

4. Senate inquiry into greenwashing

- On 29 March 2023, the Senate referred an inquiry into greenwashing to the Senate Standing Committee on Environment and Communication, due for report by 5 December 2023. The terms of reference include legislative options to protect consumers from greenwashing in Australia and advertising standards in relation to environmental and sustainability claims. The closing date for submissions is 8 June 2023.
- In light of the heightened regulatory, media and consumer focus on greenwashing, the inquiry submissions, hearings and findings will likely attract a significant amount of media coverage. Indeed, a number of organisations may very well be signalled out and exemplified for engaging in greenwashing. The harsh light of the inquiry spotlight could cause significant reputational damage to the entities it is shone upon. Equally, the inquiry presents entities with a genuine opportunity to engage with the government on sustainability-related issues and advocate for their own interests and preferred position.



Areas of elevated / emerging risk exposure – what to watch in FY24

1. Carbon neutral claims

- According to ASIC analysis, in 2022 over 400 companies referenced the terms 'carbon neutral' or 'net zero' in price sensitive ASX announcements. In 2019 this number was below 50. In light of this eight fold increase, ASIC and regulators around the world have turned their attention to the veracity of 'carbon neutral' claims.
- As discussed in our previous publication, [*The rising tide of greenwashing: Navigating 'greenwashing' risks in climate change targets & sustainability credentials \(December 2022\)*](#), ASIC issued its first infringement notices for greenwashing in October 2022 to Tlou Energy for, among other things, claiming that the electricity it generated would be carbon neutral. ASIC has also compelled numerous entities to make corrective disclosures in instances where there appeared to be no reasonable basis for 'carbon neutral', 'clean' or 'green' claims.

Three key risk factors to be aware of in the context of carbon neutral claims are:

The reliance on and nature of carbon offsets: For some time now, the reliability and integrity of the carbon offset market has been called into question. In June 2023, the Albanese Government announced a full audit of environmental offsets, stating 'it's not clear whether offset arrangements prevent environmental decline, particularly where they are not effectively enforced or maintained', foreshadowing stronger environmental laws which will include a new offsets standard. Criticisms of carbon offsets are now moving into the realm of greenwashing to the extent that entities rely on offsetting schemes to make carbon neutrality claims. Indeed, the UK Advertising

Standards Authority has indicated it will ban 'carbon neutral' claims relying on carbon offsets (unless they can demonstrate they are actually effective).

A class action has been filed in a District Court in California in relation to Delta Airlines' 'carbon neutral' claims. The suit alleges that Delta labelling itself as 'the world's first carbon-neutral airline' is misleading in light of its reliance on the carbon offsets market (which they claim is inherently unreliable due to inaccurate accounting, delayed and speculative emissions reductions, the susceptibility of projects to natural disasters etc).

Failing to disclose reliance on offsets: Aside from the nature of offsets themselves, carbon neutral claims are also vulnerable to criticism to the extent that they fail to disclose that offsets have been relied upon to achieve carbon neutrality.

A class action has been filed in a District Court in New York against Dantone Waters of America (the manufacturer of Evian), challenging the 'carbon neutral' claims on bottles of Evian spring water. Evian was certified by the Carbon Trust as carbon neutral in 2020. However, the claim alleges that the products are not 'carbon neutral' in the sense that reasonable consumers would expect, as the company relies on carbon credits to offset the emissions, but this explanation does not appear on the product labelling and nothing directs consumers to a website for further information.

The reliance on certification / trademarks: When an entity utilises certification or trademarks to position itself as carbon neutral, a multitude of greenwashing risks can arise. On one hand, risks arise as a consequence of how the entity utilises the mark. For example, ambiguity regarding whether the certification applies to the entire product range, only certain products or to the business as a whole and failure to describe the nature of the certification scheme (or how it is applied to the product / business)

presents a misleading disclosure risk. On the other hand, greenwashing risks arise by virtue of the nature of the certification scheme itself, particularly where the standard required to obtain and use a mark is substantially lower than the standard consumers would typically expect a 'carbon neutral' certification to convey. For example:

The Environmental Defenders Office (on behalf of the Australia Institute) has filed a complaint with the ACCC alleging that the Climate Active trademark program and its carbon neutral claims (including its use by companies) is misleading or deceptive under the Australian Consumer Law for several reasons including: (1) the trademarks used in relation to carbon neutral organisations do not require entities to significantly reduce emissions; (2) 'carbon neutral organisations' can be contributing to emissions through their products and services (despite consumers expecting that the trademark would certify the entire business); (3) carbon neutral products are not reducing emissions but are paying for offsets (and are therefore not best practice); and (3) the trademarks do not make clear the details of how the program works or disclaimers in relation to the claims made.

The Department of Climate Change, Energy, the Environment and Water is currently conducting a consultation in relation to the future direction of Climate Active and is considering a range of issues including the use of the Climate Active certification trade mark.



Areas of elevated / emerging risk exposure – what to watch in FY24

2. Halo advertising – extrapolating particular initiatives across an entire business

- 'Halo advertising' greenwashing risks arise in circumstances where an entity draws attention to the sustainability features of a single environmental initiative in a manner that creates the false impression that these features can be extrapolated across the entire brand. This practice, known as halo advertising, has been a recent focus of international regulators.
- In June 2023, the UK Advertising Standards Authority (ASA) banned advertisements from multiple oil and gas companies for misleading the public about their ESG credentials. The bans were issued on the basis that companies with large and expanding fossil fuel products and only a small portion of net zero or renewable products were misleading the public about their significant contributions to greenhouse gas emissions through the ads.

A TV commercial for Petronas said the company was 'enriching lives for a sustainable future'. According to the ASA, the ad failed to mention the company's significant carbon emissions and gave the misleading impression that Petronas was already having a positive environmental impact.

In June 2023, the UK ASA published [updated guidance on greenwashing claims](#), which included a section on claims regarding initiatives designed to reduce environmental impact and instances in which such claims may give a misleading impression of the entity's overall environmental credentials.

- To mitigate this risk, entities ought to sufficiently contextualise claims regarding their environmental initiatives with material information about the overall environmental impacts of the business. This is particularly important in sectors where consumers are less likely to be aware of the entity's contribution to emissions or environmental harm (such as the financial sector).

3. Greenhushing – no safe harbour from greenwashing risk

- In light of the heightened regulatory scrutiny on greenwashing, it can be tempting for Australian companies to seek to minimise liability risks by remaining silent on relevant climate and sustainability-related risks, targets and strategies.
- This practice, known as 'greenhushing', is ill-advised both from a commercial and legal perspective. From a commercial perspective, investors and other stakeholders increasingly consider the assessment, disclosure and strategies in relation to sustainability-related risks and opportunities as a 'ticket to play'. From a legal perspective, remaining silent on or attempting to minimise climate and sustainability-related financial risks exposes companies and their directors to liability risks as, depending on the nature and materiality of that sustainability-related risk, silence can constitute a material misstatement of a company's financial position or prospects.
- The practice of greenhushing is within ASIC's sights. In a speech delivered on 5 June 2023 at the AFR ESG Summit, AISC Chair Joe Longo quoted a report by Swiss carbon finance consultancy, South Pole, which found that nearly a quarter of the 1,200 companies surveyed have decided not to talk about their net zero commitments at all and confirmed that greenhushing 'is just another form of greenwashing'.





Practical tips for reducing your greenwashing exposure



Greenhouse gas emissions reduction targets

Targets may represent both a present intention, and a future matter. This means that, at the time the representation is made, a company must have both: (a) a genuine intention to credibly pursue the stated objective; and (b) a reasonable basis on which to ground their view that the targets, in the manner in which they are communicated, may be achieved. This does not mean that it is necessary to have a granular, complete roadmap of how targets will be achieved prior to making them public. But it speaks to the importance of clear, specific communication of any conditions or barriers to the achievement of that objective, and of how the company intends to progress towards the goal.

Care must be taken in representing that net zero targets or emissions reduction trajectories are 'science-based' or 'Paris-aligned'. It is prudent to avoid representing that emissions reduction targets or trajectories are 'Paris-aligned' or 'science-based' if they do not also include a 45% reduction by 2030, across all scopes (1, 2 and 3).

Target setting is only the first step. Credible implementation is critical. Activist shareholders have begun filing 'books and records' claims under section 247A(1) of the *Corporations Act* seeking access to company documents that demonstrate the implementation of its commitments.

Relevant caveats must be clearly stated alongside the targets that they purport to limit, and be given proportionate emphasis. The *ACCR v Santos* and *Milieudefensie v Shell* cases highlight the potential dangers associated with reliance on future technological developments and/or actions of third parties where these conditions have not been clearly articulated.

Language is important when communicating targets. Take care to avoid making absolute claims that imply certainty or control where there are material conditions that may impact the ability to achieve a target (such as the development of new technology), without appropriately disclosing the relevant challenges. However, this does not mean that a company can solely rely on 'aspirational' language to defend the absence of a genuine intent or effort to pursue the target. Nor does it mean that a company can entirely condition its commitments on shifts in the broader economy. Rather, as a statement of present intention, targets should clearly communicate both the end objective and the manner in which a company itself intends to pursue that objective.



'Truth to label'

As a starting point, consider regulatory guidance on green advertising. In Australia, the ACCC has recently published draft guidance on environmental sustainability claims. For financial products and services, ASIC has published Info Sheet 271. Recent speeches by [ACCC Deputy Chair Delia Rickard \(20 Sept 2022\)](#) and [ASIC Deputy Chair Karen Chester \(10 May 2023\)](#) are also informative.

As the bar of 'sustainability' becomes higher, more specific and more measurable, 'truth to label' is increasingly important. This applies to general claims of a company or institution's sustainability credentials, and increasingly, to specific disclosures of the potential harms associated with use of emissions-intensive products.

Avoid vague and unqualified labels such as 'green', 'eco-friendly' or 'sustainable' in favour of specific descriptions of the sustainability attributes that a product carries (e.g. 50% recycled plastic, tobacco free).

Certification schemes must be clearly described, apply directly to the product or business, and not be misleading. Do not use logos or symbols that appear to be trustmarks but are not.

Practical tips for reducing your greenwashing exposure



Enterprise branding

Sustainability credentials are financial management credentials. Overstatement can have a material impact on corporate value.

Prudent management of these issues requires collaboration between the sustainability team, executive, accounting and finance team, strategic communications, and legal teams.

Avoid making general claims. Avoid claims that are defensible in relation to part, but not all, of your company's products or services, or that only hold under certain conditions. (See *Client Earth v BP*).

Be specific, but not selective. Claims should be clear and specific in terms of the environmental benefit conferred, rather than vague and unqualified. However, care should be taken to ensure that promotion of one specific aspect of a product's characteristics or company's sustainability credentials does not imply broader 'green' operation.

Sustainability credentials are an important employment consideration. In addition to exposing companies to external legal challenge, a failure to make good on claims may expose companies to internal legal challenges by staff.



Financial reporting

Corporations should assess the extent to which climate change and other sustainability-related issues such as biodiversity loss or fresh water availability may present material risks to their financial prospects in the face of uncertainty. Conduct stress-testing and scenario across a plausible range of climate futures.

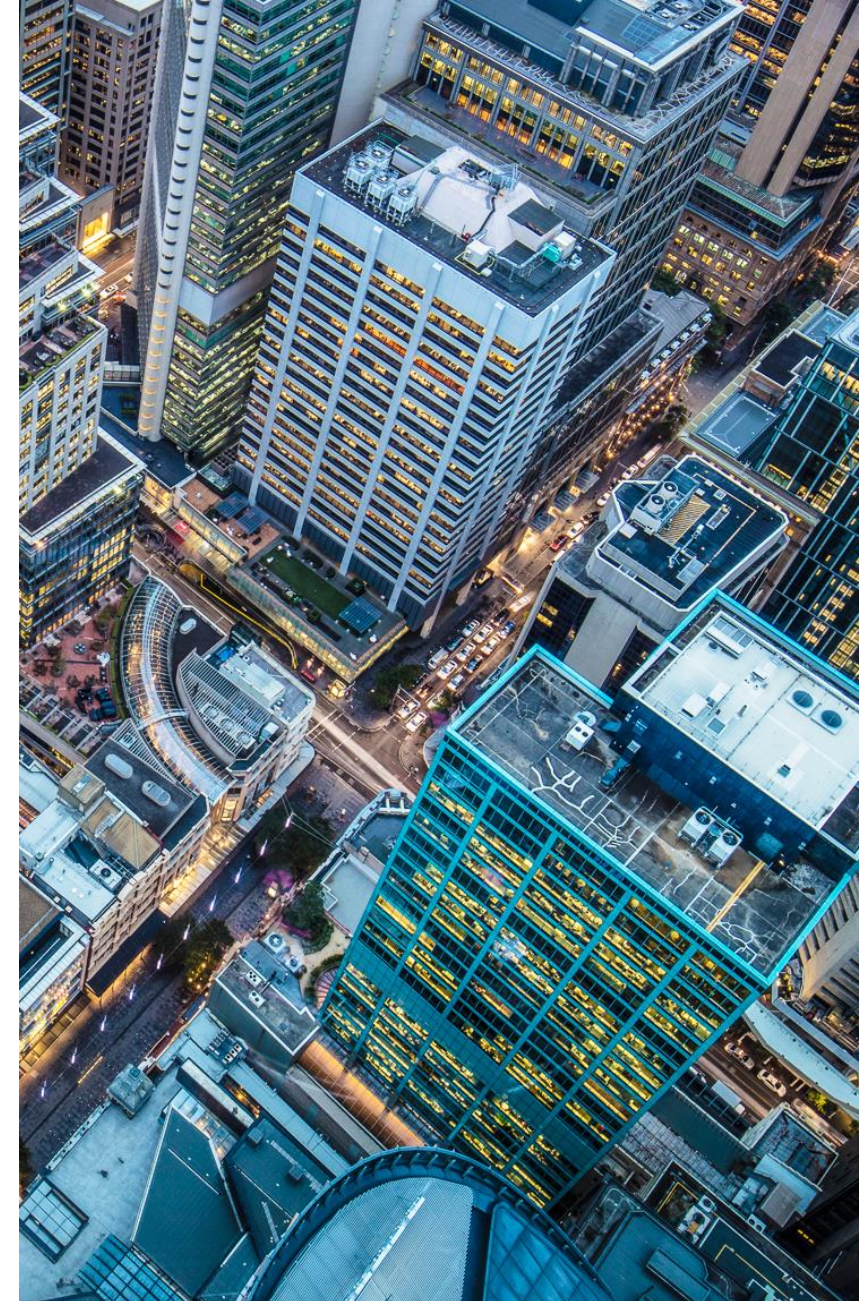
Consider what information should be disclosed as material. This should be based not only on quantitative outcomes, but by reference to the information reasonable investors consider to be decision-useful. Reference should be had to *ASIC Guidance 247*, *ASX CGP Recommendation 7.4* and the TCFD recommendations.

Consider the extent to which sustainability-related risks and financial prospects may impact on variables applied in calculating accounting estimates in its statement of financial position (balance sheet). This is particularly relevant for assets and liabilities stated at fair value, and/or for which significant management judgement is required. This may include variables such as (for example) asset useful lives, impairments, provisions for losses or onerous contracts etc. Reference should be had to the AASB/AuASB Joint Guidance, and the IFRS S1 and S2 international standards recently released by the ISSB.

Under IFRS S1 and S2, corporations (from as early as 2024) will need to disclose information about climate and sustainability-related risks and opportunities that could reasonably be expected to affect the entity's cash flows, its access to finance or cost of capital over the short, medium or long term.

Consider the narrative disclosures that may need to be made in the notes to the financial statements in order to ensure that a true and just view is presented.

Consider alignment between sustainability strategies and targets, and financial statements. For example, to what extent has capex and opex been aligned with emissions reduction plans?



How MinterEllison can help

MinterEllison has a dedicated team of legal and consulting ESG experts who advise businesses on their climate change and sustainability challenges. The team moves clients from reactive compliance to being strategic, accountable, and reporting on financial and non-financial risks, defending litigation, and withstanding regulatory scrutiny. We offer support across greenwashing regulatory, transactional, and dispute issues.



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