The rising tide of greenwashing

Navigating 'greenwashing' risks in climate change targets & sustainability credentials

SPECIAL INSIGHT

Summer 2023 update

MinterEllison.

The ‘greenwashing’ conundrum… or opportunity for those who get it right

‘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.

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, it has now become an acute source of legal risk for both commercial corporations and financial institutions.

There are heightened demands on corporate sustainability from both investors and customers on the one hand, and elevated scrutiny from regulators and strategic litigants on the other. An ability to navigate the risks associated with ‘green’ claims has never been more important.

In this publication, we explore these trends, sharing insights from recent regulatory investigations and greenwashing litigation in Australia and globally. Woven throughout are practical steps to reduce legal and reputational exposures for companies and boards.

We show that setting targets, and promoting sustainability credentials, is not a catch-22 situation. Businesses can, and increasingly must, develop ambitious and credible transition plans to reduce their emissions and environmental impacts – but can do so in a way that minimises the risk of exposure to litigation, regulatory action, or reputational risks from consumer or civil society campaigns.

CLICK ON HEADING TO NAVIGATE TO SECTION

Common greenwashing risks

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Misleading or deceptive conduct

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

1 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 in relation to biodiversity. **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.**

2 '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 have moved from being amorphous (and thus broadly defensible) to imply a more defined – and much higher – standard of conduct.**

3 Enterprise branding

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

4 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).

We analyse each of these categories of claim in subsequent pages.

Common greenwashing RISK 1

Emissions reduction targets

Climate change – 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, with significant interim reductions over the short- and medium-term. Pressure is also building on companies to set broader nature-related targets, including in relation to biodiversity. 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.

Emissions reductions (or other nature-related) targets can be both representations of present intention and statements in relation to future matters. Liability for misrepresentations of future matters is subject to particular rules, including under section 769C of the *Corporations Act* and section 4 of the *Australian Consumer Law*.

Specifically, a representation of a future matter will be misleading or deceptive if, at the time the representation was made, the company making the statement did not have reasonable grounds for making it. The characterisation of a representation as regarding a future matter can be particularly onerous, as the defendant is presumed not to have had such reasonable grounds or intention, unless they can demonstrate otherwise. This indicates that important factors to defend against liability may include:

- the language in which a net zero target is expressed (and qualified),
- evidence of diligent interrogation of the grounds relied upon at the time the targets were set, and
- strategic progress towards the stated targets.

Recent claims illustrate a number of important principles to consider in setting – and implementing – emissions reduction targets.

Common greenwashing risk 1 – emissions reduction targets

EMISSIONS TARGETS – KEY POINTERS TO AVOID 'GREENWASH'

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 (see *ACCR v Santos* and *Milieudefensie v Shell, page 6).*

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) (see *Milieudefensie v Shell, page 6*). The Science Based Targets initiative is now publishing target criteria that it considers necessary for alignment with the latest scientific consensus.

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 (see *Abrahams v CBA, page 7*).

Language is important when communicating targets.

Organisations should 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 (see *ACCR v Santos* and *Milieudefensie v Shell, page 6*).

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. This also points to the importance of diligence in evaluating the basis for, and strategic corollaries of proposed targets.

Common greenwashing risk 1 – emissions reduction targets

Milieudefensie et al v Royal Dutch Shell plc: A court opines on 'Paris-alignment'

In May 2021, a Dutch court found that Shell's failure to reduce emissions on a trajectory consistent with the Paris Agreement was a breach of its duty of care to, and human rights of, Dutch citizens. Shell was ordered to increase its emissions reduction policy to 45% by 2030 across all scopes against a 2019 baseline. The court criticised Shell's prevailing emissions reduction policy, finding that it was 'not concrete, has many caveats and is based on monitoring social developments rather than the company's own responsibility for achieving a CO2 reduction.' Shell lodged an appeal against the decision in March 2022. However, the Dutch court declared its judgement provisionally enforceable, finding that immediate compliance with the emission reduction order outweighed the interests of Shell in maintaining the status quo during the appeal.

In its assessment of the unwritten standard of care, the court incorporated the IPCC science on what is required to meet the Paris temperature goals ('a universally endorsed and accepted standard to protect the common interest of preventing dangerous climate change'). The court made three key steps in its analysis:

- the Paris goals are not just the parties' obligation to keep warming to well below 2°C, but also their agreement to take efforts to strive for 1.5°C;
- this requires steps to track the IPCC emissions reduction pathways that give a chance of limiting warming to 1.5°C, namely, a pathway of achieving a 45% reduction by 2030; and,
- Scope 3 emissions are relevant, especially where they are a majority of the corporation's emissions footprint.

On 25 April 2022, Milieudefensie sent a letter to Shell's Board of Directors calling for Shell to take urgent action to comply with the verdict of May 2021.
It warned of personal liability risks towards third parties resulting from a failure to act. The letter was also sent to Shell's largest and most influential shareholders, informing them that the verdict is not being implemented and that this poses risks to Shell, its shareholders and the Board.

Although the judgment does not create a legally binding precedent on Australian companies, it reflects an elevated expectation on full value-chain net zero targets. It also demonstrates judicial preparedness to give short shrift to 'greenwashing' or mis-alignment between corporate emissions reduction policies and strategic actions. It shows the necessity of translating climate policies into concrete, actionable plans and how failure to do so exposes organisations to legal and reputational risk.

ACCR v Santos Ltd: Shareholder activists challenge veracity of emissions reduction targets

In August 2021, the Australasian Centre for Corporate Responsibility (ACCR) filed a Federal Court claim against Santos Ltd, alleging that it engaged in 'greenwashing' in certain statements in its 2020 Annual Report (published on 18 February 2021). The claim alleges (in part) that Santos misrepresented that it had a 'clear and credible plan' to meet its emissions reduction targets of 'net zero' scope 1 and 2 greenhouse gas emissions by 2040.

Specifically, ACCR alleges that Santos' Annual Report conveyed a misleading impression that it had identified a series of steps, based on reasonable assumptions, that were sufficient to achieve net zero greenhouse gas emissions by 2040, and that it intended to implement those steps. The misrepresentations are alleged to have occurred both by *representation* and *omissions (*such as failing to clarify that its targets depend on a range of undisclosed or unreasonable qualifications and assumptions).

The relevant omissions are alleged to include:

- that Santos' emissions reduction strategy is largely dependent on carbon capture and storage (**CCS**) technology that has not yet been developed at commercial scale or cost;
- That Santos intends to increase its emissions footprint in the near term via exploration and production projects, before shifting to an emissions reduction trajectory; and
- That Santos' targets do not account for additional scope 1 and 2 emissions associated with its proposed CCS, blue hydrogen production plans or expected hydrocarbon growth and exploration opportunities beyond 2025, and depend on a range of undisclosed and unreasonable qualifications and assumptions.

ACCR is seeking declarations of contravention, public corrective statements (to be published on its website, in its next Annual Report, Climate Change Report and via the Australian Stock Exchange) and injunctions to prevent the reoccurrence of the alleged breaches.

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A short step to claims against directors?

ACCR's claim against Santos is limited to the company itself, and to allegations of misleading disclosure. However, it is not difficult to conceive of circumstances in which such a claim could also be extended to directors and officers personally – particularly when it involves statements made in the annual report, which must be approved under a resolution of the directors under the Corporations Act. It is also feasible that such claims may be extended to a breach of a director's duty of due care and diligence, under the Australian doctrine of 'stepping-stones' liability.

The potential for these exposures reinforces the importance of robust board evaluation of a company's net zero targets and broader sustainability claims, and adequate documentation of that evaluation. Directors may seek specific advice and assurance on:

(a) whether the basis by which the business considers that the targets (in the form expressed) may be achieved is reasonable and with clear disclosure of any associated limitations;

(b) the strategic implications that the targets imply; and

(c) the scheduling of integration of relevant planning and reports on action into the board agenda in order to demonstrate genuine intention.

For further information on directors' fiduciary duties and corporate governance obligations, see guidance prepared MinterEllison for the Australian Institute of Company Directors: Climate risk governance guide.

Common greenwashing risk 1 – emissions reduction targets

Abrahams v Commonwealth Bank Australia: Shareholder activists seek books and records

In August 2021, Equity Generation Lawyers filed a books and records claim against CBA on behalf of shareholders Mr and Mrs Abrahams under section 274A of the *Corporations Act*. The claim sought production of documents created by CBA in analysing the consistency of new coal, oil and gas (and related pipeline/ship infrastructure) project finance under stated ESG policies.

The claimants sought documents in the context of CBA's 2019 environmental and social framework and policy, including internal documents created for the purposes of:

- carrying out an assessment of the environmental, social and economic impacts of seven coal, oil and/or gas (and related infrastructure) projects;
- carrying out an assessment of whether the projects are in line with the goals of the Paris Agreement; and
- discharging any obligation or responsibility that any CBA unit, division or employee has under CBA's internal environmental and social policy.

The claimants also sought access to documents that record consideration of the adoption of CBA's 2021 climate commitments – which limit the Paris-aligned commitment to project financing only. This included any documents that were provided to the board.

In November 2021, the Federal Court of Australia ordered by consent of the parties that CBA produce certain documents to the claimants for inspection in tranches in December 2021 and February 2022.

CBA provided documents in response to the November 2021 orders. However, the parties remain before the Court in disputation over redactions applied by CBA to the documents produced.

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ACCR's choice of counsel

The ACCR is being represented by Noel Hutley SC and Sebastian Hartford-Davis, who are the authors of the influential 'Hutley Opinion' on directors' duties and climate change. The most recent update to the Hutley Opinion (April 2021) highlighted the risk of 'greenwashing' liability for misleading disclosure should there be inconsistency between a company's stated position and ambition on climate risk management, and its internal strategy, plans and actions.

MinterEllison has acted as instructing solicitors on all three Hutley Opinions. See: New Hutley Opinion: What does it mean for directors? (April 2021).

INSIGHT

'books and records' first

This claim is the first known 'books and records'-style claim where shareholders have sought to use statutory inspection powers to obtain information on their company's approach to climate change. Books and records claims have not, to date, been commonly deployed in Australia. (However, activist superannuation fund beneficiaries are increasingly seeking to utilise an equivalent information production provision under section 1017C of the Corporations Act in a climate context).

Books and records claims are, however, routinely invoked in the United States under section 220 of the Delaware General Corporation Law, often by shareholders seeking to gather information on which to base a decision whether to commence securities fraud proceedings. In recent cases such as those against AmerisourceBergen and NVIDIA Corporation, the Delaware Courts appear to be taking a more expansive approach to the requisite 'proper purpose', finding that it is enough for a shareholder to show they have a credible basis to investigate potential wrongdoing, waste or mismanagement, rather than needing to identify the intended use for the information sought.

An order may only be made under s247A if the Court is satisfied that the applicant is acting in good faith and that the inspection is being made for a 'proper purpose'. The 'purpose' for which the applicants sought to inspect CBA's books in the Abrahams case was not specified in the Originating Process. However the request indicated that the applicants were interested in both the implementation of existing policies, and the board's involvement in the decision to adopt renewed climate commitments in 2021.

This case illustrates the potential for shareholder remedies to be deployed to obtain information on whether companies are robustly implementing their stated policies on climate change. This is critically important at a time where companies are grappling with how to implement ambitious emissions reduction strategies set in an environment of heightened stakeholder pressure and expectation. Quite apart from the Abrahams claim, the law provides little room for misalignment between commitments on sustainability and actions, and offers a range of remedies by which strategic litigants may seek to pursue associated grievances.

Common greenwashing risk 1 – emissions reduction targets

Greenwashing complaint made against Glencore by EDO

In September 2022, the Environmental Defenders Office lodged a complaint with ASIC and the ACCC on behalf of Lock the Gate Alliance and the Plains Clan of the Wonnarua People against multinational mining giant Glencore. The complaint requests ASIC and the ACCC to investigate 12 statements made by Glencore about its plans to reach net zero emissions by 2050. In addition, the Environmental Defenders Office is requesting the ACCC to provide greater guidance to companies about their net zero climate claims, noting 'the ACCC's Guide to Green marketing does not currently address net zero or emission reduction claims.'

In essence, it is alleged that a number of statements published on Glencore's Australian website and in its climate reports about its net zero commitments constitute misleading or deceptive conduct under s 18 of the *Australian Consumer Law* and/or s 1041H of the *Corporations Act 2001*. For example, it is alleged that Glencore has represented that it aims to be a net zero total emissions company by 2050 and is committed to align its targets and ambition with the goals of the Paris agreement and laying the foundations for a low carbon future.

These representations are alleged to be misleading or deceptive (or likely to mislead and deceive) consumers or investors on the basis that:

a) Glencore has no immediate plans to decarbonise in Australia and is in fact expanding its coal production in Australia, which is likely to increase its emissions; and

b) Glencore's emissions do not appear to include all methane produced by their mines, and if included would require greater cuts to their emissions.

Postscript – While there are no suggestions of a direct linkage to this claim, in December 2022 Glencore announced it would discontinue its plans for the Valeria thermal coal project in Bowen Basin, Queensland, Australia. It attributed this decision to both recent coal royalty reforms, and the company's climate change strategy.

Greenwashing complaint made against Santos by Market Forces

In August 2022, activist shareholder group, Market Forces, submitted a formal complaint to ASIC regarding potentially misleading statements at Santos' annual shareholder meeting in May about how Santos' plans for new oil and gas projects complied with the International Energy Agency's (IEA's) scenarios. The IEA's scenarios include the Net Zero Emissions Roadmap, which includes assumptions of no new oil and gas development after 2021. The group has asked ASIC to review Santos' conduct and consider taking action.

TARGET SETTING GUIDANCE RELEASED AT COP27

During COP27, the UN High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities released a report self-described as a 'how-to guide to ensure credible, accountable net-zero pledges'.

The ten recommendations outlined in the report, detail what non-state actors need to consider through each stage of their progress towards achieving net-zero ambitions and addressing the climate crisis.

Common greenwashing RISK 2

Truth to label

Product or service ‘truth to label’

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

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While there is still no universal definition of ‘sustainability’ or ‘green’, frameworks such as the EU’s Green Finance Taxonomy are starting to raise the bar on when such terms can be justified. In December 2022, the Australian Treasury also announced that it would assume leadership of the development of an Australian Sustainable Finance taxonomy building on work led by industry under the Australian Sustainable Finance Initiative.

In June 2022, ASIC published Information Sheet 271 to assist superannuation and investment funds avoid greenwashing when offering or promoting sustainability-related products. The ACCC is also actively monitoring sustainability and environmental claims. It flagged a forthcoming 'internet sweep' of various environmental claims made by Australian businesses.

With these emerging standards and elevated market expectations, it is more important than ever to be clear about exactly what organisations mean in their labelling, and that what they mean is credible.

Common greenwashing risk 2 – 'truth to label'

'Truth to label' in financial services

With the huge growth in ESG and green-labelled financial products, 'truth to label' has emerged as a particular focus for financial institutions in recent years. From ASIC in Australia to the SEC and Department of Justice in the US, prudential and securities regulators have announced thematic reviews into the sustainable investment credentials promoted by regulated entities. Indeed, ASIC has already commenced issuing infringement notices for greenwashing.

ASIC has issued a number of statutory notices to produce relevant information to superannuation funds, under section 912C of the *Corporations Act*. There has been an upsurge in 'whistleblower' claims, where employees are reporting their concerns about the disconnect between promoted credentials and investment practice.

'Truth to label' for goods

Misrepresentation as to the nature, quality or characteristics of goods or services may contravene the prohibitions against specific misrepresentations under Part 3.1 of the *Australian Consumer Law*. This is particularly significant in light of the recent increase in pecuniary penalties (see right).

While pecuniary penalties are not being sought in that case, the *ACCR v Santos* claim includes an allegation that Santos has acted in breach of section 33 of the *Australian Consumer Law*. This is on the basis that the description of its natural gas as 'clean energy' is liable to mislead the public as to the nature, characteristics, suitability and quality of its primary product.

On the next page, we draw on recent claims to illustrate a number of important principles to consider in labelling of goods or services as 'green' or 'sustainable'.

INCREASE IN PECUNIARY PENALTIES

On 10 November 2022, reforms under the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* introduced significant increases in the maximum penalties a court can order against corporations and individuals for engaging in conduct that contravenes Australian competition law and the Australian Consumer Law, including making false and misleading representations about climate and environment related matters.

For corporations, the new maximum penalty per contravention will be the greater of:

- $50 million (**a five fold increase**, up from $10 million); or
- three times the benefit obtained and reasonably attributable to the conduct; or
- if the total value of the benefit cannot be determined, 30% of the corporation's adjusted turnover during the breach turnover period (**a significant increase**, up from 10%; and a broader period over which the relevant turnover measure is calculated, from 12 months).

For individuals, the new maximum penalty is $2.5 million per contravention (**a five fold increase**, up from $500,000).

The reforms and their likely impact highlight the need to review and strengthen competition and consumer law compliance measures and seek specialist advice to mitigate 'greenwashing' risks.

ASIC fines Vanguard for greenwashing

ASIC has issued three infringement notices to Vanguard Investments Australia for greenwashing. Product disclosure statements for Vanguard International Shares Select Exclusions Index Funds claimed to exclude investment in companies 'involved in the production, manufacturing, or significant *sales* of tobacco'. However, ASIC found that Vanguard's screen only excluded manufacturers and producers, not wholesalers, retailers or companies involved in the sale of tobacco products. Vanguard has paid $39,960 in compliance with the infringement notices.

This decision is significant for two key reasons. Firstly, it demonstrates the growing propensity of regulators to impose fines and infringement notices at first instance as opposed to affording organisations the opportunity to amend the wording of their policies. Secondly, while the financial penalty imposed amounted to less than $40,000, it demonstrates the potential for reputational impacts which findings like these can have on an organisation, despite the payments not being an admission of guilt or liability.

Common greenwashing risk 2 – 'truth to label'

ACCR v Santos Ltd: Shareholder activists challenge 'clean energy' label

In addition to challenging the veracity of Santos' emissions reduction targets, described on page 6, the ACCR also alleges Santos' statements on 'clean energy' contravene the prohibitions against misleading of deceptive conduct in the *Corporations Act* and *Australian Consumer Law*.

ACCR alleges that Santos' references to natural gas as 'clean energy' convey a misleading impression that the extraction of natural gas, and the generation of energy using natural gas, does not have a material adverse effect on the environment, nor that it releases material amounts of greenhouse gases into the atmosphere.

The misrepresentations are alleged to occur by both *representation* (essentially of the 'clean' nature of the fuel) and *omission* (of the significant amount of methane and carbon dioxide released in the process of producing and using the gas, and of the availability of alternative energy technologies that do not release material quantities of those greenhouse gases).

The claim also alleges that the description of Santos' natural gas as 'clean energy' is liable to mislead the public as to the nature, characteristics, suitability and quality of this product, contrary to the prohibition against specific misrepresentations in the supply of goods under section 33 of the *Australian Consumer Law*.

ACCR is seeking declarations of contravention, public corrective statements (to be published on its website, in its next Annual Report, Climate Change Report and via the Australian Stock Exchange) and, injunctions to prevent the reoccurrence of the alleged breaches.

DWS Group regulatory investigation: Whistleblower claims into ESG in investment practice

In September 2021, it was revealed that the US Securities and Exchange Commission, US federal prosecutors, and the German financial supervisory authority BaFin each have probes into the asset manager arm of Deutsche Bank for allegedly misleading investors on how it uses ESG and sustainability criteria across its US$1 trillion fund products. The regulatory investigations follow whistleblower allegations by their former Head of Sustainability published by the Wall Street Journal earlier that year. DWS has issued a statement strongly denying the allegations made against it.

In May 2022, the Deutsche Bank and DWS offices were raided by 50 officers from the Frankfurt public prosecutor, BaFin and Federal Criminal Police Office, seeking evidence in connection with the investigation. Hours after the raid, DWS CEO, Asoka Worhrmann, announced his resignation.

In October 2022, German consumer group, Verbraucherzentrale Baden-Württemberg (**VBW**) announced it has launched legal action against DWS for alleged greenwashing in an advert published in May in which DWS claimed the fund invests 0% of its assets into controversial sectors including 'coal' and 'armament goods'. VBW is also claiming that the fund's emissions advertising may be misleading given the calculations are not explained and the quality of emissions data cannot be verified.

There is not yet any suggestion that the Australian business of DWS is being investigated by ASIC in relation to the global claims. However, this should bring little comfort to Australian financial institutions, as ASIC is otherwise extremely active in this area. Its recent supervisory activities include a thematic review via notices to provide information to substantiate sustainable investment claims under section 912C of the Corporations Act, and publication of Information Sheet 271.

ASIC issues first greenwashing fine to Tlou Energy Limited

In October 2022, ASIC fined ASX listed energy company Tlou Energy Limited $53,280 for four instances of alleged false or misleading statements regarding their sustainability commitments and credentials. This is the first action ASIC has taken for greenwashing. ASIC was concerned that Tlou either did not have a reasonable basis to make certain representations, or that certain representations were factually incorrect, namely that:

- electricity produced by Tlou would be carbon neutral;
- Tlou had environmental approval and the capability to generate certain quantities of electricity from solar power;
- Tlou's gas-to-power project would be 'low emissions'; and
- Tlou was equally concerned with producing 'clean energy' through the use of renewable sources as it was with developing its gas-to-power project.

SEC charges Goldman Sachs Asset Management

In June 2022, it was reported that the US Securities and Exchange Commission (**SEC**) was investigating Goldman Sachs Asset Management (**GSAM**) for potentially violating ESG pledges made in marketing materials.

In November 2022, the SEC charged GSAM for multiple 'policies and procedures failures' relating to two mutual funds (the Goldman Sachs International Equity ESG Fund and the Goldman Sachs Emerging Markets Equity Fund) and a separately managed account strategy (the US Equity ESG Strategy). These were all marketed as ESG investments.

In relation to the US Equity ESG Strategy, the SEC found that from April 2017 until June 2018, GSAM did not adopt written policies governing how it evaluated ESG factors. Further, once policies were adopted across the three products, GSAM failed to follow them consistently until February 2020. GSAM agreed to pay a US$4 million penalty to settle the charges (without admitting guilt or liability).

Common greenwashing risk 2 – ‘truth to label’

**‘TRUTH TO LABEL’
– KEY POINTERS TO AVOID ‘GREENWASH’**

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.

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 general labels such as ‘green’ or ‘sustainable’ in favour of specific descriptions of the sustainability attributes that a product carries (e.g. lower carbon, recycled, tobacco free).

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.

Common greenwashing RISK 3

Enterprise branding

Corporate credentials and advertising

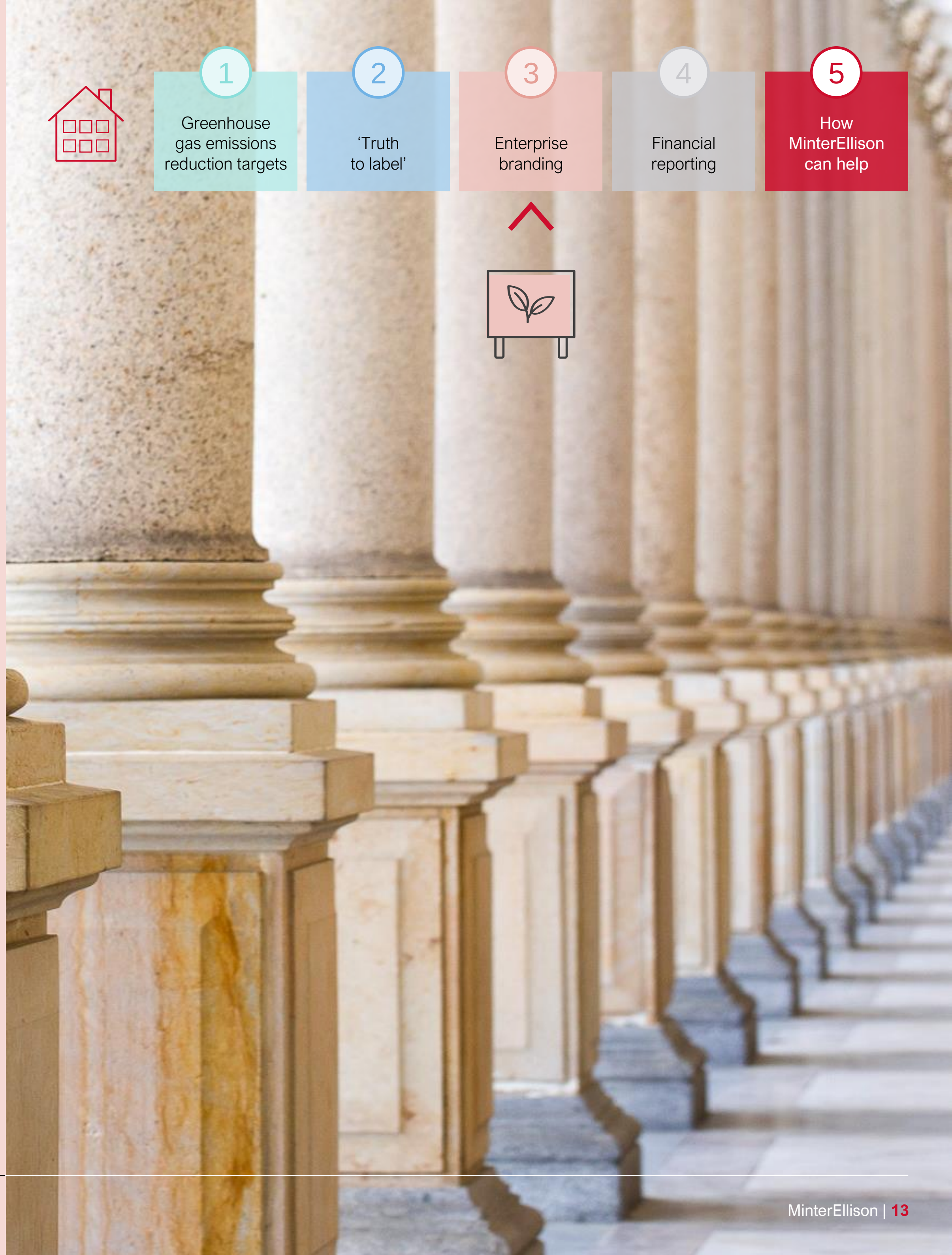
Consumer protection regulators are increasingly scrutinising greenwash in advertising campaigns – including the promotion of corporate 'sustainable' branding.

While the focus of influential investors and financial regulators is on greenwashing in financial filings, misleading sustainability credentials in consumer-facing advertising remains a key source of reputational and legal risk.

A recent review of 500 business websites by the international peak body for consumer protection regulators, the International Consumer Protection Enforcement Network (ICPEN, of which Australia's ACCC is a member) found that 40% appeared to make sustainability claims that were potentially misleading. These included:

- vague claims and unclear language including terms such as 'eco' or 'sustainable' or reference to 'natural products' without adequate explanation or evidence of the claims;
- own brand eco logos and labels not associated with an accredited organisation; and
- hiding or omitting certain information, such as a product's pollution levels, to appear more eco-friendly.

While regulators, strategic litigants and civil society groups are scrutinising consumer-facing advertising in the legal domain, new forms of reputational risks are arising for some companies in the online world. This includes activist targeting of the social media accounts of fossil fuel companies, in a practice described as 'greentrolling'.



Common greenwashing risk 3 – enterprise branding

First aviation greenwashing claim brought against KLM

In July 2022, Fossielvrij NL, ClientEarth and Reclame.NL filed a case in Amsterdam against KLM, alleging that adverts promoting the Dutch airline's sustainability initiatives are misleading. In KLM's 'Fly Responsibly' campaign, the airline makes representations that it is creating a more sustainable future and is on track to reach net zero emissions by 2050. The environmental groups claim this is misleading because KLM's strategy relies on the use of more efficient aircrafts and fuels, which are not sufficient to enable the aviation sector to meet the goals set out in the Paris Agreement.

KLM's campaign also encourages customers to offset their flights or donate money to 'greener' fuels through KLM's CO2ZERO scheme, which is said to fund reforestation projects and the purchase of biofuels. The environmental groups allege that KLM's promotion of the CO2ZERO scheme undermines global action to mitigate climate change given such schemes do not limit the amount of damage caused by greenhouse gas emissions and other warming impacts of aviation.

HSBC adverts banned for greenwashing

In October 2022, the UK's Advertising Standards Authority (**ASA**) determined that two HSBC advertisements were misleading on the basis that they promoted the bank's green credentials without mentioning its contribution to carbon dioxide and greenhouse emissions.

The adverts outlined HSBC's efforts to plant trees and help its customers achieve net zero emissions. According to the ASA, the adverts 'omitted material information' about HSBC's activities and were therefore misleading. The ASA stated 'customers…would not expect that HSBC in making unqualified claims about its environmentally beneficial work, would also be simultaneously involved in the financing of businesses which made significant contributions to carbon dioxide and other greenhouse gas emissions.'

ClientEarth v BP Corporate credentials advertising

In 2019, UK-based environmental NGO ClientEarth alleged BP misled the public by the way in which it presented its energy business in advertising campaigns in violation of the OECD Guidelines for Multinational Enterprises. Despite representing the business as low carbon in the campaign, BP's capital expenditure in renewables was approximately 1% relative to its fossil fuel energy business.

The UK national contact point found the complaint was material and substantiated and would have proceeded had BP not already withdrawn the advertising campaign.

ADVERTISING – KEY POINTERS TO AVOID ENTERPRISE BRANDING 'GREENWASH'

Consider regulatory guidance on green advertising

In Australia, the ACCC can be expected to publish updated guidance on sustainability and environmental claims following its 'greenwashing' internet sweep, which will help inform what steps businesses can take to improve the integrity of their environmental claims.

More recently, in September 2021, the UK Competition & Markets Authority published new Guidance on Environmental Claims on Goods and Services. The Guidance, colloquially known as the 'green claims code', sets out six key principles for environmental claims:

- claims must be truthful and accurate;
- claims must be clear and unambiguous;
- claims must not omit or hide important relevant information;
- comparisons must be fair and meaningful;
- claims must consider the full life cycle of the product or service; and
- claims must be substantiated.

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, page 14*).

Be specific, but not selective

Claims should be clear and specific in terms of the environmental benefit conferred, rather than vague and general.

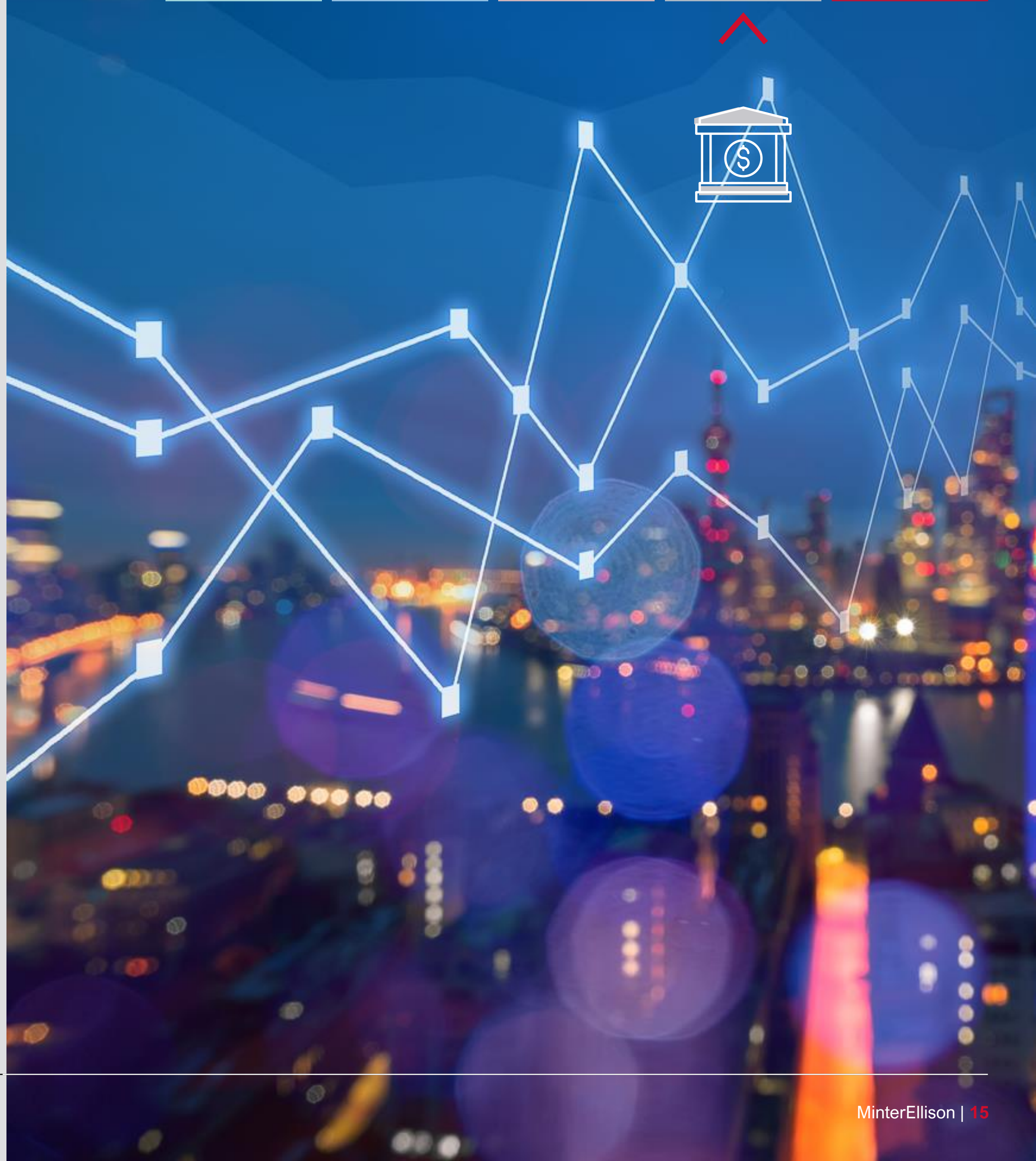
However, organisations should take care to ensure that promotion of one specific aspect of a product's characteristics or company's sustainability credentials does not imply broader 'green' operation.

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 regarding material impacts on financial prospects (in the directors' report or in the Operating and Financial Review), as well as financial position and performance (financial statements).

In December 2022, the Australian Treasury released a consultation paper seeking input on the development of an Australian climate-related financial reporting framework. The purpose of the proposed framework is to provide business and investors with clarity and certainty required to manage climate risks and invest in new opportunities. Consultation will close on 17 February 2023.

Treasury's Consultation paper follows the release of the International Sustainability Standards Board (**ISSB**) Exposure Drafts IFRS S1 (General Requirements for Disclosure of Sustainability-related Financial Information) and IFRS S2 (Climate-related Disclosures) in March 2022. These exposure drafts have themselves been the subject of consultation regarding applicability in an Australian context, led by the Australian Accounting Standards Board (**AASB**) and Auditing and Assurance Standards Board (**AuASB**). Once finalised, the proposed standards would form a comprehensive global baseline to meet the information needs of investors in assessing corporate governance, strategy, risk management and financial impacts associated with climate change.



Emerging greenwashing risk – financial reporting

An emerging risk which is relevant now

Treasury's proposed introduction of financial reporting standards on climate change will go some way to provide certainty to reporting entities who are grappling with the complexity and uncertainty inherent in the assessment of climate-related financial impacts. However, Australian public reporting corporations would be ill-advised to assume that, absent future reforms, there are no current obligations to consider (and disclose as appropriate) material financial impacts associated with climate change and other sustainability-related issues on their financial performance, position and prospects.

Risks to financial prospects

In August 2019, ASIC confirmed that climate change is a 'systemic risk that could have a material impact on the future financial position, performance or prospects of entities' (ASIC Regulatory Guidance 247). In March 2021, ASIC addressed the need for all listed companies to comply with the law where it requires disclosure of material climate risk and to consider the recommendations of the Taskforce on Climate-related Financial Disclosure (**TCFD**) when reporting material climate risk.

In 2019, the ASX Corporate Governance Council also published its Corporate Governance Principles and Recommendations (4th ed) (**CGP**). Recommendation 7.1 states that companies are required to disclose whether they have material exposure to environmental or social risks and if they do, how they manage or intend to manage those risks.

Financial position and performance

In their Joint Guidance released in April 2019, the AASB and AuSB stated that 'investors have specifically identified climate-related risks as being used in their decision making'. They said that 'entities can no longer treat climate-related risks as merely a matter of corporate social responsibility and may need to consider them also in the context of their financial statements.' Indeed, climate and sustainability-related issues are increasingly identified as key audit matter / requiring significant management judgement.

Best practice examples (domestic)

A number of ASX200 companies are already integrating forward-looking climate-related assumptions into their financial reporting and disclosing relevant assumptions in the notes to their financial statements.

Commonwealth Bank of Australia: climate change identified as a financial risk

Climate change is identified as both a strategic (environmental and social) and credit risk in the notes to the financial statements in CBA's 2022 Annual Report. Scenario analysis was identified as a key control and risk mitigation strategy to understand the physical and transition risks of climate change.

See Notes to Financial Statements, page 216: 'Climate risk is a risk for the Group. The impacts of climate change have the potential to affect our customers' ability to service and repay their loans, and the value of collateral the Group holds to secure loans. These impacts include long-term changes in climatic conditions, extreme weather events, and the action taken by governments, regulators or society more generally to transition to a low carbon economy.'

BHP: climate change identified as an area of significant judgement

Climate change and the transition to a low carbon economy is identified as an indicator of impairment of non-current assets requiring significant management judgement in the notes to the financial statements in BHP's 2022 Annual Report. Climate change is also identified as a relevant factor when determining prospective depreciation rates and asset carrying values.

See Notes to Financial Statements, page 155: '… the potential financial impacts on the Group of climate change and the transition to a low carbon economy have been considered in the assessment of indicators of impairment, including the Group's current assumptions relating to demand for commodities and carbon pricing, including their impact on the Group's long-term price forecasts [and] the Group's operational emissions reduction strategy.'

Emerging greenwashing risk – financial reporting

Best practice examples (international)

A number of international companies are also conducting and disclosing the results of scenario analysis as well as adjusting their financial performance and risk profiles in light of the physical and economic transition risks of climate change.

Rabobank: financial performance adjusted in light of economic transition risk

In June 2022, the Dutch government announced its plan to reduce nitrogen oxide emissions from the country's agricultural sector, admitting that 'there is not a future for all farmers within [this] approach.' In response to this announcement, Rabobank downgraded the creditworthiness of its entire €10.3 billion dairy farm loan portfolio. As a result, the lender also restated the lifetime expected credit losses of the downgraded agricultural loan portfolio. This downgrade was in turn reflected in a €76 million adjustment to Rabobank's financial performance as of 30 June 2022.

Centrica: impacts of climate change incorporated into sensitivity analysis

Centrica included in its 2021 Annual Report and Accounts a high-level sensitivity analysis, based on forecast prices aligned to the International Energy Agency's Net Zero Emissions by 2050, which assumes governmental policies are put in place to achieve the temperature and net zero goals by 2050. This sensitivity retains the prices for the liquid period (4 years) but replaces the longer term thereafter with the IEA's forecast prices for Net Zero Emissions by 2050.

	Ten-year long-term average price (i)	*Change in post-tax write-back / (impairment) (ii)*
	2027-2036	
	2021	*£m*
NBP (p/th)	*36*	*(2)*
Brent ($/bbl)	*45*	

i) Prices shown in 2020 real terms.

(ii) Change in impairment restricted due to the most material fields having already been written back to their depreciated historic cost and having excess impairment headroom. The post-tax NPV movements of the fields is £(28) million.

FINANCIAL REPORTING – KEY POINTERS TO AVOID 'GREENWASH'

Corporations should:

1. **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, organisations should conduct stress-testing and scenario analysis across a plausible range of climate futures.

2. **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. For disclosures in the directors' report / Operating and Financial Review, organisations should reference *ASIC Guidance Regulatory 247*, *ASX CGP* Recommendation 7.4 and the Recommendations of the TCFD (*page 16*).

3. **Consider the extent to which sustainability-related risks to 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 consideration may include variables such as (for example) asset useful lives, impairments, provisions for losses or onerous contracts etc. Corporations should consider the AASB/AuASB Joint Guidance on *Climate-related and other emerging risks disclosures: assessing financial statement materiality using AASB/IASB - Practice Statement* (*page 15*).

4. **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 fair view is presented.

5. **Consider alignment between sustainability strategies and targets and financial statements.**

   For example, to what extent has corporate strategy, capex and opex been aligned with emissions reduction plans? For further information refer to guidance prepared by MinterEllison for CPA Australia: Climate change and Financial Reporting.

How MinterEllison can help

In a field as dynamic as sustainability, it is critical to understand not only the law as it stands, but its direction of travel. Similarly, strategy and operationalisation need to be responsive and flexible to significant uncertainties.

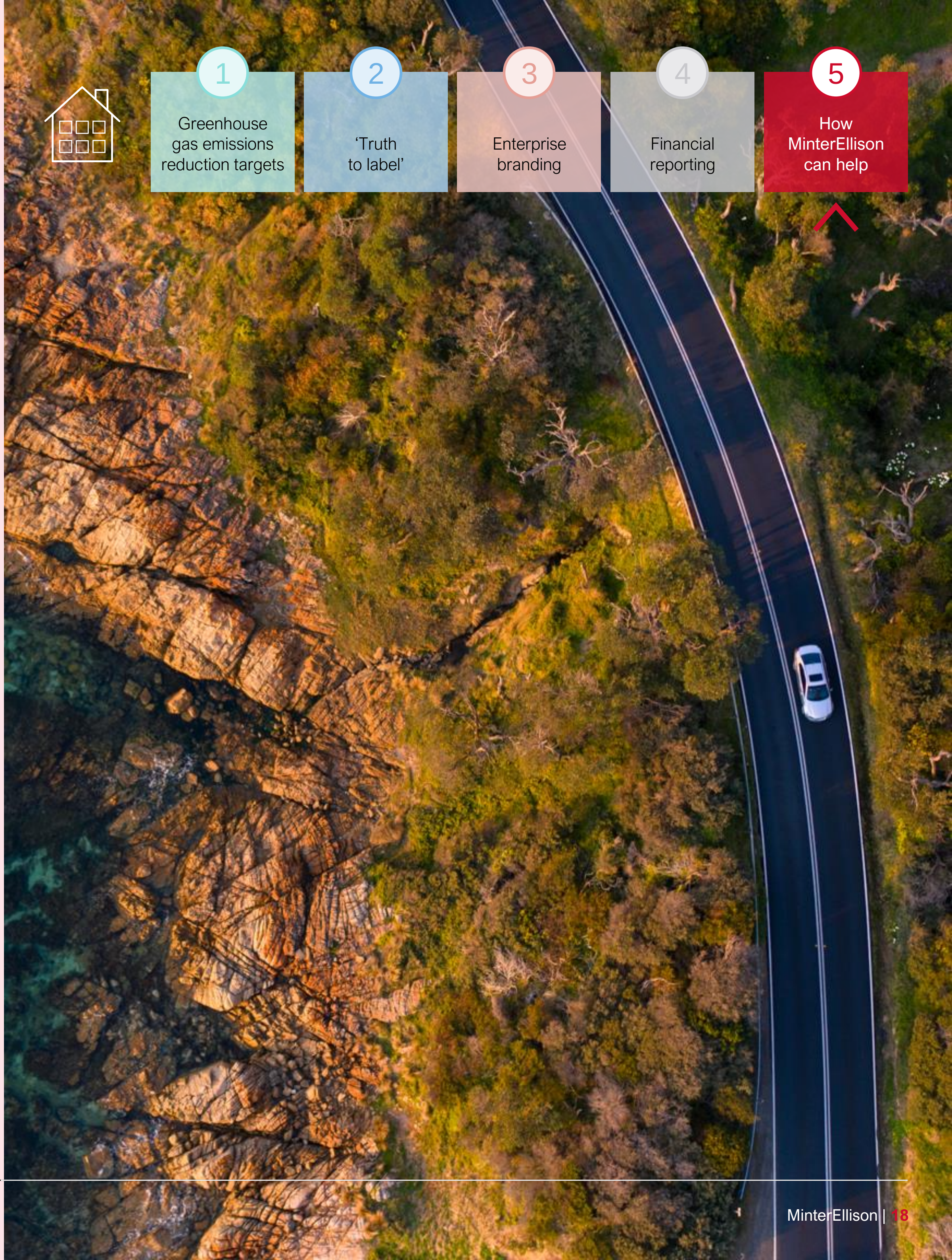
We understand that legal advice has limited value outside its commercial context. For organisations, a deep understanding of market trends, emerging issues and the unique context in which the organisation operates is essential. At MinterEllison, we provide legal and consulting services under one roof. Our team are recognised as leaders in their field of climate and sustainability risk governance, and work across the Asia-Pacific, Europe and North America. Clients value our responsive, commercial approach. We are curious by nature, diverse in our disciplines and authentic in our relationships.

When clients engage MinterEllison they choose to work with legal and consulting practitioners who are at the forefront of thought leadership in sustainability-related finance and liability risks - in both Australia and internationally. We are also experienced in designing sustainability governance and risk management frameworks that are flexible and future-focused, and best able to drive change and continuous improvement across the organisation.

From desktop analysis to design and development of fit-for-purpose Sustainability Risk Governance Frameworks, our teams can tailor our approach to suit clients' specific needs and requirements. Our approach does not involve a 'one-size-fits-all' overlay of standardised frameworks, but a bespoke analysis based on our significant client-side climate risk governance experience.

We pride ourselves in delivering high quality and actionable outputs for our clients, allowing them to quickly and efficiently adjust their thought processes and practices to address the unique challenges of sustainability business and legal risk exposures.

Whether you are at the beginning of your climate risk governance journey, or committed to best practice, MinterEllison's multidisciplinary team can assist with the assessment, governance and management of climate-related risks.



How MinterEllison can help

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Our key pointers to avoid ‘greenwashing’

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 published guidelines on sustainability claims in labelling, packaging and advertising for more than a decade. For financial products and services, ASIC has published *Info Sheet 271*.

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 general labels such as ‘green’ or ‘sustainable’ in favour of specific descriptions of the sustainability attributes that a product carries (e.g. lower carbon, recycled, tobacco free).

BRAND ADVERTISING

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 general. 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 emerging international standards (ISSB IFRS S1 and S2).

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?

MinterEllison.