

Questions on notice from Senator O'Neill

'Greenwashing'

1. Is greenwashing:
 - a. A more significant problem in Australia than in other peer countries?
 - b. A large share of disclosure compliance and enforcement issues in Australia?

ASIC, in Information Sheet 271 ('INFO 271'), has defined "greenwashing" in relation to investments as the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical.¹ While INFO 271 focuses on sustainability-related products issued by funds, ASIC has clarified that these principles may apply to other entities that offer or promote financial products including companies listed on a securities exchange.

With the investor community, both locally and abroad, placing a greater emphasis on sustainability and ESG-related matters, there is a growing incentive for those promoting a financial product to make statements about their ESG credentials or specific efforts in this area. As such, this is an area of focus for both local and international regulators.

ASX is not aware of data on whether greenwashing is currently a more significant problem in Australia than in other peer countries. However, with investor interest so focused on ESG-related matters, the risk of greenwashing statements that are dishonest, false, misleading or deceptive is expected to continue to increase.

Australia has in place a strong legal and regulatory framework, utilised by ASIC, ACCC and other relevant regulatory bodies, to address such misleading statements. For instance, section 1041E of the Corporations Act prohibits the making or disseminating of false or misleading statements in relation to financial products. Similarly, section 1041G prohibits engaging in dishonest conduct and section 1041H prohibits engaging in misleading or deceptive conduct.

In Australia the work of shaping policy, monitoring compliance and taking enforcement action in respect of greenwashing misconduct is being led by ASIC and ACCC. ASX's own ability to address greenwashing issues is limited to the contractual powers between ASX and the relevant listed entity, chiefly the ASX Listing Rules and accompanying Guidance Notes.

Listed entities release key publications via ASX's Market Announcements Platform ('MAP') to provide information to the market and satisfy their continuous disclosure obligations under section 674 of the Corporations Act and Listing Rule 3.1. These publications include periodic financial and operational reports, prospectus documents, key operational announcements regarding new initiatives or acquisitions, investor presentations and speeches or commentary by the entity's chair or CEO.

ASX has always had a particular focus on listed entities using MAP to publish "ramping" statements. Section 7.10 of Guidance Note 8 prohibits statements that attempt to "ramp up" the share price of the entity without offering substantive justification. Ramping takes many forms and is typically motivated by what listed entities perceive would positively influence the price or value of their

¹ <https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>

securities. Given current trends in investor sentiment and expectations, greenwashing and sustainability-related claims are expected to remain a focus for ASX's work on ramping.

Where a statement made by a listed entity on MAP looks to contravene ASX's guidance on ramping, including from making unjustified greenwashing or other sustainability-related claims, ASX will investigate and take further action. These actions include questioning the entity privately or formally via written query letters, which may subsequently be published. ASX may then take further action under its compliance framework, including requiring the company to publish a corrective announcement, suspension or censure of the listed entity or referring the suspected greenwashing conduct to ASIC for civil or administrative action.

Greenwashing statements by listed entities currently represent a relatively small but significant area where compliance actions by the ASX to address the disclosures have been taken. As stated above, given the growing investor interest focused on ESG-related matters, the risk of false or misleading greenwashing statements, and the number of compliance actions taken by the ASX in response, is expected to continue to increase.

ASX's Listings Compliance team also maintains a close working relationship with the relevant corresponding teams within ASIC in order to ensure ASX moves in step with the corporate financial regulator as it continues to take action to address greenwashing issues in the Australian financial market.

- 2. Are the current policy settings, legislation and regulations appropriate and effective for greenwashing in Australia?**
 - a. If not, what reforms may be needed?**
 - b. Are there reforms overseas that are relevant to Australia?**

ASX believes that Australia has a strong and robust legal and regulatory framework in place that has been, and continues to be, utilised by ASIC and the ACCC to address greenwashing concerns in Australia.

ASIC has released INFO 271, which provides a detailed guide on how to avoid greenwashing when offering or promoting sustainability-related financial products or services.² The ACCC has published its own guide providing direction on how green marketing interacts with the Australian Consumer Law ('ACL').³

ASX is aware that other regulators abroad are similarly focused on this issue and have released similar guidance based on the legislative and regulatory framework that they operate in.

Domestically, the Corporations Act contains prohibitions against making or disseminating false or misleading statements or otherwise engaging in dishonest or false or misleading conduct in relation to financial products. The ASIC Act further permits the issue of infringement notices under section 12GXA for breaches of section 12DA, which prohibits a corporation from engaging in misleading or deceptive conduct in relation to financial services.

Outside financial services, greenwashing claims would generally be captured by section 18 of the ACL, which prohibits misleading or deceptive conduct, and section 29 of the ACL, which prohibits false or misleading statements. This would apply to non-financial services and non-financial products

² <https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>

³ <https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf>

offered by listed entities to the general market.

ASX is aware that the ACCC and ASIC, in leading Australia's response to greenwashing concerns, continue as part of that work to review and engage with international regulatory initiatives and reforms.

3. In relation to regulatory approaches taken to date:

- a. How effective is ASIC's work on greenwashing to date and do you have any suggestions for changes?**
- b. Are there any approaches to greenwashing that the ACCC is taking for non-financial products that would be useful for financial products?**
- c. Are there approaches that ASIC's peer organisations overseas are taking that ASIC should consider?**

ASX understands that greenwashing is an enforcement priority area for both ASIC⁴ and ACCC.⁵ ASIC has established a dedicated greenwashing team and has issued multiple infringement notices in relation to greenwashing, including two to listed entities.^{6,7} The ACCC recently launched an internet sweep to identify misleading environmental and sustainability claims.⁸

Good regulation is clear and consistent and the approaches taken by ASIC and ACCC in addressing greenwashing within their respective jurisdictions are effective, comprehensive, collaborative⁹ and similar in nature. In a speech in September 2022,¹⁰ the ACCC's then Deputy Chair, Ms Delia Rickard, referred to the similarities between the ACCC's basic test and ASIC's guidance for avoiding greenwashing for superannuation and managed funds (INFO 271).¹¹

ASX is not aware of any approaches taken by ASIC's peer organisations abroad, that would be applicable in Australia, that ASIC has not already considered.

⁴ <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/>

⁵ <https://www.accc.gov.au/media-release/compliance-and-enforcement-priorities-for-2022-23>

⁶ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-294mr-asic-acts-against-greenwashing-by-energy-company/>

⁷ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-001mr-asic-issues-infringement-notices-to-energy-company-for-greenwashing/>

⁸ <https://www.accc.gov.au/media-release/accc-internet-sweeps-target-greenwashing-fake-online-reviews>

⁹ <https://www.accc.gov.au/speech/speech-to-smh-sustainability-summit>

¹⁰ <https://www.accc.gov.au/speech/speech-to-smh-sustainability-summit>

¹¹ <https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>

4. Australia has three statutory financial reporting bodies:

- a. The Financial Reporting Council (FRC);**
- b. The Australian Accounting Standards Board (AASB);**
- c. The Australian Auditing and Assurance Standards Board (AUASB).**

How effective is their work to date on greenwashing and are there any approaches being undertaken by their peer organisations overseas that should be considered in Australia?

Treasury has recently released a public consultation paper seeking views on, among other things, potential structures for these bodies in relation to sustainability-related standards.¹² Additionally, draft legislation has been released to provide the FRC, AASB and AUASB with specific and more explicit powers to develop sustainability standards and correspondingly, the auditing and assurance and oversight over these standards.¹³

ASX's Chief Compliance Officer is a member of the AASB/AUSB Sustainability Reporting Project Advisory Panel, an informal consultative group. The globalised nature of financial reporting means that the statutory financial reporting bodies are beholden to international standard setters, including the International Sustainability Standards Board (ISSB), and the initiatives and reforms proposed by those bodies. ASX understands that there are regular consultations among the international and local bodies.

ASX is supportive of a consistent approach to sustainability disclosure cultivated by such close consultation. Such disclosures will make it easier for all relevant parties to understand, monitor and police sustainability-related claims for potential greenwashing. ASX has confidence that the initiatives taken by the statutory financial reporting bodies and the Commonwealth Government, including those described above, will lead to such an outcome.

5. Are there differences in how greenwashing compliance and enforcement is handled for different types of financial products, such as super, managed funds, ETFs, shares and bonds?

The clear and complete disclosure of relevant information is of paramount importance in respect of all financial products, in order to ensure for a fair, orderly and transparent financial system in Australia. Owing to this, financial products are subject to a strict and regularly enforced regulatory framework that prohibits false or misleading statements being made in respect of financial products and services.

ASIC has clarified that the principles in INFO 271 may apply to other financial products that take into account sustainability-related considerations including the issue of green bonds and listed companies.

Shares that trade on ASX's exchange are further subject to the ASX Listing Rules that prohibit ramping through any means, including greenwashing or making sustainability-related claims that cannot be justified. These rules are consistent with ASIC's regulatory framework. ASX continues to work closely with ASIC in ensuring a consistent and effective greenwashing compliance and enforcement regime.

¹² <https://treasury.gov.au/consultation/c2022-314397>

¹³ <https://treasury.gov.au/consultation/c2022-340878>