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ASIC Enforcement for Sustainability Reporting Will be Different to Greenwashing

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When assessing how to comply with the new reporting obligations, reporting entities should recognise the differences in the enforcement approach that ASIC will take in relation to mandatory climate reporting compared with the approach adopted by it in relation to Greenwashing.

Greenwashing misconduct has focussed on financial services entities which have volunteered to provide statements about their green credentials which have been demonstrated to be misleading and deceptive based on the application of well-established Corporations Act principals.

Under Australia's mandatory climate disclosure regime, relevant entities are required to produce "sustainability reports", which require that climate-related disclosures are reported in the same context as the financial statements and directors report for a relevant year. As a result, climate disclosures will be subject to the existing liability framework in the Corporations Act and the ASIC Act which includes reference to existing director's duties, misleading and deceptive conduct provisions, and general disclosure obligations.

In contrast to its enforcement of Greenwashing, ASIC has repeatedly stated that it will take a "pragmatic and proportionate approach" to supervision and enforcement of sustainability reports in the early stages of this regime. This is in support of the primary goal of the regime which is to facilitate "high quality climate reporting by large Australian businesses and financial institutions."

To help companies achieve this, the reporting regime includes transitional arrangements where liability for misleading and deceptive conduct in relation to the most uncertain parts of a climate statement (e.g. reporting on Scope 3 emissions) and certain other components will be the subject of certain limited immunities. These immunities will apply for a temporary and phased in basis to statements in sustainability reports prepared for financial years commencing during the first three years starting on 1 January 2025.

However, while these limited and temporary protections will certainly be helpful for reporting entities, they will not apply to any voluntary statements that entities wish to make about their sustainability profile or credentials and which are not required by the new reporting regime. These voluntary statements will still be assessed on the longstanding principles applicable to misleading and deceptive statements and the established enforcement principles which have been applied to date to Greenwashing.

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