



*Crisp Law Newsletter*

# *Greenwashing in the construction industry*



***This newsletter examines issues of greenwashing in the Australian construction industry, how the law mitigates greenwashing, and what this could mean for professionals in the construction industry.***

The construction industry contributes 37% of global carbon dioxide emissions; notably through concrete, steel, glass, and aluminium production. Given these impacts, construction firms may wish to highlight their sustainability credentials or practices. However, construction companies must be transparent about the realities of their environmental impacts; organisations such as ASIC have initiated proceedings against financial institutions that have engaged in greenwashing. As the law evolves to echo growing sentiment favouring sustainable development, construction professionals may be held liable for similar practices in the near future. This newsletter explores the definition of greenwashing, assesses how the law recognises it, and gives insight into how construction companies can comply with consumer law and global environmental standards.

### **What is Greenwashing?**

Greenwashing is a term used to describe the provision of false or misleading environmental claims or the omission of information in order to make a product or service appear to be ethical, sustainable, or have a lower environmental impact. Such practices create false impressions amongst consumers who believe they are purchasing environmentally friendly services or products; this practice undermines the consumers' power to hold corporations accountable for their impacts and adherence to global standards.

Some common examples of greenwashing in the construction industry include:

- A construction project claiming to be 'low carbon' without showing the baseline against which it is compared.
- A company markets 'greenness' whilst focusing on a limited range of its projects or products.
- False carbon-neutrality claims



## How does the law define and address greenwashing?

Regulatory Authorities such as the ACCC provide several principles for transparent environmental claims. They require environmental and sustainability claims to be truthful and based on reasonable grounds for making representations about future events. Furthermore, the organisation affirms business' responsibilities under the Australian Consumer Law not to make false or misleading claims, and advises that businesses should consider the claims it makes in many aspects, including information it chooses not to disclose, visual elements, colours, and logos.

Furthermore, Australia is a world leader in climate litigation. There are numerous common law precedents initiated by ASIC in relation to greenwashing by financial institutions. This method of addressing greenwashing is becoming an increasingly effective means of holding governments and corporations accountable to their environmental claims, and putting important principles and definitions such as 'greenwashing' into the common law. Some notable examples include:

- *ASIC v Mercer Superannuation* → This case defines the claims which constitute greenwashing, which involve 'false or misleading environmental or sustainability claims in order to make a company or its business appear more environmentally friendly, sustainable or ethical, particularly in order to induce consumers to purchase its products or services or to invest in the company'. Mercer was held liable for such conduct. This was ASIC's first successful greenwashing case which resulted in a landmark \$11.3 million penalty for Mercer, which they had agreed to pay out.
- *ASIC v Vanguard Investments* → This case encompassed a claim against Energy Australia regarding the misleading marketing of carbon neutral products. This case draws upon the definition of the term 'greenwashing' in scholarship, defining it as "the misleading and deceptive disclosures employed by financial institutions to entice environmentally conscious investors into purchasing their financial products that, in reality, fall short of meeting the expected Environmental, Social, and Governance (ESG) or green credentials." The consideration of this definition could influence how greenwashing is recognised in future litigation.
- *Australian Centre for Corporate Responsibility (ACCR) v Santos* (ongoing) → The Australian Centre for Corporate Responsibility (ACCR) claims that Santos intends to expand its natural gas operations based on undisclosed assumptions regarding the effectiveness of carbon capture and storage technology. The lawsuit alleges that these misrepresentations violate Australian consumer protection and corporations laws.

## **What are the implications for professionals in the construction industry?**

- Greenwashing is an increasingly prevalent contemporary issue which professionals in the building industry must be aware of.
- There has been increased litigation for instances of Greenwashing in the financial sector. Due to the strong link between construction activity and environmental issues, parties may seek to sue construction companies for greenwashing.
- Construction professionals should strive to be transparent with their environmental impacts to avoid claims of misleading or deceptive conduct.
- Builders must be mindful of how they present their environmental, social, and governance (ESG) credentials to the market. As stakeholders increasingly demand accountability, principals are likely to shift the risks linked to their ESG commitments onto builders whenever feasible.
- A diverse range of strategic litigants may emerge to drive change within the construction industry, including plaintiffs who have successfully argued that companies who have failed to mitigate climate change have adversely affected the wellbeing and rights of communities.
- Additionally, we can anticipate a growing intersection between climate change litigation and biodiversity claims. As awareness of environmental issues expands, legal actions may increasingly address how corporate practices impact not only climate but also ecosystems and biodiversity, leading to more comprehensive approaches to sustainability in the construction sector. This evolving landscape will require builders to adopt transparent practices and proactive strategies to manage risks associated with both climate change and social responsibility.

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