W+K UPDATE

ASIC's first greenwashing case ups the ante on ESG issues

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At a glance

- ASIC has issued its first greenwashing proceeding against Mercer Superannuation regarding allegedly misleading statements Mercer made on its website about the sustainable nature of some of Mercer's superannuation investment options.
- The proceeding confirms ASIC's broad focus on ESG enforcement, given the proceeding addresses claims about alcohol production and gambling industries, in addition to carbon-emitting industries.
- For insurers, this action highlights the breadth of ESG risk as one that extends beyond D&O insurance and exposures arising from capital raisings and ASX disclosures.

After months of sending strong signals, ASIC has made good on its promises and issued its first greenwashing proceeding. The proceeding is issued against Mercer Superannuation (Australia) Limited regarding allegedly misleading statements it has made about the sustainable nature of some of its superannuation investment options.

The allegations are centred on Mercer's statements on its website about its Sustainable Plus investment options offered to Mercer's members. That option, said ASIC, was marketed as suitable for members who are "deeply committed to sustainability" because they excluded investments in companies involved in carbon-intensive fossil fuels like thermal coal (and, incidentally, alcohol production and gambling).

ASIC alleges that despite the representations made about the product, the reality was that the Sustainable Plus option had investments in 15 companies involved in the extraction or sale of carbon-intensive fossil fuels, 15 companies involved in the production of alcohol, and 19 companies involved in gambling. ASIC also made a point of naming some of the companies in which investments were held.

While the particulars of the allegations remain scant (ASIC has chosen not to publish the court documents in its media release), there are several key takeaways arising from this development:

1) ASIC is serious about its greenwashing enforcement mandate.

To date, ASIC has issued a series of infringement notices which – while serious – have carried minimal financial consequences, with the quantum of the infringements ranging between $13,320 at the lowest end to $53,280 at the highest end. The proceeding marks a new stage in ASIC's approach to greenwashing enforcement.

2) It's not just about the offer documents.

ASIC alleges that the misleading statements are on Mercer's website, as distinct from the PDS and offer documents (and even annual reports, which have been the subject of scrutiny in private litigation). This means that entities need to ensure that all material (wherever published) has a proper basis and should assume that all representations will be scrutinised. Additionally, this action (and other enforcement activity) demonstrates that what is said and represented about an investment can matter more than the fact of the investment itself.

3) We might start seeing more of the "S" in ESG.

While ASIC has characterised its proceeding as a greenwashing case, it is telling that it extends the alleged misrepresentations to the investments in the alcohol production and gambling industries. While these industries have attracted less attention than carbon-emitting industries, it could represent a broader ESG mandate that might be pursued by ASIC in the future.

4) Will superannuation be ASIC's target in the short-term?

Superannuation has been at the centre of public and private litigation in the greenwashing space, and ASIC's proceeding against Mercer follows an infringement noticed issued last year against Diversa Trustees for statements on its website about how it applied its investment screens. ASIC's release also makes clear that it is using its expanded (post-Hayne) powers to target superannuation trustees. While it remains to be seen who ASIC will target next, the touchpoint that the superannuation industry has with the broader public means that superannuation trustees are likely to be an attractive target.

The implications for insurers

This proceeding highlights the breadth of ESG risk as one that extends beyond D&O insurance and exposures arising from capital raisings and ASX disclosures. This has implications for insurers regarding the types of products that will respond to ESG claims in circumstance where, so far, the ESG exposures are in the form of regulatory and declaratory proceedings as opposed to proceedings for damages.

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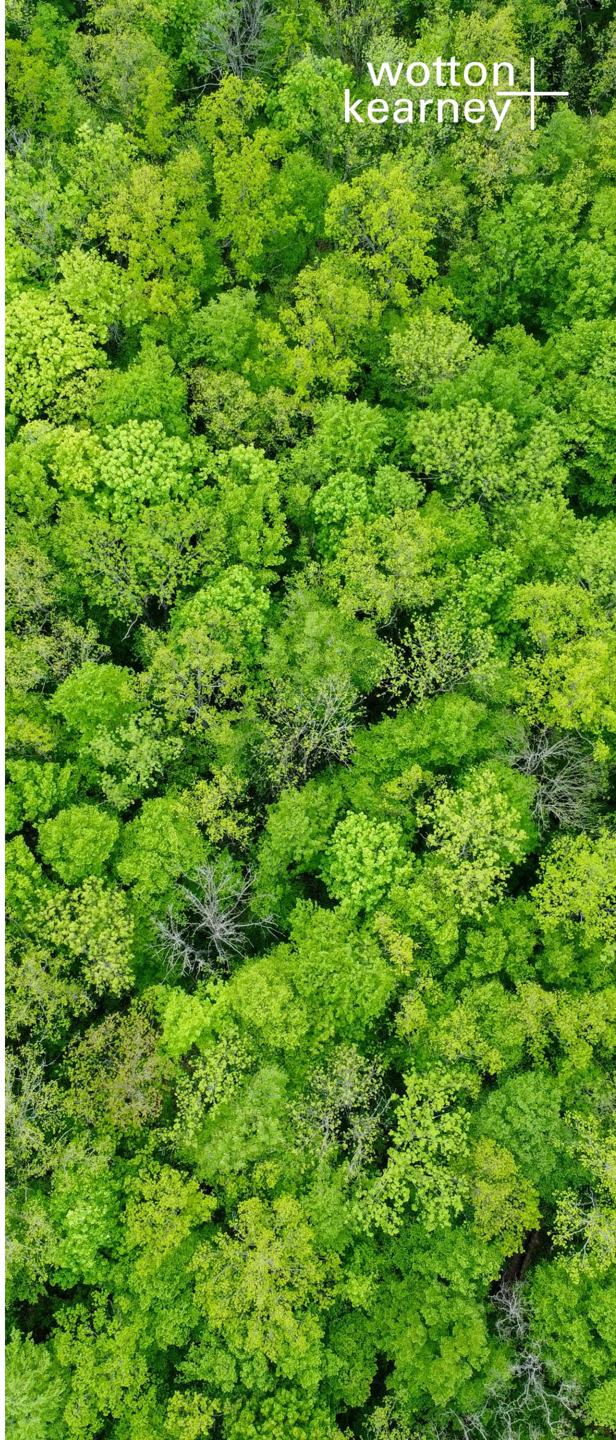

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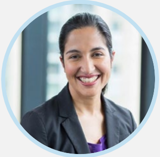

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