IS *'FREEDOM-WASHING'* THE NEW GREENWASHING, AND WHAT ARE ITS LEGAL CONSEQUENCES?

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Companies will often make representations about modern slavery as part of their environmental, social and governance (ESG) measures.

In this article, we consider whether potentially false or misleading claims about modern slavery (i.e., freedom-washing) may be further called out by Australian regulatory bodies.

'Freedom-washing' is a term that can be used to describe a false or misleading claim by an organisation about the positive work being done to identify, assess and combat its modern slavery risks.

Even an *understatement* or *nonstatement* of an organisation's modern slavery risks in its supply chains and operations may be considered 'freedom-washing' if it has the intent or effect to mislead the reader (for example, if the organisation's responses appear overall to be more positive than they would otherwise appear in that light).

'Freedom-washing' will not necessarily involve an overtly false action. In some circumstances, a claim may not be entirely accurate despite being partly accurate.

An organisation required to report under the *Modern Slavery Act 2018* (Cth) (Modern Slavery Act) needs to carefully consider the information it releases about its modern slavery risks and responses and whether it is potentially engaging in 'freedom-washing.'

Importantly for all current and future reporting organisations, the scrutiny continues to mount around the legislative framework combatting modern slavery (including in terms of reporting, offences and penalties).

This scrutiny is highlighted by the release of the following recent important reports and studies:

- The statutory report of the Modern Slavery Act (see here);
- The targeted review of Divisions 270 and 271 of the *Criminal Code 1995* (Cth) (see here); and
- The Modern Slavery Index (see here).

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AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC) / AUSTRALIAN CONSUMER LAW

As previously reported by K&L Gates, the ACCC has released long-anticipated guidance on environmental and sustainability claims (Guidance—see here), which sets out eight principles that businesses should follow when making environmental and sustainability claims and to comply with the Australian Consumer Law (ACL).

Although the Guidance was issued in the context of making environmental and sustainability claims, in our view, its eight principles can be applied equally to guide businesses in making 'modern slavery' claims without breaching the ACL. The Guidance encourages businesses to:

- Make accurate and truthful claims;
- Have evidence to back up claims;
- Not leave out or hide important information;
- Explain any conditions or qualifications on claims;
- Avoid broad and unqualified claims;
- Use clear and easy to understand language;
- Remember visual elements should not give a wrong impression; and
- Be direct and open.

The ACL contains a broad prohibition against businesses engaging in misleading or deceptive conduct and prohibits the making of false or misleading representations about specific aspects of goods or services. As a result, claims that overstate an organisation's modern slavery commitments generally, or inaccurately portray the working conditions within certain supply chains, may contravene the ACL.

We therefore recommend that organisations should also reflect on the Guidance when preparing a modern slavery statement or releasing information on modern slavery practices.

Breaches of the ACL incur very significant penalties. For corporations, the maximum pecuniary penalty *per breach* is the greater of:

- AU$50 million;
- Three times the value of the 'reasonably attributable' benefit obtained from the conduct; or
- If this benefit cannot be determined, 30% of the corporation's adjusted turnover during the breach turnover period (being a minimum of 12 months).

The ACCC will consider whether the following factors apply when determining whether to take enforcement action for a breach of the ACL:

- The conduct is of significant public interest or concern;
- The conduct results in substantial harm to consumers and detriment to business competitors;

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- Large businesses are making claims on a national scale;
- The conduct involves a significant new or emerging market issue, or compliance or enforcement action is likely to have an educative or deterrent effect; or
- ACCC action will help clarify aspects of the law, especially newer provisions of the ACL.

Furthermore, the ACCC will take into account the genuine efforts and appropriate steps that were taken by the business to verify the accuracy of any information they relied on.

But is there actually any appetite in the ACCC to seek to enforce the ACL with respect to 'modern slavery' claims?

To date, it has not given any indication that 'modern slavery' claims will be an enforcement priority. However, the ACCC has demonstrated a willingness to crack down on businesses that have sought to take advantage of increasingly environmentally and socially conscious consumers (e.g. greenwashing). Combined with growing scrutiny and broadening calls for tougher responses to be taken by government and business in combatting modern slavery, the possibility of ACCC action does appear to exist, if not now, then in the not too distant future.

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC) / FINANCIAL PRODUCTS AND DISCLOSURE OBLIGATIONS

General Provisions

The *Corporations Act 2001* (Cth) (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (Cth) both contain general prohibitions against companies:

- Making statements or circulating information that is false or misleading; or
- Engaging in dishonest, misleading or deceptive conduct in relation to a financial product or financial service.[1]

ASIC released Report 763 earlier in the year (read it here), which expanded on its approach to 'greenwashing' outlined in Information Sheet 271 (read it here). It detailed ASIC's recent interventions in response to growing claims from companies, managed funds and superannuation funds about their ESG credentials.

ASIC has expanded both its surveillance and enforcement activities in regards to 'greenwashing.' ASIC has pursued civil penalty proceedings and issued infringement notices to companies that are making statements that are false or misleading about ESG 'greenwashing' claims.

In light of these actions in the ESG space, we recommend companies be vigilant about the information they include in their modern slavery statements and be careful about the modern slavery disclosures they make in relation to a financial product or service.

Product Disclosure Statements

Under section 1013D(1)(l) of the Corporations Act, if a financial product has an investment component, its issuer must include in the product disclosure statement the extent to which labour standards or environmental, social or ethical considerations are taken into account in selecting, retaining or realising an investment. This is relevant in

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the modern slavery context where companies are releasing product disclosure statements that refer to modern slavery ESG considerations or make reference to previous market disclosures on modern slavery practices.

ASIC has undertaken reactive and proactive surveillance of product disclosure statements, advertisements, website and other market disclosures. ASIC is also progressing surveillance of the superannuation fund sector on ESG claims.

International Sustainability Standards Board (ISSB) Standards for Disclosure

In addition to ASIC's enforcement powers, the ISSB has introduced two new standards, IFRS S1 and S2. The standards are likely to be substantially aligned to the mandatory climate-related disclosures in Australia being prepared by the Australian Accounting Standards Board and the Treasury.

Relevant to modern slavery, the new standard IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information requires an entity to disclose information about its sustainability-related risks and opportunities in its general purpose financial reports (read it here).

To achieve the required fair presentation of sustainability-related financial information, an entity is required to provide a complete, neutral and accurate depiction of those sustainability-related risks and opportunities. Additionally, any material information must be disclosed. Information can be material where it omits, misstates or obscures information that could reasonably be expected to influence the decision making of readers of such reports.

'Sustainability-related risks and opportunities' are broadly defined as risks and opportunities that could reasonably be expected to affect an entity's cash flows or access to finance. Anything that impacts an entity's value chain will be an opportunity or risk to its cash flows. The entity's work force is an example of a sustainability-related risk and opportunity. Therefore, reporting entities may have to report modern slavery in their supply chains as a material risk to their value chain, particularly if they are operating in a sector where the risk of modern slavery is heightened (for example, renewable energy projects or garment manufacturing).

While compliance with the ISSB standards remains voluntary until codified under Australian law, it is expected that the standards will be widely adopted by companies internationally.

OTHER CONSEQUENCES OF FREEDOM-WASHING

There are many other potential legal consequences of freedom-washing. These include:

- Criminal liability under section 137.1 of the *Criminal Code Act 1995* (Cth): This offence applies where a person knowingly gives information that is false or misleading or omits any matter or thing without which the information is misleading, and the information is given to a Commonwealth entity;
- Breach of directors duties: If directors are not appropriately managing and disclosing the company's modern slavery risks, then they could be in breach of the duty to exercise skill, care and diligence;
- Requisition resolutions: Shareholders may requisition a resolution at the company's annual general meeting in regards to modern slavery and the company's supply chain practices; and
- Shareholder class action: Shareholders may start a class action if the company has breached continuous disclosure laws by not reporting a modern slavery issue correctly or accurately.

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INTRODUCTION OF PENALTIES UNDER THE MODERN SLAVERY ACT

The report on the statutory review of the Modern Slavery Act was released on 25 May 2023.

Its recommendations included that the Modern Slavery Act be amended to provide that it is an offence for a reporting entity to:

- Fail, without reasonable excuse, to give the minister a modern slavery statement within a reporting period for that entity;
- Give the minister a modern slavery statement that knowingly includes materially false information;
- Fail to comply with a request given by the minister to the entity to take specified remedial action to comply with the reporting requirements of the Modern Slavery Act; and
- Fail to have a due diligence system in place that meets the requirements set out in rules made under section 25 of the Modern Slavery Act.

The Australian Government has signaled it will now consider Professor John McMillan's review and will consult across government and with stakeholders in formulating its response to the recommendations. Companies operating business in Australia should watch this space carefully.

HOW CAN WE HELP?

K&L Gates regularly advises clients in relation to their modern slavery risks and appropriate responses. We will continue to monitor the legal landscape relevant to the risks associated with freedom-washing and we can advise you on your disclosure under your modern slavery statement.

If you are looking for guidance or support, our team would be happy to talk with you.

We acknowledge the contributions to this publication from our graduate Harrison Langsford.

FOOTNOTES

[1] See sections 1041E, 1041G and 1041H of the *Corporations Act 2001* (Cth), and sections 12DA and 12DB of the *Australian Securities and Investments Commission Act 2001* (Cth).

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