



Global Compact
Network Australia

Avoiding Greenwashing, Bluewashing and Other Forms of Corporate Whitewashing

Perspectives on risk and enforcement

Wednesday 5 July 2023, 12.00pm - 1.00pm (AEST) | Virtual

Welcome and Acknowledgement of Country



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Speakers



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Senior Specialist, ASIC



HUMAN RIGHTS



LABOUR



ENVIRONMENT



ANTI-CORRUPTION

Agenda

1. Welcome
2. Speaker Presentations
3. Q&A
4. Closing

Housekeeping



Q&A function: Submit your questions through the Q&A function throughout the webinar



Chat function: Comment on the content in the chat box throughout the session



Tech support: Message in the chat function or email secretariat@unglobalcompact.org.au



Corporate greenwashing landscape in Australia



Elisa de Wit

Partner, Norton Rose Fulbright
Australia



NORTON ROSE FULBRIGHT

*We acknowledge
the traditional
custodians of the
lands where we are
meeting.*

'Girawaa' © 2020 Jordan Ardler.

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What is Greenwashing?

- The deceptive practice employed by some organisations to create an **illusion of environmental responsibility**, potentially misleading consumers and undermining the true impact of their actions
- Disinformation disseminated by an organisation to as to present an **environmentally responsible public image**
- A practice of **misleading** the public about the environmental benefits of a product, service or organisation. It is often used as a **PR tactic** to make a company or product appear more **eco-friendly** than it really is
- Behaviour or activities that make people believe that a company is doing more to **protect the environment** than it really is



The “Sins of Greenwashing”

Hidden
trade-offs

Vagueness

Irrelevance

Fibbing or
deliberately
lying

No proof
claims

Worshipping
false labels

Lesser of
two evils

Greenwashing consequences

Market Fairness

Consumer confusion & mistrust

Climate inaction

FINANCIAL TIMES

'Net zero' plans by some of world's biggest companies accused of falling short

Analysis of corporate carbon-cutting pledges says most targets lack 'integrity'

the guardian

Oil firms' climate claims are greenwashing, study concludes

Most comprehensive scientific analysis to date finds words are not matched by actions

FINANCIAL REVIEW

Most Australians think banks lie about their green credentials

NEWS

Volkswagen chief apologises to shareholders over emissions scandal

Why does it matter?

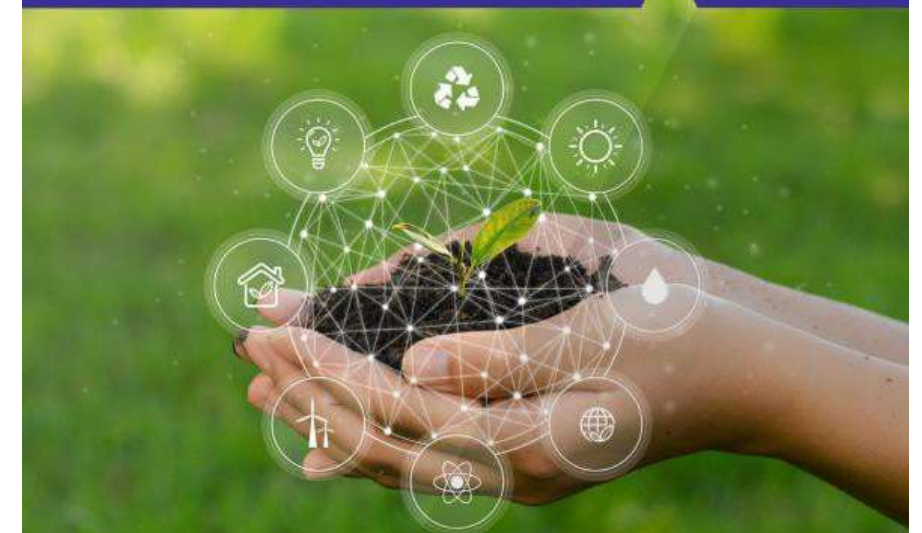
- ACCC's internet sweep found: 57% of the "green" claims made by 247 businesses on their websites were vague, unsubstantiated claims.



Greenwashing by businesses in Australia

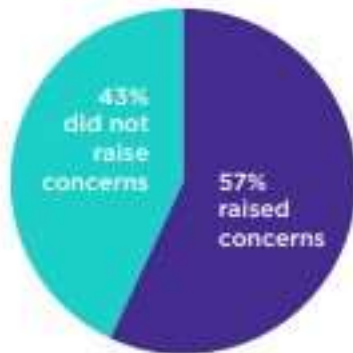
Findings of the ACCC's internet sweep of environmental claims

March 2023



KEY TAKEAWAYS

Overall proportion of businesses identified as making concerning claims



SOME BUSINESSES ARE:

- 1 using vague or unclear environmental claims
- 2 not providing sufficient evidence for their claims
- 3 setting environmental goals without clear plans for how these will be achieved
- 4 using third-party certifications and symbols in a confusing way.

- ASIC's *Recent Greenwashing Interventions* reported: 23 corrective disclosure outcomes ordered, 11 infringement notices issued, and 1 civil penalty proceeding commenced.

Source: Greenwashing by businesses in Australia: Findings of the ACCC's internet sweep of environmental claims, Australian Competition & Consumer Commission, March 2023; ASIC Report 763: Recent Greenwashing Interventions, May 2023

Current legal standards in Australia

- No current laws specifically addressing greenwashing
- Misleading and deceptive conduct
 - ss 1014E, 1041G and 1041H of the *Corporations Act 2001*
 - ss 12DA and 12DB *Australian Securities and Investments Commission Act 2001*
 - Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (also known as the Australian Consumer Law)
- Disclosure requirements
- ASIC Guidance
 - Information Sheet 271: How to avoid greenwashing when offering or promoting sustainability-related products
- Parliament of Australia Senate inquiry on greenwashing



International anti-greenwashing laws and standards

- Various anti-greenwashing laws have emerged such as:
 - The **UK's Green Claims Code** produced by the Competition and Market Authority;
 - **UK's Advertising Codes** produced by the Committee of Advertising Practice and the Broadcast Committee of Advertising Practice;
 - the **French Climate and Resilience Law** (also known as the French Consumer Code) that is set to take effect in 2023;
 - the European Union's proposed **Unfair Commercial Practices Directive** (also known as the UCPD Guidance); and
 - the **Proposal for EU Directive on Green Claims** (adopted in March 2023)



53% of green claims give vague, misleading or unfounded information



40% of claims have no supporting evidence



Half of all green labels offer weak or non-existent verification



There are 230 sustainability labels and 100 green energy labels in the EU, with vastly different levels of transparency

The greenhushing phenomenon

- “Going green and then going dark” phenomenon
- Side effect of the greenwashing crackdown is that companies are **disincentivised to demonstrate climate ambition over fear of greenwashing claims or public / regulatory scrutiny**
- South Pole’s report found:
 - while 67% of the 1200 companies surveyed have set science-based emissions reduction targets, 23% of the companies surveyed have decided not to publicise their efforts

“Greenhushing – in which companies stop all voluntary disclosure of ESG information – is just another form of greenwashing.”

– ASIC Chair, Joe Longo

Bluwashing and Blackwashing

- **Bluwashing** – The practice of companies signing the UN Global Compact (and other similar initiatives) to boost brand credibility while taking little or no substantive action with respect to these initiatives' objectives.
- **Blackwashing** – The practice of companies using racial equity issues in marketing etc. to boost brand credibility while taking little to no substantive action on such issues.



Some suggestions for best practice



Understand disclosure obligations of environmental, social or ethical considerations where a sustainability-related financial product has an investment component

- s 1013D(1)(l) of the *Corporations Act 2001*
- ASIC's Regulatory Guide 65: Section 1013DA disclosure guidelines



Prepare and verify data in accordance with the International Financial Reporting Standards S1 and S2 issued by the International Sustainability Standards Board



Apply the Voluntary Carbon Market Integrity Initiative Claims Code of Practice to ensure integrity and credibility of claims relating to the use of carbon credits



Seek expert legal support to adequately understand your organisation's compliance obligations amid upcoming regulatory changes, including mandatory climate-related financial disclosures and voluntary nature-related financial disclosures

ACCC

Greenwashing & the Australian Consumer Law



Rami Greiss

Executive General Manager, Consumer
and Fair Trading, ACCC

Outline

1. Role of the ACCC
2. Why greenwashing is a priority for a competition and consumer regulator
3. Results of the ACCC's 2022 Greenwashing Sweep
4. Guidance for business and next steps

The role of the ACCC

Independent Commonwealth statutory authority

National regulator administering and enforcing the *Competition and Consumer Act 2010* (CCA), which contains the *Australian Consumer Law* (ACL)

Shared responsibility for the *Australian Consumer Law* with the State and Territory fair trading and consumer protection authorities

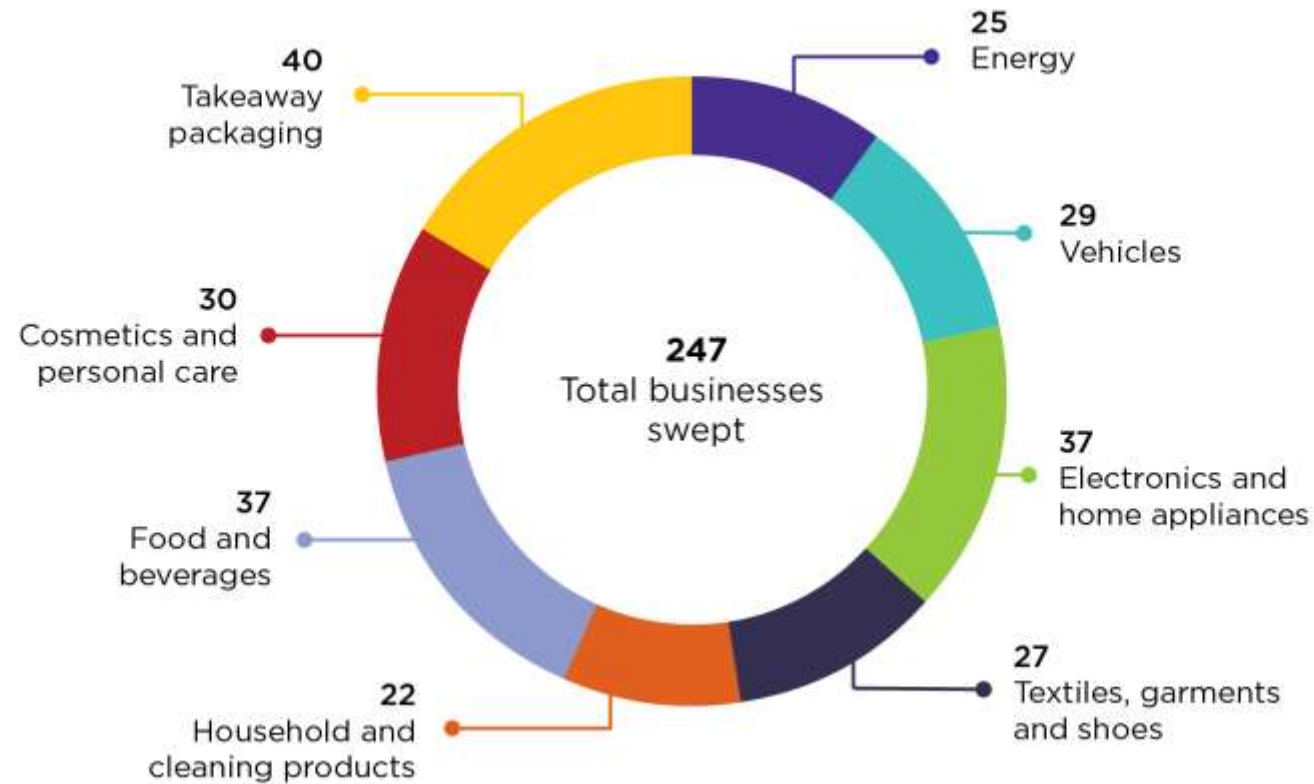
Sole responsibility for Australia's competition law enforcement

Why greenwashing is a priority for the ACCC

1. Changing consumer preferences
2. Information asymmetry
3. Gap between business and consumer understanding (about technical standards and manufacturing processes)
4. Premium pricing
5. Businesses at a competitive disadvantage

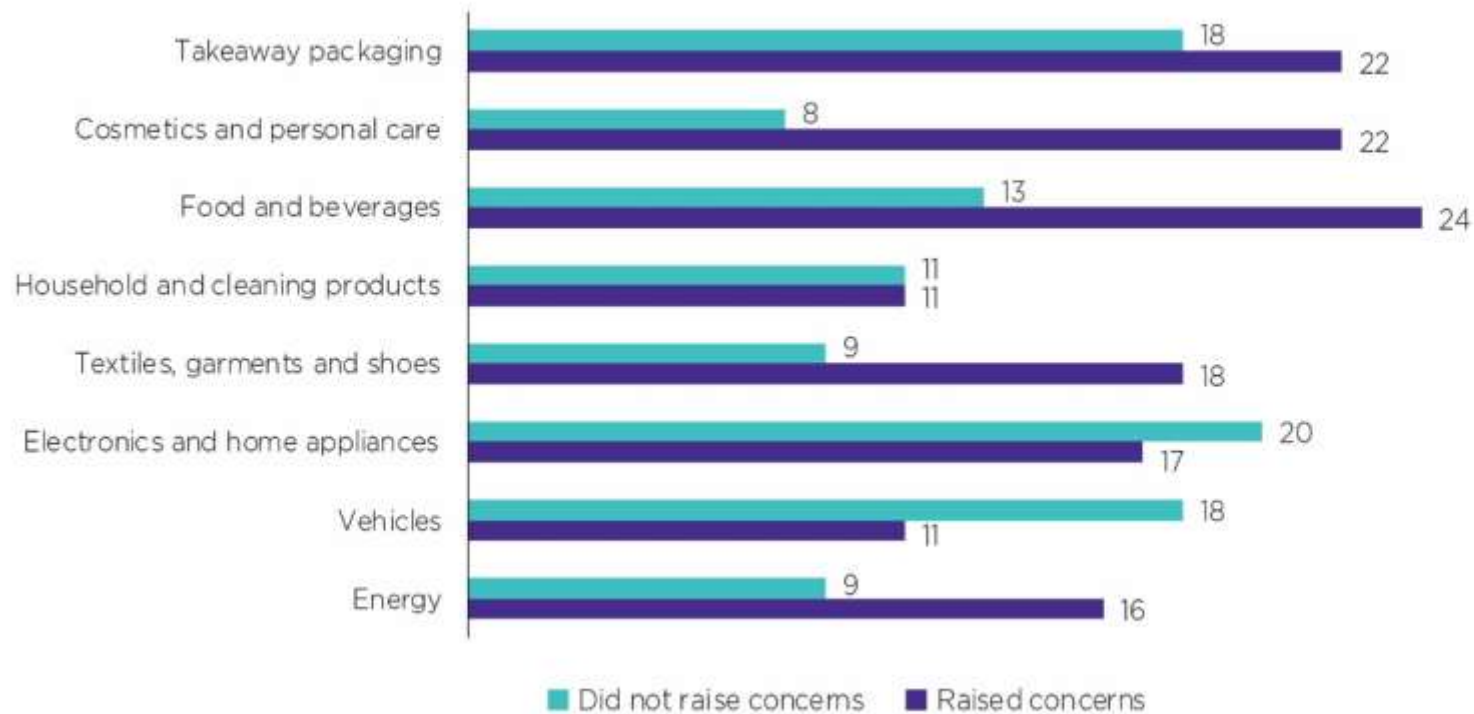
ACCC Sweep – high level results

BREAKDOWN OF BUSINESSES SWEEP



ACCC Sweep – High level results

NUMBER OF BUSINESSES MAKING CONCERNING CLAIMS BY SECTOR



ACCC Sweep – Key concerns



Vague & unqualified claims



Absolute claims



Lack of substantiating information



Comparison claims



Exaggerating benefits or omission of key information



Aspirational goals



Eco-labels and certification



Images and logos



Colours and imagery

guidance for business – broad principles

- Be accurate and truthful
- Back up your claims
- Don't leave out or hide important information
- Explain any conditions on your claims
- Avoid vague claims
- Use clear and direct language
- Be honest about your aspirations

Next steps – guidance for business

- The ACCC will shortly release draft guidance for business.
- Aims of the guidance:
 - Help businesses understand their obligations under the ACL when making environmental or sustainability claims
 - Outline examples of good practice, and ways that businesses can mitigate their risk of non-compliance
 - Encourage businesses to be share their environmental credentials where they have made genuine improvements

Next steps – consultation on guidance

- The ACCC will first release its guidance in draft form.
- The ACCC will consult on the draft guidance.
- We will be seeking views from all interested stakeholders, including businesses, industry bodies and consumer groups.
- We will have more detail about consultation in the near future.

ASIC

Greenwashing: Prevention & Enforcement



Jennifer Balding
Senior Specialist, ASIC



Agenda

1

Introduction

2

ASIC Infosheet 271 – *How to avoid Greenwashing*

3

ASIC's Enforcement Priority on *Greenwashing*

4

ASIC's *Greenwashing* enforcement work

- Mercer Superannuation
- Tlou Energy
- Black Mountain Energy

Introduction

Greenwashing: misrepresenting the extent to which a financial product or investment strategy is *environmentally friendly, sustainable or ethical*

Demand and growth in ESG investments → increased risk of greenwashing



Sustainable finance

Support market integrity through proactive supervision and enforcement of governance, transparency and disclosure standards in relation to sustainable finance

ASIC 2022-2026 Corporate Plan: our strategic priorities

- ASIC-issued regulatory guidance: **Information Sheet 271 How to Avoid Greenwashing** (June 2022)
- **ASIC enforcement action** against greenwashing (October 2022 and continuing)
- Other greenwashing actions – Australian competition regulator actions and private actions

Why is Greenwashing a concern?

- Greenwashing **distorts relevant information** that a current or prospective investor might require in order to make informed investment decisions.
- It can **erode investor confidence** in the market for sustainability-related products and poses a threat to a fair and efficient financial system – significant unfair competitive advantage
- **Increasing demand** for sustainability-related or ESG assets - projected to exceed US\$53 trillion by 2025 (more than 1/3rd of total – US\$140.5trn)
- The number of listed companies referencing **'net zero'** or **'carbon neutral'** in price sensitive ASX announcements **increased:**

50 in 2019 → 300 in 2021 → 420 in 2022 = ↑ 840%/3yrs



ASIC Info Sheet 271: *How to avoid greenwashing*

INFO 271 provides an overview of the applicable Australian legal obligations, and lists nine questions product issuers should consider when preparing communications and disclosures, including:

- *Is the sustainability-related financial product **true to label**?*
- *Has **vague sustainability terminology** been used?*
- *Are **headline claims** potentially misleading?*
- *Have the **incorporation of sustainability-related factors into investment decisions** and stewardship activities been clearly explained?*
- *Have **investment screening criteria** been clearly explained?*
- *Are stated sustainability-related targets **supported by reasonable grounds**?*

ASIC's Enforcement Priority on *Greenwashing*



- In February 2023 ASIC warned businesses **greenwashing** is part of a continuing focus on protecting consumers from financial harm - “up the ante” to move beyond fines and into court action:
 - Investigations already underway into super/retail investment funds and listed companies
 - More serious actions for egregious claims which are made to a broad section of the public

“There is enormous investor interest and much more significant sums are being proportionately invested in things that are best described as sustainable finance and investments funds”

– ASIC Deputy Chair Sarah Court



More Info: [23-026MR ASIC to expand enforcement focus areas in the coming year | ASIC](#); [AFR: The major areas ASIC is patrolling for offenders this year - 15/02/23](#)

ASIC Report 763: ASIC's recent greenwashing interventions

- Issued May 2023
- ASIC has expanded our surveillance and enforcement activities related to greenwashing
- Purpose of report is to provide transparency on the nature of the matters where we have recently intervened
- Examples of regulatory interventions:
 - Net zero statements and targets
 - Use of terms such as 'carbon neutral', 'clean' or 'green'
 - Fund labels
 - Scope and application of investment exclusions and screens

More Info: [Report REP 763 ASIC's recent greenwashing interventions](#)



ASIC's recent greenwashing interventions

Report 763 | May 2023

About this report

This report outlines ASIC regulatory interventions made between 1 July 2022 and 31 March 2023 in relation to greenwashing concerns.



ASIC's Greenwashing enforcement work

Energy company fined \$53,000 in ASIC's first greenwashing penalty

Greenwashing action against 'net-zero' claims

ASIC fines Tlou Energy \$53,280 in first action taken over corporate greenwashing

Diversa Trustees fined for Cruelty Free Super greenwashing

ASIC TAKES ACTION AGAINST ALLEGED 'GREENWASHING', WITH MORE TO COME

Black Mountain fined \$40,000 over net zero greenwashing as ASIC sharpens blades

Vanguard fined for 'misleading' ESG claims

'Should send shockwaves': ASIC sues Mercer Super in greenwashing crackdown



Mercer Superannuation (Australia) Ltd

- ASIC's first court action for greenwashing – commenced in February 2023

Mercer

Operator of large superannuation fund which offered various 'Sustainable Plus' investment options

Mercer's 'Sustainable Plus' Investment Options

- AUD\$170m under management
- 3,300 fund members

"For potential members that are deeply committed to sustainability, I encourage you to consider the Sustainable Plus options. Our Sustainable Plus options go further than the other options in their commitment to sustainable investment. First they exclude investments in certain sectors deemed not to be sustainable. These options will not invest in alcohol, gambling and carbon intensive fossil fuels like thermal coal."

Mercer marketing video



Mercer Superannuation (Australia) Ltd

ASIC alleges that various Sustainable Plus investment options had holdings in nearly 50 companies which should have been excluded from investment:

- **15 companies** involved in the extraction or sale of **carbon intensive fossil fuels**
 - including *AGL, BHP, Glencore PLC, Whitehaven Coal*
- **15 companies** involved in the **production of alcohol**
 - including *Budweiser Brewing Company APAC Ltd, Carlsberg AS, Heineken Holding NV, Treasury Wine Estates*
- **19 companies** involved in **gambling**
 - including *Aristocrat Leisure, Caesar's Entertainment Inc, Crown Resorts and Tabcorp Holdings*



Mercer Superannuation (Australia) Ltd

- **ASIC is seeking:**

- **Declarations** that Mercer contravened ss 12DB(1)(a) and 12DF(1) of the ASIC Act (relating to false or misleading representations)
- **Pecuniary penalties**
- **Adverse publicity orders** (requiring Mercer to publicise any contraventions found by the Court)

- Listed for case management hearing on 20 July 2023



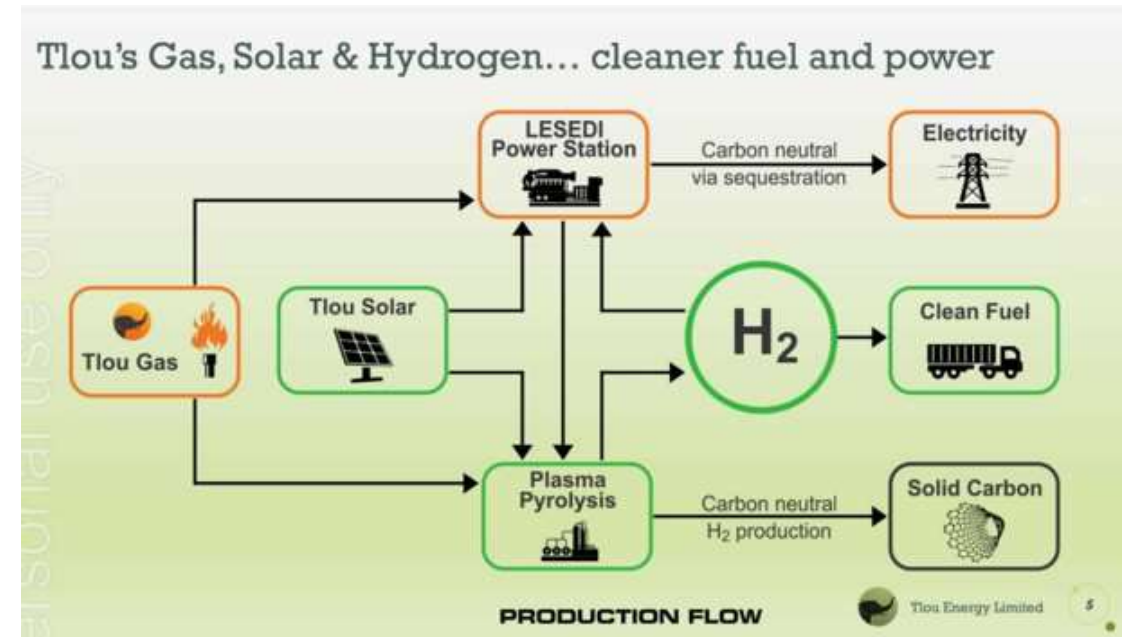
Tlou Energy Limited (ASX:TOU)

Tlou Energy:

- Small cap (\$16.8M @ Oct 2022) energy listed on ASX, UK AIM Exchange and Botswana Stock Exchange
- Lesedi Project – natural gas production in Botswana to generate electricity
- In October 2021 Tlou made a series of sustainability-related statements in ASX announcements which represented that:

Carbon-Neutral Representations

- The electricity generated at Tlou's power station would be **carbon neutral**
- Plans to achieve carbon neutrality through '**carbon sequestration**'





Tlou Energy - statements

Solar Power Representations

- Tlou had **environmental approval** and the **capability** to generate certain quantities of electricity from **solar power**

Low-Emissions and Clean Energy Representations

- Tlou was equally concerned with producing '**clean energy**' through the use of solar and hydrogen as it was developing its gas-to-power project
- It's Tlou's gas-to-power project would be '**low-emissions**' and was '*steadily progressing*'





TLOU – False or misleading representations

ASIC Infringement Notices

- On 25 October 2022, Tlou paid four **Infringement Notices** totalling \$53,280 issued by ASIC in relation to concerns about false or misleading statements
- ASIC was concerned that the representations were **false or misleading** including because:

Carbon Neutral Representations

- Tlou had not undertaken any:
 - substantive modelling of the **carbon dioxide emissions** that would be generated by the Lesedi Project required to be offset
 - studies in relation to whether it would be feasible to use **carbon sequestration** to offset carbon dioxide emissions
 - meaningful investigation as to whether it would be possible to obtain **carbon credits or offsets** for the Lesedi Project



TLOU – False or misleading representations

ASIC Infringement Notices (cont'd)

Solar Power Representations

- Tlou did not have **environmental approval** to construct a **solar farm** to generate the represented quantity of electricity
- Tlou did not plan to generate electricity from **solar power** until **after** selling electricity generated through the combustion of **coal bed methane**

Low-emission & Clean Energy Representations

- Tlou's primary asset was **predominantly a fossil fuels project**
- Tlou's plans to develop **clean energy** were at an **early stage** and not planned to be significantly advanced until after generating electricity from natural gas
- Tlou had not undertaken a **greenhouse gas assessment** of the emissions to be generated by the Lesedi project and thus had **no reasonable basis** to assert that their gas-to-power project would be '**low emissions**'



Black Mountain Energy Ltd (ASX:BME)

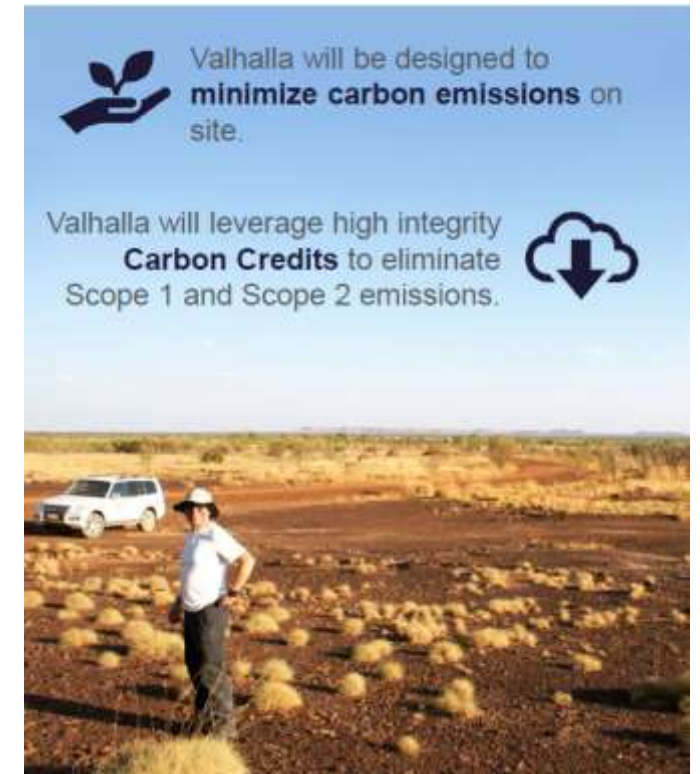
Black Mountain Energy:

- Small cap (\$10.2M @ Dec 2022) energy & resources company
- *Project Valhalla* – natural gas development in Canning Basin, WA

Net Zero Statements

BME issued statements in ASX announcements in December 2021, May 2022 and September 2022, which represented that:

- BME was creating a natural gas development project with '**net-zero carbon emissions**'
- Greenhouse gas emissions associated with Project Valhalla would be **net zero**





BME – False or misleading representations

ASIC Infringement Notices

- On 3 January 2023 BME paid three **Infringement Notices** totalling \$39,960 issued by ASIC in relation to concerns about false or misleading statements
- ASIC was concerned that the representations were **false or misleading** including because:
 - BME had **not progressed any specific works** related to its **net zero aim** and had **not allocated funding** for such works
 - BME had **not undertaken any specific modelling of carbon dioxide emissions** likely to be generated from Project Valhalla required to be offset to achieve carbon neutrality
 - BME's net zero emission target would **only apply** if BME was to progress **to production** and not intended to apply to exploratory or development activities
 - **No credible basis** for asserting natural gas it produced would be carbon neutral

Q & A



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Closing

Please fill in our post-event survey
with the QR code below:



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Network Australia