Michael Vrisakis	Hi everyone. I'm Michael Vrisakis, a Partner in the Herbert Smith Freehills Financial Services Team. Welcome to our podcast series called the FSR GPS. This series focuses on topical and emerging issues in financial services regulation which we think are the most strategic and important issues for our clients. Feel free to suggest topics you would like us to cover in the future but for now, we hope you enjoy today's episode.
Luke Hastings	Hello, I'm Luke Hastings, a Partner in our Contentious FSR Team and I'm going to handover to Mark Smyth.
Mark Smyth	Thanks very much, Luke. My name is Mark, I'm a Partner in the Disputes Group at HSF in Sydney. I have a particular focus on ESG issues, including defending novel ESG and climate related litigation. Some work in responding to enforcement investigations and assisting our clients to navigate some contentious issues across the ESG space, including greenwashing. So it's very exciting to be joining this podcast.
Sarah Webster	And so exciting to have you with us, Luke and Mark. I'm Sarah Webster, a Senior Associate in our disputes practice, with experience in regulatory investigations, enforcement, and class actions. In this episode, we're going to cast a spotlight on greenwashing and explore specifically how this very topical issue is affecting clients in the financial services sector. At Herbert Smith Freehills, we have noticed a marked increase in clients seeking advice on greenwashing and ESG issues across a variety of sectors including banking, asset management and superannuation. Mark, you've been covering ESG litigation trends in HSF's Third Wheel Podcast series. To kick us off, could you give us some background as to how and why greenwashing has become such a hot topic?
Mark Smyth	I have, Sarah, thank you very much. And thanks for the plug for the Third Wheel Podcast where we'd be delighted if you would tune into that as well. So as you say, Sarah, for some time now, ESG has been seen as an increasingly critical factor in investment decisions and that's really what has driven the focus on greenwashing as a consequence. So I think probably historically, there might have been a sense that the precursor to what we now describe as

	ESG, corporate social responsibility issues and the related commitments that companies made were maybe matters for marketing departments or really contextual matters to investment decisions, but now we're very much seeing that ESG is core to investment decisions. HSF recently put out a report on unlocking ESG investments where we surveyed many of our clients about the role of ESG in investment decisions and that very much was consistent with that theory and that I think over 90% of respondents said that ESG outcomes were important to their investment decisions and 58% went further and said that ESG was very important or critical to those decisions. So I think as a result of that, we've seen in the sort of greenwashing space a focus by the government and legislators, a focus by our enforcement regulators and then also a focus by our activist shareholders, all of whom want to ensure that commitments are framed accurately and consistently with what is reasonably achievable. But also that those ESG statements and future facing commitments are then followed through with. So in March 2023, the Federal Senate set up its inquiry into greenwashing by Australian companies in a number of industry, particularly focused on energy, vehicles, food and drink packaging, all of which raised ESG issues. That inquiry is due to report in December this year but there have been a number of submissions made to that. Secondly, both the ACCC and ASIC have had a very significant focus and enforcement priority on greenwashing. And in particular, the ACCC very recently released draft guidance on greenwashing which provides some very useful information to companies around both setting ESG related targets and making ESG related statements, but also issues to watch out for in terms of implementation of those ESG commitments. And then I think finally, businesses are also being subjected to an increasing volume, of course, of questions from investors and from activist shareholders about their ESG strategies. And so those are very much evident at AGMs but also in the context of capital raisings and other investment related matters.
Sarah Webster	And Luke, how has this issue unfolded in the financial services sector?
Luke Hastings	Thanks, Sarah. Well over the last few years we've seen rising demand and supply of financial products that incorporate some environmental, social and governance considerations in their decision-making and their investment strategies. Globally, assets under management that integrate ESG criteria reportedly grew from 30 to 35 trillion US dollars in the last 5 years and they now comprise over a third of global assets under management. So a very significant part of the financial services and financial product industry. These

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	are products that ASIC describes as sustainability related products. And they haven't just come into focus obviously in Australia but the regulators all around the world. But here in Australia, ASIC has said that sustainable finance and by default combatting greenwashing is today a whole of ASIC regulatory priority. And we've seen this in the stats, so in the nine months to March this year, ASIC has made 35 regulatory interventions against greenwashing and they include requiring corrective disclosures are made, issuing public infringement notices and at the more serious end, pursuing civil penalty proceedings.
Sarah Webster	It certainly feels like "greenwashing" is the word on every regulator's lips at the moment. Luke, could you walk us through what that term actually means and what kinds of legal issues are attracting regulatory attention in the financial services sector?
Luke Hastings	Certainly, Sarah. So ASIC made a number of speeches and sort of comments about this back in 2021. That in June 2022, they published an Information Sheet 271 entitled "How to avoid greenwashing when offering or promoting sustainability-related products". And in that information sheet they described greenwashing as the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical. And so having published that guidance they then began investigating the conduct of the super trustees and fund managers among others to see whether that guidance was being followed. But the key legal issue at the centre of each of their investigations has been the obligation not to engage in misleading or deceptive conduct and that's recorded in the Corporations Act and the ASIC Act insofar as financial services and financial products are concerned.
Sarah Webster	Thank you. So it sounds like the focus is very much on what are the representations that are being made about the product or service and to what extent are those accurate. As Luke foreshadowed, we have now had some examples of ASIC launching civil penalty proceedings in the Federal Court in relation to alleged greenwashing. Mark, whilst those cases are in their early stages, have they shed any light on the types of representations that can come under scrutiny?

Mark Smyth

Thanks, Sarah. Yes, they have and in terms of, I guess, ASIC’s enforcement strategy, as you said earlier, greenwashing was very much the word on every regulator’s lips for some time and there was a lot of talk, I guess to keep that metaphor going about greenwashing and its importance over the last few years from regulators, but I think last year we really saw action then from the regulators in terms of their enforcement strategy. What that meant initially was that there were a range of infringement notices issued by ASIC and those were really cases that aimed at identifying what ASIC considered to be clearer instances of infringements and proceeding immediately towards infringement notices. But as you say, in February of this year we had ASIC’s enforcement strategy changing further and its first civil penalty case commenced in court. And so the representations in that first ASIC case relate to the investment mandate of certain investment options and specifically statements within them to the effect that investments in certain industries and those included gambling and alcohol production would be excluded. And ASIC alleged that those investment options did in fact, over the relevant periods have investments in companies within those sectors. And so that was said to be in ASIC’s view an instance of mislabelling or an instance of a failure by the investment screening process. It’s been announced very recently in court on Friday that ASIC expects that the liability aspects of that proceeding will end up not being contested and that ASIC will move then with that entity towards submissions in relation to penalty.

Secondly, ASIC commenced in July of this year, so very recently, its second court-based greenwashing proceeding also in the Federal Court, and this time, against the responsible entity of a fund, which enabled the investors to invest in various bonds. The representations in that case are also focused on the ESG criteria that applied to the investments, and in particular to investments in certain companies being excluded on the basis that the company had significant business activities in specified industries, and in that case including in the fossil fuels industries.

Finally and most recently, ASIC has commenced its third greenwashing proceeding in just this month also seeking civil penalties, and this time against a superannuation fund alleging that it had exposed its members to investments that it had claimed on its website to limit or exclude. Again, the investments in this case allegedly relate to gambling, tobacco and the coal mining sector, but also interestingly investments in Russian entities following Russia’s invasion of Ukraine, and in ASIC’s views those matters are said to be inconsistent with the relevant disclosures that the fund had made.

Sarah Webster	So we've got three civil penalty proceedings addressing similar subject matter within about six months of each other. Luke, interested in your key takeaways from these early proceedings as well.
Luke Hastings	Sarah, it certainly illustrates the heightened regulatory focus from ASIC. It's really actively conducting investigations in this area and so you'd have to anticipate a number of those investigations and then proceed to enforcement and it's highly likely that we're going to see more cases coming through the pipeline. But one of the proceedings that Mark mentioned which was commenced against, or has been commenced against the responsible entity of a global bond fund, that particular fund was described as ethically conscious and the case has reportedly had a significant effect on global asset managers and raised questions around the extent to which they might be relying on certain indices to form the basis of their ESG investment options. And from the public records, so you can see the court documents that have being filed, the composition of the relevant fund appears to have been based on a global index which in turn purported, as Mark mentioned, to exclude securities based on research and screening processes. In particular, companies whose significant business activities involve fossil fuels, alcohol, tobacco, gambling, military weapons, etc. And the case has illuminated the risk of relying on those ESG screening processes that appear to have been applied to some third party's index.
Sarah Webster	Thank you. It sounds like the scope of investment exclusions and ESG screening criteria has really been the focus of the proceedings commenced to date. More broadly, ASIC released Report 763 in May 2023 on its recent greenwashing interventions, which also identified other matters that ASIC has considered, including net zero statements and targets, and claims of decarbonisation, terms like 'clean', 'green' or 'carbon neutral', and fund labels that include sustainability related terms. ASIC gives an example of a corrective disclosure outcome where the responsible entity of a managed fund deleted terms from a fund name that suggested it was seeking to transition from carbon. Luke, there is a pretty bright spotlight being cast upon these issues. What are some of the implications for our clients?
Luke Hastings	Well, Sarah. I guess as ever, it's important for our clients to be vigilant about the representations that they're making about their offerings. And those

	representations, you know, aren't just in the detailed legal documents, they can be commonly on websites, on social media, certainly in the product disclosure statements or other offer documents that are prepared and issued, but they can even appear in the name of the company itself or their products and services. I mentioned earlier one of the funds was described as the ethically conscious fund and that of course may carry with it a particular representation. So it's important for there to be really clear communication and alignment between the product development team, the marketing team, the investment team and of course, the legal teams, to ensure that the representations that are made not just but in marketing materials among others, accurately reflect the underlying nature of the investments and on an ongoing basis.
Sarah Webster	The last point you draw out is a really important one, it's certainly important not to set and forget. In June this year the Chair of ASIC gave a speech on ESG and mentioned that some companies in response to ASIC's focus on greenwashing might engage in "greenhushing". Mark, could you explain that phenomenon for our listeners?
Mark Smyth	Yeah, sure. "Greenhushing", it's a great term and it refers to the practice of being silent on ESG strategy or walking back statements in relation to the ESG. So for example, not disclosing or promoting net zero commitments or ESG policies. So in light of the significant focus from an enforcement and litigation perspective on greenwashing, the phenomenon suggests that some companies are seeking to limit their disclosures or to say less about ESG for fear of falling foul of misleading or deceptive conduct provisions of the kind that Luke has described. I think, as against this, of course and there was an interesting debate about this just last week at the AACD conference at which Sarah caught ASIC enforcement commissioner appeared on the panel of. On the one hand of course, it's important for any statements around ESG, particularly future commitments, to be accurate and there's no suggestion from ASIC or us or anyone else that companies should be out there making statements that they're not 100% comfortable standing behind. But on the other hand, there is a significant demand from investors and the general public to actually understand what companies' positions on ESG issues are. So it's not really the case that companies can draw back altogether in terms of their ESG statements. There's such a demand from the public and from investors to understand ESG positions and so really, the difficulty is ensuring that within all of the uncertainty that relates to long-term future commitments

in particular, that you are accurate that your testing and ensuring to the extent you can that you have reasonable grounds for statements. And ensuring you are as accurate as possible while at the same time still giving investors and the public the sort of information that they're very much demanding.

Sarah Webster	Thank you. I think that gives our listeners a helpful overview of the current greenwashing landscape, but this is of course only one facet of a broader trend, which is ESG concerns increasingly translating into legal action. Mark, could you walk us through some of the other bases of legal claims that you are starting to see?
Mark Smyth	Sure and I think, Sarah, that it's fair to say that greenwashing related proceedings have been probably the most significant set of developments in the ESG space and where, whether it'd be the regulators or whether it'd be the corporate shareholder activists who are bringing proceedings are seeing more, the most fertile ground. But I suppose the second bucket would be, within certain sectors, wherever there are significant climate change impacts of decisions, there will be increasingly a litigation risk. So particularly in the environment and planning context whenever there are major approvals that might have an emissions impact, we're seeing significant litigation attaching there. But a broader sort of relevance particularly within the financial services sector, we're seeing novel types of claims that are directed to either the entity or to the directors around their duties to manage ESG risks and in particular, we're seeing claims that are focused on managing climate change related risks, including risks of stranded assets and the like. It's fair to say that so far those novel claims have faced significant difficulties. So I mean, in Australia, there was a broad tort-based claim that alleged that in approving a coal mine extension the relevant minister, the minister for the environment owed a duty of care to young Australian children in considering the approval and that sort of a decision could have impacts for corporate entities as well but that was overturned on appeal in a very clear fashion. There is however a narrower case which is currently before the courts and which will be heard later this year which is the Pabai Pabai case in which Torres Strait Islander communities are bringing a challenge to the Commonwealth Government in respective of its alleged failure to manage

climate change related risks. So that is a narrower sort of claim than the earlier one that we saw in Sharma.

Finally, and most recently there was an unsuccessful claim against the directors of Shell in respect of managing climate change risks and in that case the activist group alleged that the Board had failed to take sufficiently active steps to set stringent climate change related targets and to manage energy transition. The court in that case very much was of the view that those were matters that involved serious questions of business judgment and the balancing of a whole range of different considerations and not in that case, for appropriate for the court to intervene in and second guess. But of course in the future there might be different and narrower, more targeted claims of that kind that emerge.

Sarah Webster

It will certainly be interesting to see what's on the horizon as far as the novel new claims go. Just adding to that, Luke, are there other issues or sources of ESG-related disputes that you're starting to see impact clients in the financial services sector, either in Australia or abroad?

Luke Hastings

Yes, Sarah, just very briefly. We're seeing activists in this space pursue financial institutions that supply capital to other companies to look at the ESG focus and raising questions around the scope of their due diligence procedures, particularly around the intended use of capital that they are supplying to borrowers and in particular, will it be used in a way that raises any ESG concerns or otherwise cuts across broader environmental principles that they might, that the bank might have signed up to globally. So banks are coming under increasing public pressure to thoroughly investigate the use of funds and even in some circumstances, to refuse to finance some endeavours. And as practically, that has the consequence that banks aren't just being scrutinised for their own activity but also for the activity of their borrower clients.

Sarah Webster

Thank you, Luke. Another topic which we have not covered today is ASIC's focus on governance in relation to ESG issues and its scrutiny of climate risk disclosures. HSF has another podcast series, called 'Reporting for Duties: ESG Reporting in Australia', and so listeners can also tune into some really interesting episodes there on issues such as the new climate reporting regime.

	That’s about all we have time for today. Thank you for tuning in to another episode of the FSR GPS Podcast Series, and thank you Luke and Mark, for sharing your insights with us.
Luke Hastings	Our pleasure, thank you.
Mark Smyth	Thank you, Sarah. Thanks for tuning in.

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