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# Staying clean while being green

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Grow | Protect | Operate | Finance



# Today's agenda

- What is greenwashing
- The regulatory landscape in New Zealand
- What's going on overseas
- A few examples from the market
- Key watch outs
- Strategies for in-house legal teams
- Best practices and how to avoid a crisis
- Questions



# What is greenwashing?



- Marketing that overplays or misleads consumers about the environmental impacts of a business/product/service/fund.
- Eco-conscious products & services attract higher sales and a price premium.
- Consumers don't have the time or resources to fact check claims, so can easily be misled.
- What are the risks?

# What is a green claim

- Buzzwords like *green, eco-friendly, natural, organic*
- Comparative claims – *greener, friendlier, better for the planet*
- Disposal claims – *recyclable, compostable, biodegradable*
- Production claims – *made with renewable energy, carbon neutral, farm to fork*
- Content claims – *bio plastic, made with corn starch, sustainable funds, from plants not plastic*
- Overall impression - imagery like trees, oceans, the colour green
- Brand names – *Plantly, GoGreen, Recycup*



# What are the legal risks to businesses?

## Fair Trading Act 1986

Claims must be:

- True
- Backed up ie substantiated when made (not later)

*Will a substantial number of the relevant purchasing public be misled or deceived by the claim?*

*What would a “reasonable consumer” understand the claim to mean?*

Companies can be fined up to \$600,000 and individuals up to \$200,000 per breach.



# Advertising Standards



- Advertising Standards Code applies to all marketing
- Environmental claims under ASC rules 1(i) and 2(h):

*Advertisements must not depict or encourage environmental damage or degradation.*

*Environmental claims must be accurate and able to be substantiated by evidence that reflects scientific and technological developments.*

# More regulation seems inevitable

- Consumer NZ is calling for specific legislation to tackle greenwashing.
- 2021 review by the FMA of IFPs ie funds that incorporate non-financial factors, like ESG.
- Result - real concerns about greenwashing.
- In the meantime, we'll likely get piecemeal guidance (e.g. Commerce Commission on labelling of plastics).



PREMIUM

## Capital Markets: Paul Gregory - Marketing without substance won't wash

By Paul Gregory  
25 May, 2023 04:59 AM · 5 mins to read

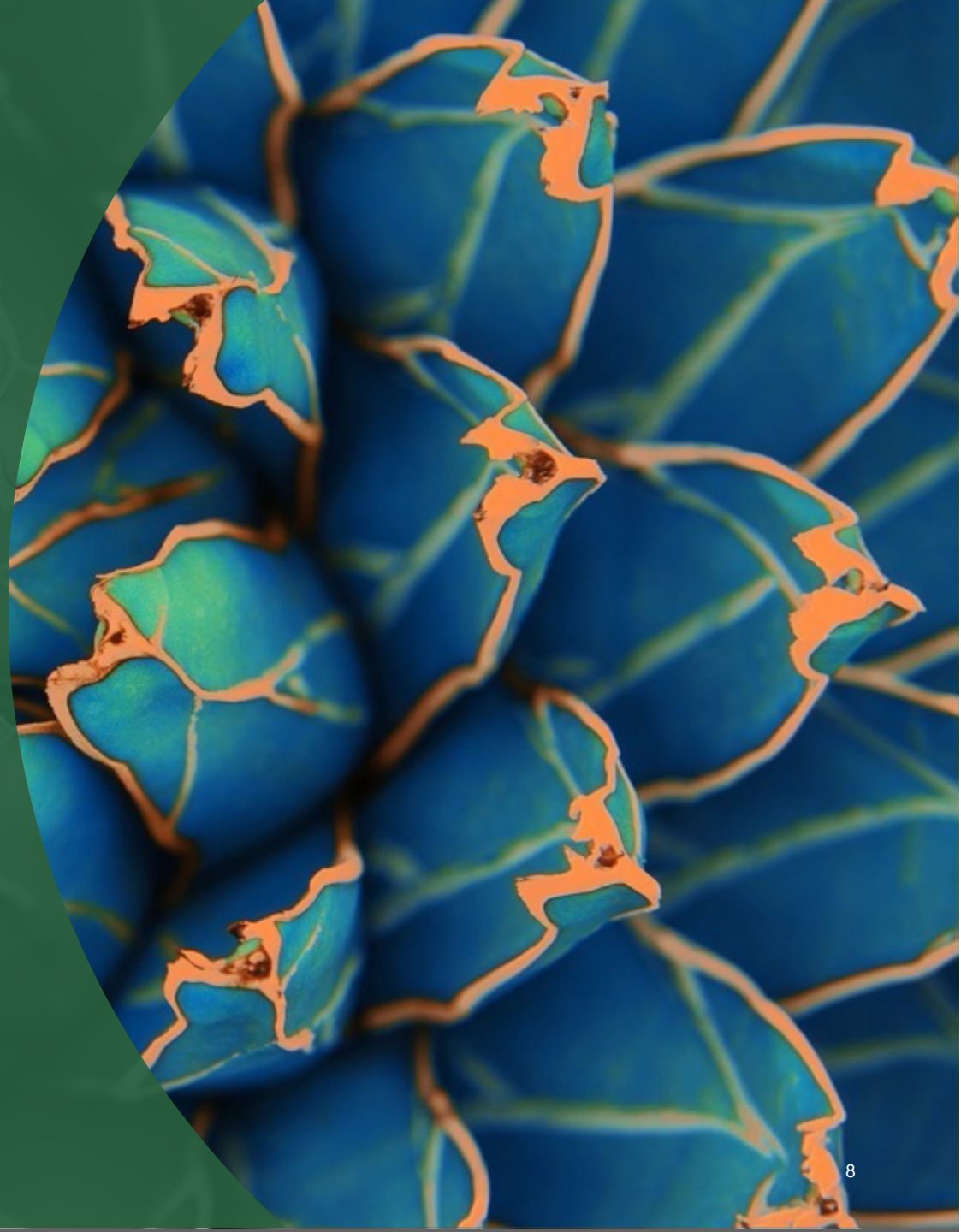
Save | Share



Paul Gregory. Photo / Supplied

The image shows a screenshot of a news article. At the top right, there is a 'PREMIUM' badge. The main headline is 'Capital Markets: Paul Gregory - Marketing without substance won't wash'. Below the headline, it says 'By Paul Gregory' and '25 May, 2023 04:59 AM · 5 mins to read'. There are 'Save' and 'Share' icons. The main image is a portrait of Paul Gregory, a man with glasses, wearing a dark suit, light blue shirt, and dark tie. Below the image, it says 'Paul Gregory. Photo / Supplied'.

**What is going on in the  
rest of the world?**







# Australia

- Over \$150,000 in infringement notices issued since October 2022, and commencement of first ASIC civil action against Mercer.
- ACCC investigating numerous businesses for greenwashing after a recent market sweep:

*"Already, we have several active investigations underway across the packaging, consumer goods, food manufacturing and medical devices sectors for alleged misleading environmental claims and these may grow, as we continue to conduct more targeted assessments into businesses and claims identified through the sweep. We will take enforcement action where it is appropriate to do so as it is critical that consumer trust in green claims is not undermined."*  
(March 2023)

*"Greenwashing (put simply) is for ASIC ... a corrosive agent to market integrity and thus to fair, efficient and informed markets."*

(ASIC Deputy Chair Karen Chester, May 2023)

# EU Green Claims Directive

- Currently just a proposal.
- Part of regulatory framework for European Green Deal.
- Applies to products available on the EU market (including those made available on the EU market by non-EU businesses) and to environmental claims of traders that provide activities in EU market.
- Addresses substantiation and communication of voluntary environmental claims.
- Traders must carry out an assessment to substantiate explicit environmental claims.
- Specific rules when making comparative environmental claims and about communicating those claims.
- Requires a certificate of conformity from an independent, accredited third party "verifier" before making any environmental claim.



# United States of America

- Class action litigation for greenwashing is busy.
- Hot spots for litigation are the states of New York, California and Illinois (plaintiffs follow the \$\$\$).
- Main regulators are FTC (advertising) and FDA (food or cosmetics) EPA (all things environmental) SEC (securities).
- But in the USA most activity is consumer class action enforcement.
- More class actions based on vaguer claims and on green reputations not just specific claims about products/services.
- Class actions = cost of doing business in the USA.

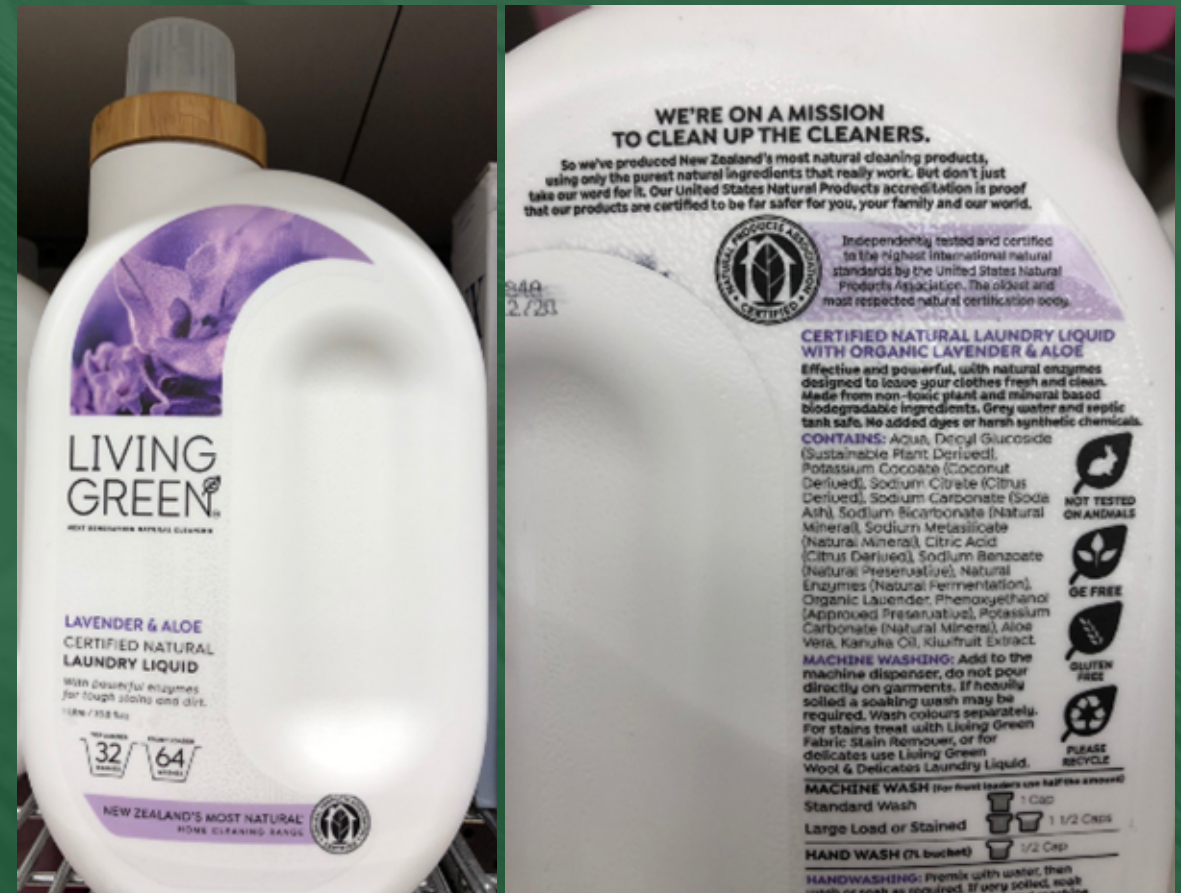


An aerial photograph of a dense forest. The top half of the image shows lush green trees, while the bottom half shows trees with yellow and orange autumn foliage. A large, dark green, semi-transparent shape with a pointed right edge is overlaid on the left side of the image, containing the text.

# Examples from the market

# Laundry products

- Strong claims about naturalness and superiority
- Strong reliance on USNPA certification
- Promotion of the certifier itself
- 'Clean up the cleaners' - comparative or puffery?



# Bin bags

**Plant-ly**  
FROM THE EARTH.  
FOR THE EARTH.

**16 HOME COMPOSTABLE  
BIN LINERS**

36L Tie Top  
L 60x71cm

100% CORN STARCH  
100% COMPOSTABLE  
100% VEGAN  
WATER BASED INK

**FOR**  
For every 1 roll, 1 tree is planted in an area hit hardest by climate change providing living wages to locals.

**Certified Home Compostable!**

BIN LINER CONTAINS PBAT - COMPOST IT!  
WRAP FROM RECYCLED PAPER - RECYCLE IT!

PLANT-LY.COM

9 421905 369015 >

**Plant-ly**  
FROM THE EARTH.  
FOR THE EARTH.

**16 COMPOSTABLE  
BIN LINERS**

36L Tie Top  
L 60x71cm

100% CORN STARCH  
100% COMPOSTABLE  
100% PETROLEUM FREE  
100% VEGAN  
WATER BASED INK

**FOR**  
For every 1 roll, 1 tree is planted in an area hit hardest by climate change providing a living wage to locals.

**Earth Friendly,  
Petroleum Free!**

BIN LINERS MADE FROM PLANTS - COMPOST IT!  
WRAP FROM RECYCLED PAPER - RECYCLE IT!

PLANT-LY.COM

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# Air travel

A true claim, but a wider message?

Compostability implied?

Is the overall message false?



*"We believe they are better than other single-use options..."*

# Key watch outs

- Lack of legal oversight of marketing
- No formal claims review process
- No evidence bank of substantiating materials
- Over reliance on:
  - Certifications
  - Supplier statements
- Out of touch with consumer/public perception
- Too close to the content
- Too focussed on improvement as opposed to outcome
- Lack of agility when using comparative/superiority claims







# **Strategies for in-house legal teams**

# What should be checked?

Overall brand &  
product  
positioning

Trade marks

Website pages

Signage

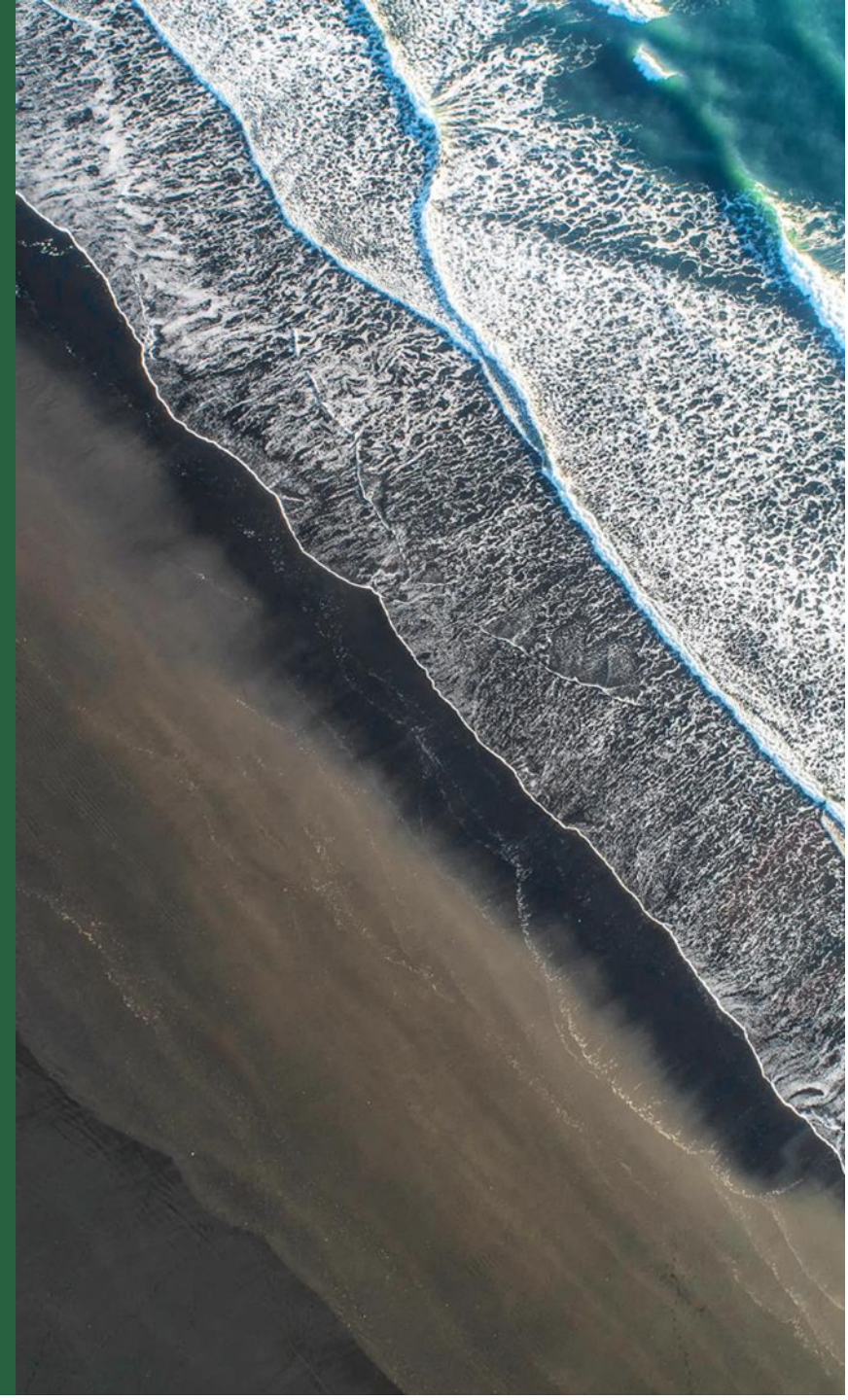
Client  
communications  
& email  
marketing

Advertising &  
social media  
assets

Website,  
company  
& brand  
descriptions

Product labels &  
packaging

Point-of-sale



# One approach to assessing potential exposure



## **Examples of what might be considered 'best practice'**

Compliance guidelines

Evidence bank

Supplier audit rights

Policies and procedures

Contractual protections

Marketing checklist

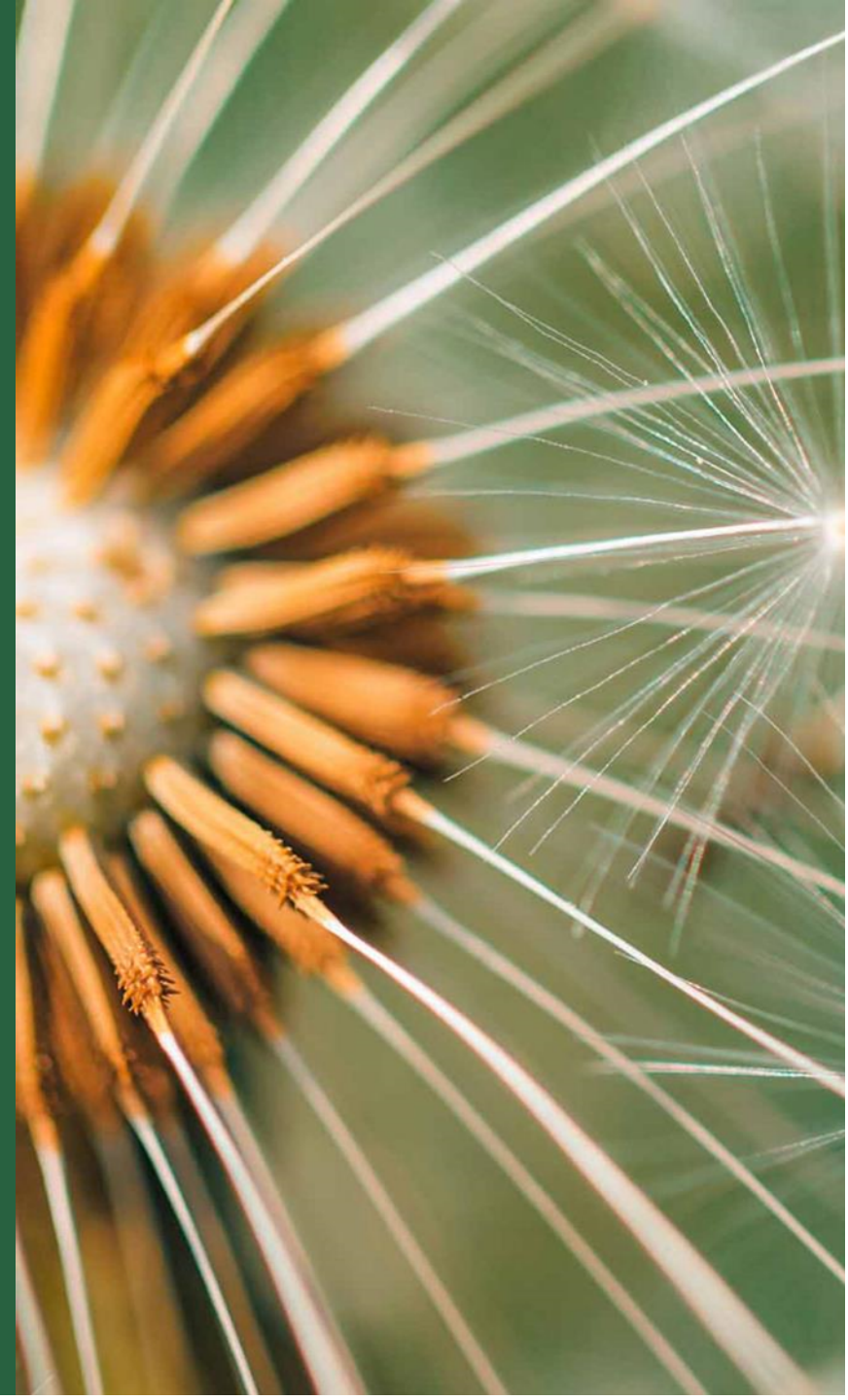
Point of responsibility

Brand questionnaire

Regular review

# Top tips to avoid greenwashing

- Understand what's important to your stakeholders – in an era of ESG fatigue this is key.
- Be detailed and transparent – use facts and figures not sweeping statements.
- Demonstrate action and progress against your ESG targets.
- Ensure your ESG strategy is authentic and right for your organisation.
- Don't try to cover up shortcomings – be honest where things haven't gone well.
- Be risk conscious in your communications but don't 'greenhush.'



# Avoiding a greenwashing crisis

	Preparatory activities
✓	Assess ESG communications to identify vulnerabilities and develop appropriate risk mitigation and stakeholder engagement strategies.
✓	Undertake horizon-scanning and analysis of policy and regulatory changes related to ESG and greenwashing.
✓	Analyze societal expectations around ESG practices and relevant issues.
✓	Coordinate with comms team on ESG program messaging and content for internal and external audiences.
✓	Undertake scenario planning, based on ESG vulnerability assessments, with actionable communications-based recommendations aligned with legal objectives.
✓	Build crisis management infrastructure should the organisation be investigated/targeted.
✓	Socialize plan with management and functional crisis managers.
✓	Conduct drills and simulations to test and maintain readiness.
✓	Repeat whole process on a regular basis.



**Questions?**



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## ABOUT JENNI

Jenni leads the IP team at Dentons Kensington Swan, working from the Auckland office. She has over 25 years' experience supporting some of the world's leading IP owners in and New Zealand and the United Kingdom, helping them develop, protect and commercialise their valuable IP assets.

Jenni was previously a partner in London at another global law firm and returned home 15 years ago to raise her baby twins as Kiwis. Jenni brings a truly global perspective to her work and advises a wide range of New Zealand businesses on developing and establishing their IP overseas and how they can take their products and services to the world. Jenni also helps businesses with a broad range of IP issues including developing and enforcing trade marks and designs, copyright, advertising and fair trading, patents, domain names, passing off and confidential information. Jenni has a particular interest in greenwashing and has done a lot of work in this area, especially with food & beverage businesses and other fast moving consumer goods companies.

Jenni is recognised by Chambers Asia Pacific, Legal 500, World Trademark Review and Managing Intellectual Property as one of New Zealand's leading IP lawyers. She is supported by a fabulous team of women and couldn't do it without them.

## ABOUT DENTONS KENSINGTON SWAN

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