Representation, whistleblowers and sustainability disclosure

MODULE 4 | PART C.2 | STUDENT COMPANION

Use the three diagrams to organise your notes, then try the practice questions before you look at the worked answers. Each answer space is for handwriting or annotation.

1. Who speaks for shareholders?

Outsider model
Ownership spread across many small shareholders with little real control, so markets and disclosure do the disciplining

Insider model
Power sits with large holders, families, banks or partner companies; common in parts of Europe and Asia

General meetings
Every shareholder can attend, question the board and vote, including on pay

Nominee directors
Placed by a major shareholder, but owe duties to the company as a whole

Investor advocates
Shareholder associations speak for retail investors, and may vote

Proxy advisers
Research companies and recommend how big investors should vote

Institutional investors
Super funds and asset managers with large votes, guided by stewardship codes

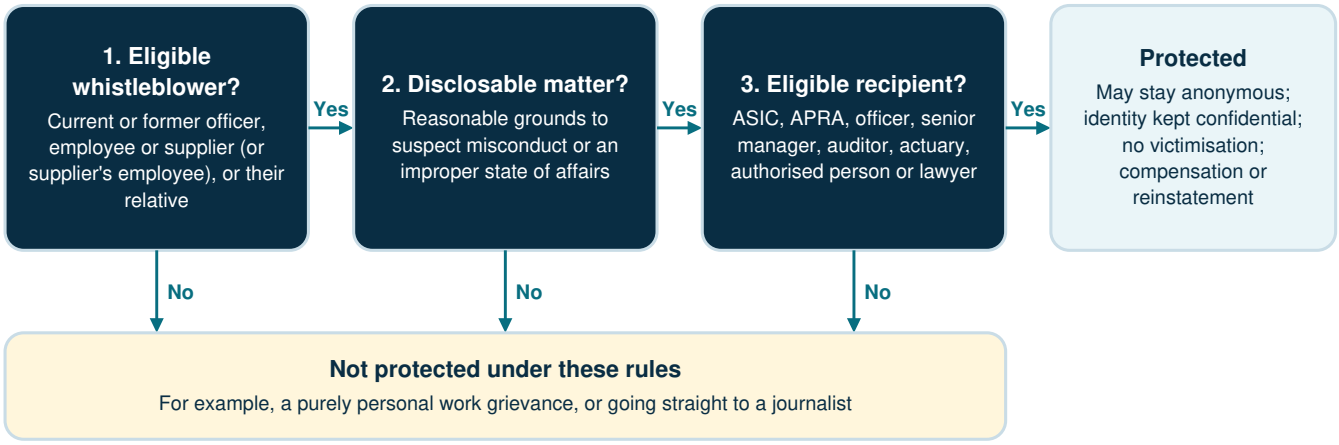
Engine No. 1 v ExxonMobil (2021)
A fund holding about 0.02% won 3 of 12 board seats because giant index funds and proxy advisers backed it

Core shareholder rights

- Attend general meetings and vote, including on executive pay.
- Receive relevant information about the company.
- Buy and sell shares freely (listed companies).
- Not be treated oppressively. In Australia, the oppression remedy lets a court step in.
- Protect their property interests in the shares.

Nominee directors. A nominee may join the board at a major shareholder's request, but once appointed they owe their duties to the company as a whole. They are unlikely to count as independent and must manage the conflict between the company's interests and their appointor's wishes.

2. Whistleblower protection: the three-step check



A whistleblower policy is compulsory for

Every public company and large proprietary company, plus every corporate trustee of a registrable super fund

Element	What the Corporations Act requires (rules strengthened from 1 July 2019)
Who	Current or former officers, employees and suppliers (including a supplier's employees), and their relatives, dependants or spouses.
What	Reasonable grounds to suspect misconduct or an improper state of affairs relating to the company. Protection applies even if the suspicion proves wrong. Personal work-related grievances are generally excluded.
To whom	ASIC, APRA, an officer or senior manager, the auditor or actuary, a person authorised to receive disclosures, or a lawyer (for advice). A journalist or parliamentarian only through a public interest or emergency disclosure, after strict conditions are met.
Protections	Anonymity allowed; identity kept confidential; protection from detriment; compensation, reinstatement and heavy penalties for anyone who victimises a whistleblower.
Policy	Every public company and large proprietary company, and every corporate trustee of a registrable superannuation entity, must have a whistleblower policy (from 1 January 2020).

3. Sustainability disclosure: honest, hushed or greenwashed?

Credible disclosure (IFRS S1 and S2)
Sustainability risks and opportunities that could affect cash flows, funding or the cost of capital | scenario analysis | transition risks and physical risks

Greenwashing
Overstating how green a company or product really is

Greenhushing
Going quiet on goals and data so no one can hold you to them

Regulatory arbitrage
Moving activity or reporting to wherever the rules are weakest

ASIC v Vanguard Investments Australia (September 2024)
$12.9 million penalty: an 'ethical' bond fund claimed fossil fuel screening, yet at times about 74% of its securities by market value had not been researched or screened as claimed

IFRS S1 sets general requirements for sustainability-related financial disclosures and IFRS S2 deals with climate. Both apply to annual reporting periods starting from 1 January 2024 in jurisdictions that adopt them. Australia began phasing in mandatory climate-related financial reporting from 1 January 2025, starting with its largest entities.

Real example. In September 2024 the Federal Court ordered Vanguard Investments Australia to pay a $12.9 million penalty, then the largest for greenwashing in Australia. Vanguard had said an ethical bond fund screened out issuers with significant fossil fuel activities, but at times about 74% of the fund's securities by market value had not been researched or screened against those criteria.

Real examples: Engine No. 1 v ExxonMobil (ExxonMobil Form 8-K filings, May-June 2021); Boohoo independent review by Alison Levitt QC (September 2020); Senate Economics References Committee inquiry into the performance of ASIC (2014); ASIC media release 24-213MR (September 2024).

Practice questions

MODULE 4 | PART C.2 | TRY THESE BEFORE THE WORKED ANSWERS

Question 1 - the nominee director

Imagine **Kestrel Ridge Energy Ltd**, a listed company. Its largest shareholder, **Corvus Capital**, holds 22% of the shares and arranged for **Daniel Osei** to join the board as its nominee. The board is about to consider a capital raising that would dilute Corvus unless it buys more shares. Before the meeting, Corvus asks Daniel to email it the confidential board papers and to vote whichever way Corvus prefers. (a) To whom does Daniel owe his duties? (b) May he send Corvus the board papers? (c) How should he approach the vote?

Question 2 - who is a protected whistleblower?

Imagine **Bellweather Freight Pty Ltd**, a large proprietary company. Three people want to raise concerns. **Mai**, who left the finance team last year, contacts ASIC because she suspects the chief financial officer of inflating revenue figures. **Tom**, a current warehouse supervisor, believes safety inspection records are being falsified and goes straight to a journalist without telling anyone else first. **Luca**, a driver, tells the human resources manager that his own roster change was unfair to him. For each person, decide whether the Corporations Act whistleblower protections are likely to apply, and explain why.

Question 3 - honest, hushed or greenwashed?

Imagine the **Kowari Ethical Growth Fund**, run by Kowari Investments Ltd. Its website says: 'Fossil-fuel free - every holding screened by our ESG team.' Its disclosure document says it excludes companies earning more than 10% of revenue from fossil fuels. An internal review finds that 18% of the fund's holdings by value were never screened, and that two holdings earn most of their revenue from gas pipelines. Last year Kowari also deleted its net zero target from its annual report without explanation and stopped publishing emissions data. (a) Is the website claim likely to be misleading? (b) What does the deleted target suggest? (c) What should Kowari's board do now?

Worked answers

MODULE 4 | PART C.2 | WORKED ANSWERS - ATTEMPT THE QUESTIONS FIRST

Question 1 - Kestrel Ridge Energy Ltd

- **(a)** To Kestrel Ridge as a whole. Being a nominee does not change a director's duties: Daniel must act honestly, in the company's interests and for proper purposes, using his own judgement. He may weigh Corvus's views only where they line up with the company's interests.
- **(b)** Not without the board's approval. Board papers are confidential company information, and a director must not misuse information gained as a director. Papers about a capital raising are also likely to be price-sensitive inside information, so passing them on could amount to tipping. Any information-sharing arrangement with an appointing shareholder should be authorised by the board and protected by confidentiality and insider trading safeguards.
- **(c)** He must decide what is best for the company, not take instructions. He should disclose the conflict between his link to Corvus and his duty to the company, follow the board's conflict procedures, and step out of the discussion and vote if the conflict is significant. The board should not treat him as independent.

Question 2 - Bellweather Freight Pty Ltd

Person	Protected?	Why
Mai	Yes	A former employee is an eligible whistleblower; suspected false revenue figures give reasonable grounds to suspect misconduct; ASIC is an eligible recipient. She is protected even if she turns out to be wrong, and she may stay anonymous.
Tom	Not for the journalist disclosure	A journalist can receive a protected disclosure only as a public interest or emergency disclosure, which first requires a disclosure to a regulator and other strict conditions. His concern is likely to be a disclosable matter, so he should first report it to an eligible recipient, such as the auditor, a senior manager, the company's whistleblower officer or ASIC.
Luca	Generally no	A purely personal work-related grievance is excluded. It belongs in HR or workplace relations channels, unless it also involves a disclosable matter or victimisation for whistleblowing.

Question 3 - Kowari Ethical Growth Fund

- **(a)** Very likely. The claim is absolute ('every holding screened', 'fossil-fuel free'), yet 18% of holdings were never screened and two holdings fail the fund's own 10% revenue test. Because the ethical screen is the fund's main selling point, the gap is material - the same pattern penalised in ASIC v Vanguard (2024). Misleading claims about financial products can breach the laws against misleading conduct that apply to financial services.
- **(b)** Greenhushing: going quiet on targets and data so investors can't measure progress. Silence can also mislead by omission if investors were relying on the target, so a changed target should be explained.

- **(c)** Correct or withdraw the claims at once; fix the screening process and either sell non-compliant holdings or openly change the stated policy; tell investors, and consider remediation and reporting to ASIC; strengthen oversight, for example board review of marketing claims and independent assurance of ESG data; and report transparently, explaining any change to targets.

Common slip: treating every complaint as whistleblowing. Check all three steps: an eligible person, a disclosable matter and an eligible recipient.

These answers explain the general position; real outcomes depend on the full facts and legal advice. Kestrel Ridge Energy, Corvus Capital, Bellweather Freight, Ridgeline Haulage and Kowari are imagined. Law: Corporations Act 2001 (Cwlth) Part 9.4AAA. Real case: ASIC media release 24-213MR (September 2024).