



Law Council
OF AUSTRALIA

Greenwashing

Senate Environment and Communications References Committee

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Telephone +61 2 6246 3788
Email mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

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- the Australian Environment and Planning Law Group and the Superannuation Committee of its Legal Practice Section;
- its Business and Human Rights Committee; and
- the Law Society of New South Wales

for their input to this submission.

Executive Summary

1. The Law Council thanks the Senate Environment and Communications References Committee (**Committee**) for the opportunity to make a submission to its greenwashing inquiry (**Inquiry**).
2. Greenwashing is the misrepresentation of the extent to which a product, service, investment or initiative is environmentally or climate friendly, sustainable or ethical.
3. The Law Council's submission canvasses the current legislative frameworks, code-based and accreditation frameworks, enforcement activities and guidance materials with application to greenwashing in Australia, as well as international developments regarding sustainability claims that may be of interest to the Committee. These current legislative frameworks prohibit false and misleading claims, representations and conduct in financial services and marketing and promotion.
4. In the Law Council's view, the most significant 'missing piece' in Australia's regulation of greenwashing is uniformity of language, meaning and purpose across regulators, business, investors and consumers, and within regulatory frameworks.
5. The recently launched joint initiative of government and industry Taxonomy Project, aims to develop an Australian sustainable finance taxonomy, including by reference to international schemes. It appears that the sustainable finance taxonomy being established through the Taxonomy Project would apply to the activities of financial institutions. The Law Council recommends the Australian Government and its industry partners consider the suitability of this proposed taxonomy to definitions, terms and standards commonly used in sustainability claims and that give rise to complaints of greenwashing, including in the context of environmental and sustainability claims made to consumers.
6. Continued development of clear and consistent guidance materials to support businesses to comply with their existing legal obligations under corporations law and consumer law when making sustainability claims is necessary.
7. Particular attention should be given to developing guidance about:
 - (a) the parameters of acceptable use of commonly used terms such as 'sustainable', 'green', 'carbon neutral', 'bio-degradable', 'ethical' or 'ethically sourced';
 - (b) clearer standards for and scrutiny of the use of offsets in Australia, particularly as a tool for achieving business aims such as 'net zero';
 - (c) increased transparency and accountability around certification and accreditation of products, services and investments, including by reference to a centralised and uniform nomenclature such as a taxonomy or other classification system of accreditations, symbols, logos and trust marks;
 - (d) regulators' expectations about the process for verification or substantiation of claims, particularly forward-looking claims and principles-based claims (such as alignment with the Paris Principles or other targets); and
 - (e) 'sustainability' in a broad sense as including sustainable development factors, such as social, economic and governance factors, along with environmental factors.

8. The recent enforcement actions by the regulators, including how existing legal obligations are being interpreted and applied by the courts in relation to greenwashing, as well as international developments, should also be closely monitored, to identify areas of future law reform.
9. The Law Council's Climate Change Policy sets out principles including that new laws must be both readily known and available, and should promote certainty and clarity for those affected by climate change mitigation and adaptation measures.¹

Terms of reference

10. The terms of reference for the Inquiry are as follows:

An inquiry into greenwashing, with particular reference to:

- a) *the environmental and sustainability claims made by companies in industries including energy, vehicles, household products and appliances, food and drink packaging, cosmetics, clothing and footwear;*
- b) *the impact of misleading environmental and sustainability claims on consumers;*
- c) *domestic and international examples of regulating companies' environmental and sustainability claims;*
- d) *advertising standards in relation to environmental and sustainability claims;*
- e) *legislative options to protect consumers from greenwashing in Australia; and*
- f) *any other related matters.*²

¹ Law Council of Australia, *Climate Change Policy* (Policy Statement, 27 November 2021) <<https://lawcouncil.au/resources/policies-and-guidelines/policy-statement-climate-change-policy>> [48].

² Parliament of Australia, 'Greenwashing', *Parliamentary Business* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Greenwashing>.

What is greenwashing?

Definition

11. The term 'greenwashing' should be understood as the practice of misrepresenting the extent to which a financial product³ or investment strategy, or an entity's product, services or initiatives, are environmentally or climate friendly, sustainable or ethical.⁴ It can be applied to investment products and the marketing of goods and services.
12. The incentive to make claims of these kinds arises from increased market demand for more 'green' products, and increasing consumer awareness of the manner in which investments are made, or goods and services produced.

In the context of marketing

13. In the context of marketing, the Australian Competition and Consumer Commission (**ACCC**) points out that, as consumers are increasingly interested in purchasing sustainable or environmentally friendly products, the use of environmental and sustainability claims is becoming more common in the marketing of consumer goods.⁵
14. It notes that 'sustainability claims may be made in a variety of ways':
 - *Product specific claims: These may appear on packaging, websites, advertisements or social media posts by influencers.*
 - *Company-wide claims: These will generally appear on websites or in corporate social responsibility statements and reporting documents.*
 - *Claims using logos and symbols (including certification trademarks): These can appear on product packaging, websites, or advertisements.⁶*
15. The ACCC has stated, in relation to greenwashing in the marketing of products and services, that:

Environmental or sustainability claims will only help consumers make informed purchasing decisions if the claims are clear, are not misleading and do not omit relevant information. A misleading, meaningless, or

³ A *financial product* is a facility through which, or through the acquisition of which, a person makes a financial investment and/or manages a financial risk and/or makes non-cash payments: *Corporations Act 2001* (Cth) (**Corporations Act**) section 763A. This can include shares, bonds, superannuation, interests in managed investment schemes and insurance: ASIC, 'Do you need an AFS licence?', *For Finance Professionals* (Web Page) <<https://asic.gov.au/for-finance-professionals/afs-licensees/do-you-need-an-afs-licence/#:~:text=Financial%20products%20include%20things%20such,derivatives%20and%20margin%20lending%20facilities>>.

⁴ This adapts and broadens a definition of the Australian Securities and Investments Commission (**ASIC**) in 'How to avoid greenwashing when offering or promoting sustainability-related products' (Information Sheet 271, June 2022) <<https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/#Prohibitionsagainstmisleadinganddeceptiv/>> (**ASIC's June 2022 Greenwashing Info Sheet**).

⁵ ACCC, 'Greenwashing by businesses in Australia – Findings of the ACCC's internet sweep of environmental claims' (March 2023) 3

<<https://www.accc.gov.au/system/files/Greenwashing%20by%20businesses%20in%20Australia.pdf>> (**ACCC's March 2023 Greenwashing by Australian Business Report**).

⁶ *Ibid*, 3.

unclear claim breaches consumer trust and hurts confidence in both the claim itself and sustainability claims in general.

Businesses genuinely pursuing more sustainable products and services often incur additional production or research costs. This fact combined with consumers' increasing interest in purchasing sustainable products means false or misleading sustainability claims unfairly disadvantage businesses making genuine claims. This undermines effective competition and can create a disincentive for businesses to invest in sustainability.⁷

In the context of investments

16. Research suggests that investors expect investment funds to invest their superannuation and other savings responsibly and ethically.⁸
17. The Australian Securities and Investments Commission (**ASIC**) has stated that greenwashing in relation to financial products:

... 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.⁹

18. ASIC considers greenwashing claims may be made in relation to 'sustainability-related products': a 'financial product where the issuer has incorporated sustainability-related considerations—such as environmental, social and governance (**ESG**) matters—into its investment strategies and decision making'.¹⁰
19. ESG considerations may include:
 - *environmental factors such as climate change, pollution and the use of sustainable energy sources;*
 - *social factors such as human rights, diversity policies and working conditions; and*
 - *governance factors such as board structure and political contributions.¹¹*

In the context of the SDGs and ESG

20. Greenwashing is often understood as a purely environmental issue, related to claims about the impacts that products, services or investments have on the ecosystem and biosphere.

⁷ Ibid.

⁸ Specifically, 83 per cent of Australians expect their bank account and their super to be invested responsibly and ethically and 64 per cent of Australians consider that responsible and ethical super funds and investments perform better in the long term: Responsible Investment Association Australasia, 'From Values to Riches 2022: Charting consumer demand for responsible investing in Australia' (Report, 2022) <https://responsibleinvestment.org/wp-content/uploads/2022/03/From-Values-to-Riches-2022_RIAA.pdf>.

⁹ ASIC's June 2022 Greenwashing Info Sheet.

¹⁰ Ibid.

¹¹ Dr Rachel Baird, 'Greenwashing and Sustainable Finance in Australia' (Lexis Nexis Regulatory Compliance, 2023) 1.

21. However, this omits wider elements of sustainable development practice which move beyond environment-specific concerns. Under this practice, 'sustainability' incorporates broader societal notions of climate justice, socio-economic and socio-political concerns, including the human rights of employees and communities.
22. In 2015, the United Nations introduced the Sustainable Development Goals (SDGs) and associated targets. These stand as a global commitment 'to achieving sustainable development in its three dimensions—economic, social and environmental—in a balanced and integrated manner'.¹² The SDGs 'focus global efforts and attention on 17 pressing issues',¹³ such as extreme poverty and climate change.¹⁴ ESG factors were used to focus business attention on ethical and sustainable practices prior to the SDGs being developed. The two terms are now frequently linked in concept and practice (along with other terms such as 'corporate social responsibility', 'corporate sustainable practice' and 'sustainable development investing'):

The SDGs are becoming increasingly important also for investors, as they are 'an articulation of the world's most pressing environmental, social and economic issues and, as such, act as a definitive list of the material ESG (environmental, social and governance) perspectives that should be taken into account as part of an investor's fiduciary duty'.¹⁵

23. While the contribution of business is critical to achieving the SDGs, entities increasingly make claims against these goals and criteria to attract investment, which has, in turn, led to concerns about 'SDG-washing' and 'ESG-washing' as part of greenwashing.¹⁶ That is, recognition that greenwashing occurs not only in relation to environmental claims, but also in relation to broader claims about the sustainable development credentials of businesses.
24. For example, a product should not be considered 'sustainable' if the supply chain and operations leading to its production involved modern slavery practices. Similarly, approaches to greenwashing need to address, for example, not only claims about emissions reductions, but also to incorporate related impacts, such as within business supply chains and operations, and broader social and economic outcomes, particularly for those most vulnerable to the impacts of climate change. This links to notions like 'climate justice', which the International Bar Association's Task Force defined as:

... a concept that recognises climate change will disproportionately affect people who have less ability to prevent, adapt or otherwise respond to increasingly extreme weather events, rising sea levels and new resource constraints. A climate-justice agenda embraces a

¹² *Transforming our world: the 2030 Agenda for Sustainable Development*, UN GAOR, UN Doc A/RES/70/1 (21 October 2015) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement>> (**Agenda for Sustainable Development**).

¹³ United Nations Global Compact, *Business Reporting on the SDGs* (Guidance, August 2018) <<https://unglobalcompact.org/library/5628>>.

¹⁴ Agenda for Sustainable Development, Goal 1 and Goal 13.

¹⁵ United Nations Global Compact, *Business Reporting on the SDGs* (Guidance, August 2018) <<https://unglobalcompact.org/library/5628>> 4. See also Dean Emerick, 'What is SDG and ESG?', *ESG: The Report* (Web Page, 2023) <<https://www.esgthereport.com/what-is-sdg-and-esg/#12-how-do-esg-and-sdgs-work-together>>.

¹⁶ United Nations, Department of Economic and Social Affairs, *How can investors move from green-washing to SDG-enabling?* (UN/DESA Policy Brief #77, 28 May 2020) <<https://www.un.org/development/desa/dpad/publication/un-desa-policy-brief-77-how-can-investors-move-from-greenwashing-to-sdg-enabling/>>.

*conscious recognition of the development imbalances brought into relief by climate change. Climate justice seeks to combine the climate change discussion with human rights in a way that is equitable for the most climate-vulnerable groups.*¹⁷

25. A further example is the practice of businesses benefiting from the brand reputation of Indigenous ownership, as well as receiving operational benefits, through government incentives for business that are 50 per cent Indigenous-owned, while providing little to no actual benefit to Indigenous owners or communities.¹⁸
26. It appears the approach being taken by Australian regulators is to consider 'greenwashing' as broader than environment-specific claims. As stated, ASIC considers claims invoking ESG matters to be greenwashing.¹⁹ Similarly, the ACCC is currently consulting on draft guidance to business on both 'environmental and sustainability claims',²⁰ which suggests a broadening of the responsibilities of business and the ways in which greenwashing manifests.

Framing consideration: is regulatory reform required?

27. The Law Council's submission is focused on term (e) of the inquiry's terms of reference: 'legislative options to protect consumers from green washing in Australia'.²¹ Specifically, this submission focuses on whether the regulation of corporate entities in Australia is sufficient to protect consumers adequately against the risk of greenwashing in Australia (and accurately inform investors, in the context of financial products) or whether reform is required.
28. The Law Council has already expressed support for the development of an appropriate regulatory framework to require Australian business entities with exposure to financial risks arising from the transition required to mitigate the effects of climate change to disclose that risk (**climate-related financial disclosure**).²²
29. This climate related financial disclosure framework's purpose is to ensure large businesses and financial institutions provide greater transparency and accountability about their climate-related plans, financial risks and opportunities. The Australian Government has proposed that required disclosures would align with international standards, allowing for comparison of entities' position and performance in the face of climate change.²³ By providing greater access to reliable and standardised climate-related information, the framework should assist Australian regulators, investors and consumers to identify instances of potential greenwashing of a

¹⁷ International Bar Association, Climate Change Justice and Human Rights Task Force, *Achieving Justice and Human Rights in an Era of Climate Disruption* (Report, July 2014) <<https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04>> 2-3.

¹⁸ See, e.g., Brendan Foster, "Black cladding" is having a massive impact on First Nations businesses but what is it?, *National Indigenous Times* (online, 10 June 2023) <<https://nit.com.au/10-06-2023/6310/black-cladding-is-having-a-massive-impact-on-first-nations-businesses-but-what-is-it#:~:text=To%20put%20it%20simply%2C%20black,bid%20to%20win%20government%20contracts.>>.

¹⁹ ASIC's June 2022 Greenwashing Info Sheet.

²⁰ Australian Competition and Consumer Commission, *Environmental and Sustainability Claims: Draft Guidance for Business* (July 2023) <<https://consultation.accc.gov.au/accc/environmental-and-sustainability-guidance/>>.

²¹ Parliament of Australia, 'Greenwashing', *Parliamentary Business* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Greenwashing>.

²² Law Council of Australia, Submission to Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (2 March 2023) <<https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure>>.

²³ Australian Government, Treasury, *Climate-Related Financial Disclosure – Consultation Paper* (June 2023) <<https://treasury.gov.au/sites/default/files/2023-06/c2023-402245.pdf>>.

product, service or investment's climate credentials. Entities would also be incentivised, through the enforcement settings for defective disclosures, to avoid greenwashing.

30. However, while there may be some cross-over, the two frameworks are distinct and give rise to specific and separate considerations:
- a regulated climate-related financial disclosure scheme will apply in relation to specific information about a reporting entity's exposure to physical and transition risks, and the opportunities that might be available to that entity, that are **climate-related**,²⁴ whereas,
 - any regulatory scheme relating to greenwashing would regulate the manner in which an entity addresses ESG considerations, which include broader environmental factors (in addition to climate-related considerations), social and corporate governance factors, in the offer, issuance or marketing of financial products.
31. The Australian Government has flagged that it 'will pursue a more ambitious and coordinated sustainable finance strategy in 2023', which includes:
- *First: improving transparency, beyond the disclosure reforms—so the market has more credible and verifiable data to make investment decisions, and a sustainable finance taxonomy will play a key role in this.*
 - *Second: making sure our financial regulators and governance practices continue to move with the times—so that firms and regulators are well-equipped to manage risk.*
 - *Third: confronting and cracking down on greenwashing—ensuring the credibility of sustainability-related financial targets, products and investments—because credibility is everything.*²⁵
32. A joint industry-government initiative is currently underway to develop an Australian sustainable finance taxonomy. The Australian Sustainable Finance Institute (**ASFI**), through the 'Taxonomy Project', aims to apply international lessons and developments on sustainable finance taxonomies to develop an Australian taxonomy that is domestically 'credible' and 'usable', while being 'internationally

²⁴ The details of Australian standards for climate-related financial disclosure are in the process of being developed: *ibid*. In an international context, '*Climate-related risks* refers to the potential negative effects of climate change on an entity' and '*Climate-related opportunities* refers to the potential positive effects arising from climate change for an entity', per: International Sustainability Standards Board, *IFRS S2 Climate-related Disclosures* (IFRS Foundation, 26 June 2023) Appendix A, 'Defined Terms' <<https://www.ifrs.org/projects/completed-projects/2023/climate-related-disclosures/#published-documents>>.

The IFRS S2's objective is 'to require an entity to disclose information about its climate-related risks and opportunities that is useful to primary users of general purpose financial reports in making decisions relating to providing resources to the entity'. In terms of content, this may include information about the governance processes, controls and procedures an entity uses to manage and oversee *climate-related* risks and opportunities; an entity's strategy for managing *climate-related* risks and opportunities; an entity's risk management processes to identify, assess, prioritise and monitor *climate-related* risks and opportunities; and an entity's performance in relation to its *climate-related* risks and opportunities, including progress towards any *climate-related* targets.

²⁵ The Hon Dr Jim Chalmers MP (Address to the Australian Sustainable Finance Institute, Sydney, 12 December 2022) <<https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/speeches/address-australian-sustainable-finance-institute-sydney>>.

inter-operable'.²⁶ Broadly, a sustainable finance taxonomy is a classification tool designed to assist market actors in assessing whether particular investments and economic activities are sustainable. It sets out 'principles or criteria that help classify the extent to which a financial asset supports given sustainability objectives'.²⁷ It is:

*effectively a tool comprising a set of science-, principles- or normative-based criteria for classifying finance, lending, investment and underwriting activities as having certain sustainability attributes. It can be used for bond issuance, portfolio and product development, providing a framework for labelling financial products as sustainable and promoting transparency and disclosure.*²⁸

33. These objectives may refer to any ESG factors.²⁹ ASFI has stated that:

The Australian taxonomy will enable financial institutions to identify economic activities that address key environmental and social objectives such as:

- *The Paris Agreement temperature goals of limiting global warming to well below 2°C, but preferably 1.5°C and the company and country targets to achieve those goals including Australia's commitment to reduce its GHG emissions to net zero by 2050, with an interim 43% emission reduction target by 2030;*
- *Commitment to progressing action towards the SDGs;*
- *Reporting and disclosure under the Modern Slavery Act 2018;*
- *The protection of Cultural Heritage and commitment to Free, Prior and Informed Consent;*
- *Risks and opportunities associated with disclosures under the Taskforce on Nature-related Financial Disclosures ...;*
- *Compliance with environmental laws and supporting the reversal of biodiversity loss by 2030 in accordance with the Leaders' Pledge for Nature and other national and international targets; and*
- *Commitments to reduce waste and transition to a circular economy.*³⁰

34. However, as the ASFI has noted, taxonomies across the world have, to date, focused on environmental objectives, rather than social or governance objectives. For example, the EU Sustainable Finance Taxonomy considers how economic activities align with the following six environmental objectives: climate change mitigation; climate change adaptation; sustainable use and protection of water and

²⁶ Australian Sustainable Finance Institute, 'Taxonomy Project', *Our Work* (Web Page) <<https://www.asfi.org.au/taxonomy>>.

²⁷ Australian Sustainable Finance Institute, *Analysis of International Taxonomies and Considerations for Australia* (Report, October 2022) <<https://www.asfi.org.au/publications/international-scoping-paper>> 4.

²⁸ Ibid 5.

²⁹ Ibid.

³⁰ Australian Sustainable Finance Institute, *Designing Australia's sustainable finance taxonomy* (Report, March 2023) <<https://static1.squarespace.com/static/6182172c8c1fdb1d7425fd0d/t/64221052e1667558180e4ae9/1679954013353/Framing+Paper+Update+March-compressed.pdf>> 5.

marine resources; transition to a circular economy; pollution prevention and control; and protection and restoration of biodiversity and ecosystems.

35. The EU Taxonomy Regulation 'establishes the criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable'.³¹ For example, it provides that an 'economic activity shall qualify as environmentally sustainable' if it:
- contributes substantially to, and does not significantly harm, listed environmental objectives;
 - is carried out in accordance with stipulated minimum safeguards; and
 - complies with technical screening criteria.³²
36. While the Platform on Sustainable Finance has proposed the expansion of the EU legislative framework to incorporate social objectives, 'such as health, human rights, equality, or enhancing socio-economic conditions', no jurisdiction has implemented 'governance objectives, such as anti-bribery, anti-corruption, responsible lobbying and political engagement outcomes'.³³
37. ASFI considers the primary purposes of the Australian taxonomy should be to:
1. *Direct capital flows into economic activities that substantially contribute to climate mitigation and other sustainability objectives;*
 - 2 *Help guide an orderly and just transition to a sustainable economy;*
and
 - 3 *Address greenwashing.*³⁴
38. The extent to which an Australian taxonomy might contribute to addressing greenwashing concerns will depend on the purpose and design principles settled through the Taxonomy Project,³⁵ and the governance structures associated with it.³⁶
39. The Law Council notes that the Department of the Treasury's submission to this Inquiry provides:
- Taxonomies provide a set of science-based criteria for assessing whether specific business activities are aligned with sustainability objectives, such as the transition to net zero emissions. Addressing greenwashing is one objective of sustainable finance taxonomies, as they can provide a consistent science-based indication of whether an activity or investment is 'green'. Taxonomies can be integrated into broader regulatory frameworks, including corporate disclosure requirements and investment product regulations.*³⁷

³¹ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

³² Article 3.

³³ Ibid. See also Platform on Sustainable Finance, *Report on Social Taxonomy* (28 February 2022) <https://commission.europa.eu/document/d07e1f1e-3a1f-4d55-add4-a130f26b33e3_en>.

³⁴ Australian Sustainable Finance Institute, *Designing Australia's sustainable finance taxonomy* (Report, March 2023) 6.

³⁵ See Australian Sustainable Finance Institute, *Analysis of International Taxonomies and Considerations for Australia* (Report, October 2022) <<https://www.asfi.org.au/publications/international-scoping-paper>> 5.

³⁶ Ibid 6.

³⁷ The Treasury, Submission 23 to the Inquiry 3.

40. ASFI has also suggested that an Australian sustainable finance taxonomy may integrate into existing regulatory frameworks:

An Australian taxonomy could also have implications for Australia's financial regulators. ... APRA [Australian Prudential Regulation Authority] could integrate a sustainable finance taxonomy into Prudential Standards or Practice Guidance. The Roadmap noted ASIC could establish principles-based guidance on labelling that would support intermediaries to label and rate investment products. APRA could incorporate the taxonomy into risk weightings for Authorised Deposit-Taking Institutions (ADIs).³⁸

41. The sustainable finance taxonomy being developed by ASFI appears to be directed to the activities of financial institutions regulated by financial regulators such as ASIC. The Law Council queries whether the taxonomy, or the principles or standards established within it (e.g., 'science-based indication[s] of whether an activity ... is "green"') could be applied to the environmental claims made to consumers about a business's products, services and operations, as regulated by the ACCC. As noted, the ACCC is currently consulting on draft guidance about these claims, including principles such as 'make accurate and truthful claims' and 'have evidence to back up your claims'.³⁹

Current domestic regulation and regulatory activities

Existing prohibitions

42. There are provisions of Commonwealth legislation which provide mechanisms to protect businesses and consumers from entities making misleading greenwashing claims, both in financial services or products (investments), and in marketing.

Regulation of financial services

43. Financial institutions must comply with a range of obligations under the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), when they publish or make claims about their ESG credentials in their financial services (investment products).
44. These obligations, detailed in **Attachment A**, include:
- prohibitions on making false and misleading statements and representations and engaging in dishonest or misleading and deceptive conduct;⁴⁰
 - an obligation to have reasonable grounds to make a representation about future matters;⁴¹ and

³⁸ Australian Sustainable Finance Institute, *Designing Australia's sustainable finance taxonomy* (Report, March 2023) 5.

³⁹ Australian Competition and Consumer Commission, *Environmental and Sustainability Claims: Draft Guidance for Business* (July 2023) <<https://consultation.accc.gov.au/accc/environmental-and-sustainability-guidance/>>.

⁴⁰ *Corporations Act 2001* (Cth) ss 1041E, 1041G and 1041H; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA and 12DB.

⁴¹ *Corporations Act 2001* (Cth) s 769C; *Australian Securities and Investments Commission Act 2001* (Cth) s 12BB.

- prohibitions on engaging in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose, or the quantity of any financial services.⁴²

Regulation of competition and consumer law

45. The *Competition and Consumer Act 2010* (Cth) (**CCA**) and Australian Consumer Law (**ACL**), prescribed in Schedule 2 to the CCA, provide various prohibitions in marketing and promotion.
46. These are also detailed in Attachment A, and include:
 - section 18 of the ACL, which prohibits companies from engaging in misleading or deceptive conduct. This provision also applies to false representations made in connection with various accreditation schemes, including the Equipment Energy Efficiency Program and the Water Efficiency Labelling and Standards Scheme;
 - section 29 of the ACL, which prohibits companies from making a range of false or misleading representations in connection with the supply or possible supply of goods or services or in connection with the promotion of their supply or use. These include:
 - making a false or misleading representation that goods are of a particular standard, quality, value, grade or have had a particular history or particular previous use⁴³—this provision would cover representations about a product being, for example, ‘made from 100% recycled materials’;
 - making a false or misleading representation that services are of a particular standard, quality, value or grade⁴⁴—for example, representations about a service being ‘carbon-neutral’;
 - making a false or misleading representation that goods or services have a sponsorship, approval, uses or benefits⁴⁵—for example, representations about a product being certified by an accredited body when it is not; and
 - making a false or misleading representation concerning the need for any goods or services⁴⁶—examples may be advertisements that inaccurately suggest that a particular good or service is necessary to achieve green status or carbon neutrality or reduce emissions.
47. Additionally, sections 33 and 34 of the ACL prohibit companies from engaging in misleading conduct as to the *nature* of goods or services. This includes representations about their nature, the manufacturing process or the characteristics of goods or services.
48. In October 2022, the ACCC conducted a ‘sweep’ of 247 different businesses and/or brands to ‘identify industries or sectors which commonly use environmental and

⁴² *Australian Securities and Investments Commission Act 2001* (Cth) s 12DF.

⁴³ *Competition and Consumer Act 2010* (Cth), para 29(1)(a).

⁴⁴ *Ibid* para 29(1)(b).

⁴⁵ *Ibid* para 29(1)(g).

⁴⁶ *Ibid* para 29(1)(l).

sustainability claims, and to assess whether these claims have the potential to mislead consumers'.⁴⁷ The key issues that the ACCC identified in the 'sweep' were:

- vague and unqualified claims, such as the use of terms like 'green', 'kind to the planet', 'eco-friendly', 'responsible' or 'sustainable'. It noted that:⁴⁸

These claims have little value for consumers as they can have a variety of different meanings and rarely provide enough information to allow consumers to make an informed purchasing decision. ...

There was little explanation provided about what many businesses meant by the terms used, the aspect of the business or product the claim was referring to, and why it had the claimed benefit.

- a lack of substantiating information;
- use of absolute claims;
- use of comparisons, which 'have the potential to be misleading to consumers, as they may not allow consumers to accurately assess the merits of one product over another';⁴⁹
- exaggerating benefits or omitting relevant information;
- the use of aspirational claims, with little information on how these goals will be achieved, including 'goals relating to reducing the amount of packaging, using energy from renewable sources, reducing waste to landfill, or improving supply chain traceability' and 'Net Zero' targets;⁵⁰
- use of third-party certifications in a manner which could potentially mislead consumers (discussed in further detail below); and
- use of images which appear to be trust marks, but on closer examination 'did not appear to be associated with a certification scheme'.

49. The ACCC concluded that the 'sweep' had 'identified several high-level concerns'.⁵¹ It indicated that it would conduct 'further analysis' and 'undertake enforcement, compliance, and education activities where appropriate', including 'producing updated economy-wide guidance material, as well as targeted guidance for specific sectors'.⁵²

Other regulatory schemes

50. There are other statutory schemes that may assist in enhancing the transparency and accountability of an entity's sustainability claims.
51. As stated, the proposed climate-related financial disclosure framework may assist regulators, investors and consumers identify greenwashing behaviour, given that entities caught under the framework will be required to disclose specific information relevant to their risks, plans and opportunities arising from climate change.

⁴⁷ ACCC's March 2023 Greenwashing by Australian Business Report, 4.

⁴⁸ Ibid 5.

⁴⁹ Ibid 6.

⁵⁰ Ibid 7.

⁵¹ Ibid 9.

⁵² Ibid.

52. The *Corporations Act* also requires entities, when making a Product Disclosure Statement about an investment product to include information about the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.⁵³
53. The *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER Act**) introduces registration and reporting obligations on companies that exceed certain energy and greenhouse thresholds. The NGER Act forms the basis of a national framework for the reporting and dissemination of information about greenhouse gas (**GHG**) emissions, GHG projects, energy use and GHG production by corporations. For the year 2021–22, 417 companies were required under the NGER Act to provide data to the Clean Energy Regulator on GHG emissions and energy consumption.⁵⁴
54. Additionally, the *Modern Slavery Act 2018* (Cth) requires reporting entities to, among other things, describe in relation to them and any entity that they own or control:
- the risks of modern slavery practices in their operations and supply chains;⁵⁵
 - the actions taken to assess and address those risks, including due diligence and remediation processes;⁵⁶ and
 - how the reporting entity assesses the effectiveness of such actions.⁵⁷
55. Greenwashing can be applied to statements relating to social and ethical values, such as compliance with human rights.
56. A purpose of the Modern Slavery Act includes to assist investors and consumers to make more informed decisions when using, buying and selling goods and services.⁵⁸
57. The Law Council's recent submission to the statutory review of that Act, made several recommendations to increase the effectiveness of it as a transparency measure, including to:
- impose more specific reporting obligations on entities to identify modern slavery risks and track the effectiveness of its response to those risks;⁵⁹
 - require modern slavery statements to be published on company websites;⁶⁰
 - introduce civil penalty provisions that apply to non-compliance with at least some reporting requirements, including in relation to modern slavery statements found to contain false and misleading information;⁶¹ and

⁵³ *Corporations Act 2001* (Cth) pt 7.9 div 2 sub-div B.

⁵⁴ Clean Energy Regulator, 'Corporate emissions and energy data 2021-22' (website, accessed on 2 August 2023)

<<https://www.cleanenergyregulator.gov.au/NGER/National%20greenhouse%20and%20energy%20reporting%20data/Corporate%20emissions%20and%20energy%20data/corporate-emissions-and-energy-data-2021-22>>.

⁵⁵ *Modern Slavery Act 2018* (Cth) para 16(1)(c).

⁵⁶ *Ibid* para 16(1)(d).

⁵⁷ *Ibid* para 16(1)(e).

⁵⁸ Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) 2. Other objectives stated in the Explanatory Memorandum include to support business to identify and address modern slavery risks and to develop and maintain responsible and transparent supply chains.

⁵⁹ Law Council of Australia, Submission to the Attorney-General's Department, *Review of Australia's Modern Slavery Act 2018* (13 December 2022) 33.

⁶⁰ *Ibid* 35.

⁶¹ *Ibid* 40.

- improvements to the Register of modern slavery statements, including to provide greater transparency on the Register in relation to compliance issues identified with an entity's reports.⁶²

58. The 'Report of the statutory review of the Modern Slavery Act 2018 (Cth)'⁶³ contains recommendations in relation to a number of these matters, including in relation to the mandatory report criteria,⁶⁴ offence provisions relating to objective reporting criteria,⁶⁵ publication of information about compliance with reporting criteria,⁶⁶ and improving the Register.⁶⁷

Activities by corporate regulators

59. Both ASIC and the ACCC are increasingly active in publishing information to entities and the public directed to reducing the incidence of greenwashing, and in undertaking compliance action under the Corporations Act and ASIC Act, and the CCA and ACL respectively, in relation to greenwashing conduct.

Compliance and enforcement activity

Enforcement activity undertaken by ASIC

60. ASIC has listed 'misleading conduct in relation to sustainable finance including greenwashing' as an enforcement priority for 2023.⁶⁸ This is borne out by an increase in ASIC enforcement activity in relation to greenwashing.
61. ASIC reports that between 1 July 2022 and 31 March 2023, it had 23 corrective disclosure outcomes, issued 11 infringement notices, and commenced one civil penalty proceeding.⁶⁹
62. In October 2022, ASIC issued four infringement notices to energy company Tlou Energy Limited, in what it described as its 'first action for greenwashing'.⁷⁰ These notices were issued on the basis that it had reasonable grounds to believe that Tlou had made 'a false or misleading representation that services are of a particular standard, quality, value or grade'.⁷¹
63. Specifically, the infringement notices related to representations made by Tlou in two announcements on the Australian Securities Exchange (**ASX**) that:

⁶² Ibid 46.

⁶³ Professor John McMillan AO, 'Report of the statutory review of the *Modern Slavery Act 2018* (Cth): The first three years' (Report, 2023) <<https://www.ag.gov.au/sites/default/files/2023-05/Report%20-%20Statutory%20Review%20of%20the%20Modern%20Slavery%20Act%202018.PDF>>.

⁶⁴ Ibid Recommendation 8.

⁶⁵ Ibid Recommendation 20.

⁶⁶ Ibid Recommendation 23.

⁶⁷ Ibid Recommendation 28.

⁶⁸ Australian Securities and Investments Commission, 'ASIC Enforcement priorities', *About ASIC* (Web Page) <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/>>.

⁶⁹ It is noted that payment of infringement notice penalties does not constitute an admission of a contravention of the legislative provision in question.

⁷⁰ Australian Securities and Investments Commission, 'ASIC acts against greenwashing by energy company' (Media Release 22-294MR, 27 October 2022), <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-294mr-asic-acts-against-greenwashing-by-energy-company/>>.

⁷¹ Under *Australian Securities and Investments Commission Act 2001* (Cth) para 12DB(1)(a). See infringement notices S02563037, S02563038, S02563039, and S02563040 published on the Australian Securities and Investments Commission, 'Infringement notices register', *Search ASIC's Registers* (Web Page) <<https://asic.gov.au/online-services/search-asic-s-registers/additional-searches/infringement-notices-register/>>.

- *electricity produced by Tlou would be carbon neutral;*
- *Tlou had environmental approval and the capability to generate certain quantities of electricity from solar power;*
- *Tlou’s gas-to-power project would be ‘low emissions’; and*
- *Tlou was equally concerned with producing ‘clean energy’ through the use of renewable sources as it was with developing its gas-to-power project.⁷²*

64. ASIC said that it was “concerned that Tlou either did not have a reasonable basis to make the representations, or that the representations were factually incorrect”.⁷³

65. Following this action against Tlou, ASIC issued infringement notices to investment manager, Vanguard Investments Australia Ltd.⁷⁴ These notices related to Product Disclosure Statements which ASIC was concerned may have been ‘liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services’,⁷⁵ by overstating an exclusion (or investment screen). Specifically, the exclusions claimed to prevent investment in companies involved in significant tobacco sales; ASIC was concerned that the investment screen excluded manufacturers of cigarettes and other tobacco products, but not companies involved in the sale of tobacco products.

66. In the associated media release, ASIC Deputy Chair Ms Sarah Court is quoted as saying:

Greenwashing is not limited to environmental claims but extends to misleading ethical propositions. Entities which seek to promote ethical investing must ensure their statements are accurate and able to be substantiated.⁷⁶

67. Since then, ASIC has published infringement notices against three companies for alleged false and misleading representations about environmental and climate-related matters:

- Diversa Trustees Limited, a superannuation trustee, for overstating exclusions to prevent investment in companies involved in ‘polluting and carbon intensive

⁷² Australian Securities and Investments Commission, ‘ASIC acts against greenwashing by energy company’ (Media Release 22-294MR, 27 October 2022), <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-294mr-asic-acts-against-greenwashing-by-energy-company/>>.

⁷³ Ibid.

⁷⁴ Australian Securities and Investments Commission, ‘ASIC issues infringement notices against investment manager for greenwashing’ (Media Release 22-336MR, 2 December 2022) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-336mr-asic-issues-infringement-notices-against-investment-manager-for-greenwashing/>>.

⁷⁵ Australian Securities and Investments Commission Act 2001 (Cth) s 12DF. See infringement notices S02553190, S02553191, and S02553192 published on the Australian Securities and Investments Commission, ‘Infringement notices register’, Search ASIC’s Registers (Web Page) <<https://asic.gov.au/online-services/search-asic-s-registers/additional-searches/infringement-notices-register/>>.

⁷⁶ Australian Securities and Investments Commission, ‘ASIC issues infringement notices against investment manager for greenwashing’ (Media Release 22-336MR, 2 December 2022) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-336mr-asic-issues-infringement-notices-against-investment-manager-for-greenwashing/>>.

activities', 'financing or support of activities which cause environmental and social harm' and 'poor corporate governance';⁷⁷

- energy company Black Mountain Energy Limited, in relation to claims that its natural gas development project would have 'net-zero carbon emissions';⁷⁸ and
- superannuation fund promoter, Future Super Investment Services Pty Ltd, in relation to a Facebook post which may have overstated 'the positive environmental impact of the Fund'.⁷⁹

68. ASIC has commenced civil penalty proceedings in the Federal Court against Mercer Superannuation (Australia) Limited (**Mercer**) for 'allegedly making misleading statements about the sustainable nature and characteristics of some of its superannuation investment options'.⁸⁰ Specifically, ASIC alleges that, while Mercer made statements on its website that its 'Sustainable Plus' investment options excluded investments in companies involved in carbon intensive fossil fuels, alcohol production and gambling, those options had investments in several companies involved in those industries.

69. ASIC is seeking:⁸¹

- declarations that Mercer made false and misleading statements which breached sections 12DB and 12DF of the ASIC Act;
- pecuniary penalties in relation to those breaches;
- orders requiring Mercer to disclose the contraventions; and
- an injunction preventing Mercer from continuing to engage in the conduct.

Enforcement activity undertaken by the ACCC

70. The ACCC has the following options to pursue compliance in relation to alleged breaches of the above provisions of the ACL in relation to greenwashing conduct:

- it may commence proceedings, seeking a wide range of remedies, as detailed in Table 1 of Attachment A; and

⁷⁷ Australian Securities and Investments Commission, 'ASIC issues infringement notice against superannuation trustee for greenwashing' (Media release 22-379MR, 23 December 2022) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-379mr-asic-issues-infringement-notice-against-superannuation-trustee-for-greenwashing/>>.

⁷⁸ Australian Securities and Investments Commission, 'ASIC issues infringement notices to energy company for greenwashing' (Media Release 23-001MR, 5 January 2023) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-001mr-asic-issues-infringement-notices-to-energy-company-for-greenwashing/>>.

⁷⁹ Australian Securities and Investments Commission, 'ASIC issues infringement notice to superannuation fund promoter for greenwashing' (Media Release 23-110MR, 2 May 2023) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-110mr-asic-issues-infringement-notice-to-superannuation-fund-promoter-for-greenwashing/>>.

⁸⁰ Australian Securities and Investments Commission, 'ASIC launches first Court proceedings alleging greenwashing' (Media Release 23-043MR, 28 February 2023) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-043mr-asic-launches-first-court-proceedings-alleging-greenwashing/>>.

⁸¹ 'Originating Process (Rule 2.2)', *ASIC v Mercer* (Federal Court of Australia, Victoria Registry, VID117/2023, 27 February 2023) <<https://download.asic.gov.au/media/wixfhjqf/23-043mr-merc-originating-process.pdf>> [1]-[7].

- it may use regulatory powers such as undertakings, public warning notices, and infringement notices, as detailed in Table 2 of Attachment A.
71. The ACCC also has a range of information-gathering powers which it may use to investigate any contraventions potentially arising from greenwashing conduct, as detailed in Table C of Attachment A.
72. The ACCC has a longer history of greenwashing-related compliance action than ASIC. Between 2005 and 2023, the ACCC has taken the following action:
- (a) Court actions—
 - (i) the ACCC reached successful outcomes in seven cases, with the Federal Court making orders by consent.⁸² In addition to declarations, orders have included injunctions, corrective advertising, compliance programs, customer communications and payment of costs;
 - (ii) the Court imposed penalties in three of those cases;⁸³ and
 - (iii) the ACCC's claim was dismissed by the Federal Court in two cases.⁸⁴
 - (b) Other enforcement actions—
 - (i) the ACCC accepted undertakings in 11 cases;⁸⁵
 - (ii) the ACCC issued infringement notices where the company involved elected to pay the penalty in two cases;⁸⁶ and
 - (iii) in four other cases, the company involved took steps to address the ACCC's concerns or made voluntary commitments (e.g., by removing potentially misleading claims from packaging or placing stickers over misleading claims).⁸⁷
73. By way of specific example of the above, the ACCC successfully brought greenwashing proceedings against:
- Volkswagen (2021),⁸⁸ for false representations to Australian regulators about the compliance of its vehicles with Australian diesel emissions standards. Volkswagen admitted the conduct contravened paragraph 29(1)(a) of the

⁸² *Volkswagen Aktiengesellschaft v ACCC* (2021) 284 FCR 24; *ACCC v Pental Ltd* [2018] FCA 491; *ACCC v DuluxGroup (Australia) Pty Ltd (No 2)* [2016] FCA 1286; *ACCC v Goody Environment Pty Ltd and Nupak Australia Pty Ltd*; *ACCC v Prime Carbon & Anor* [2010]; *ACCC v SeNevens International Ltd* [2009]; and *ACCC v GM Holden Ltd* [2008] FCA 1428.

⁸³ *Volkswagen Aktiengesellschaft v ACCC* (2021) 284 FCR 24; *ACCC v Pental Ltd* [2018] FCA 491; *ACCC v DuluxGroup (Australia) Pty Ltd (No 2)* [2016] FCA 1286.

⁸⁴ *ACCC v Woolworths Group Ltd* (2020) 281 FCR 108; and *ACCC v Kimberly Clark Australia Pty Ltd* [2020] FCAFC 107.

⁸⁵ *Samsung* (2013), [Global Green Plan](#) (2010), [v8 Supercars](#) (2008), [Goodyear Tyres](#) (2008), [De Longhi](#) (2008), [Energy Australia](#) (2007); [Hagemeyer Brands](#) (2006), [Environmental Marketing](#) (2006), [Clean Air Woodheating](#) (2005), and [LG Electronics](#) (2005). An undertaking was also accepted in *ACCC v GM Holden Ltd* [2008] FCA 1428.

⁸⁶ [Greenthumbs](#) (2012) and [Momentum Energy](#) (2016). It is noted that payment of infringement notice penalties does not constitute an admission of a contravention of the ACL.

⁸⁷ [OxoPak](#) (2018), [ALDI](#) (2017), [Woolworths](#) (2008), and [Origin](#) (2007).

⁸⁸ *Volkswagen Aktiengesellschaft v ACCC* (2021) 284 FCR 24.

ACL.⁸⁹ The Court made declarations to that effect and ordered Volkswagen to pay \$125 million in penalties (upheld on appeal).⁹⁰

- *Pental (2018)*,⁹¹ for false and misleading representations on packaging and on its website in relation to its White King Power Clean Flushable Toilet Wipes. Pental admitted the representations were false and misleading. The Court made declarations that Pental had breached several provisions of the ACL⁹² and orders restraining Pental from making 'flushable' representations for six years and requiring it to implement a compliance program. The Court also ordered Pental to pay \$700,000 in penalties.
- *DuluxGroup (2016)*,⁹³ for misleading representations regarding the ability of particular paint to reduce the interior temperatures of a house. Dulux admitted the contraventions and the Court made declarations and orders requiring Dulux pay pecuniary penalties in the sum of \$400,000, as well as the ACCC's costs in the sum of \$150,000, and publish notices on its website and in *The Australian* newspaper.
- *GM Holden (2008)*,⁹⁴ for misleading representations related to its carbon offset program for Saab vehicles. By consent, the Court declared that GM Holden engaged in conduct that was likely to mislead or deceive. The ACCC accepted a court-enforceable undertaking, requiring GM Holden to refrain from republishing the advertisements and retrain its Saab marketing staff. GM Holden also committed to plant 12,500 native trees to offset carbon dioxide emissions for all Saab vehicles sold during the campaign.

Guidance information

74. The ACCC and ASIC, along with other regulators, have produced guidance materials directed towards educating a wide range of stakeholders about greenwashing and how to avoid it, or otherwise promoting certain good practices that may assist in limiting instances of greenwashing.

75. In 2011, the ACCC issued a guideline, *Green marketing and the Australian Consumer Law*, which aims to:

*... assist manufacturers, suppliers, advertisers and others to assess the strength of any environmental claims they make and to improve the accuracy and usefulness to consumers of their labelling, packaging and advertising.*⁹⁵

76. The guideline:

⁸⁹ Paragraph 29(1)(a) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.

⁹⁰ Australian Competition and Consumer Commission, 'High Court denies Volkswagen leave to appeal \$125 million penalty' (Media Release, 12 November 2021) <<https://www.accc.gov.au/media-release/high-court-denies-volkswagen-leave-to-appeal-125-million-penalty>>.

⁹¹ *ACCC v Pental Ltd* [2018] FCA 491.

⁹² Specifically, section, paragraph 29(1)(a), paragraph 29(1)(g) and section 33 of the ACL.

⁹³ *ACCC v DuluxGroup (Australia) Pty Ltd (No 2)* [2016] FCA 1286.

⁹⁴ *ACCC v GM Holden Ltd* [2008] FCA 1428.

⁹⁵ Australian Competition and Consumer Commission, *Green Marketing and the Australian Consumer Law* (2011) <<https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf>> 2.

- describes the content of the prohibitions on misleading and deceptive conduct and false and misleading representations, and provides guidance on how these prohibitions may apply in the context of greenwashing;⁹⁶
- sets out key principles in making environmental claims, including that claims must be accurate, able to be substantiated, specific, in plain language, describe real benefits, and consider the whole life cycle of the product;⁹⁷ and
- expresses caution about the use of broad and unqualified claims, which ‘can be risky as they are ambiguous and do not explain any specific environmental benefit’, such as the terms ‘green’, ‘environmentally friendly’, ‘recyclable’ and ‘carbon neutral’.⁹⁸

77. To further assist business compliance with ACL, the ACCC says that it intends to publish updated material on what it considers to be good practice when making environmental and sustainability claims. It is presently inviting interested stakeholders to provide views on a draft guidance paper, which centres around ‘eight principles for trustworthy environmental and sustainability claims’,⁹⁹ these being:

- *Make accurate and truthful claims*—such claims should avoid overstating the level of scientific acceptance or exaggerating environmental benefit, and should be transparent and fair in any comparisons they invoke;
- *Have evidence to back up your claims*—and verify any evidence that is provided by third parties, including by way of third-party certifications;
- *Do not hide important information*;
- *Explain any conditions or qualifications on your claims*;
- *Use clear and easy to understand language*;
- *Visual elements should not give the wrong impression*—including symbols, trust marks and third-party labels and certifications; and
- *Be direct and open about your sustainability transition*.

78. In 2019, the ASX updated its *Corporate Governance Principles and Recommendations*,¹⁰⁰ which includes commentary on the key role of the board of a listed entity to monitor the adequacy of the entity’s risk management framework including to satisfy itself that its risk management framework deals adequately with contemporary and emerging risks including sustainability and climate change. If a listed entity considers it has material exposure to environmental or social risks, it should disclose those risks and how it intends to manage them. Such risks include physical risks and risks that arise from the transition to a lower-carbon economy.

⁹⁶ Ibid 3-5.

⁹⁷ Ibid 7-11.

⁹⁸ Ibid 12.

⁹⁹ Australian Competition and Consumer Commission, *Environmental and Sustainability Claims: Draft Guidance for Business* (July 2023) <<https://consultation.accc.gov.au/accc/environmental-and-sustainability-guidance/>>.

¹⁰⁰ Australian Securities Exchange, *ASX Corporate Governance Principles and Recommendations* (4th ed, February 2019) <<https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf>>.

79. In 2021, the Australian Prudential Regulation Authority (**APRA**) issued its prudential practice guide, *CPG 229 Climate Change Financial Risks*.¹⁰¹ The guide recommends voluntarily disclosing any forward-looking climate-risk information that may be useful for decision making, even if the company is not certain of the risk. APRA considers the Financial Stability Board's Task Force on Climate-related Financial Disclosures (**TCFD**) framework to be a sound basis for formulating such disclosures.
80. In 2022, ASIC issued its Information Sheet 271, *How to avoid greenwashing when offering or promoting sustainability-related products*,¹⁰² which also encourages voluntary disclosures which are consistent with recommendations by the TCFD.
81. Information Sheet 271 poses several questions for entities to consider when offering or promoting sustainability-related products, including:
- *Is your product true to label?*—it suggests that entities 'risk being misleading if the fund's name includes sustainability-related technology, but sustainability-related factors are not significant in the investment selection process';
 - *Have you used vague terminology?*—it suggests terms like 'socially responsible and 'ethical investing' can mean different things to different people, and when using sustainability-related terminology to describe a product care should be taken 'to adequately explain such terminology in the [Product Disclosure Statement] and other promotional material';
 - *Are your headline claims potentially misleading?*—it suggests that 'if ... communications and disclosures contain a headline claim about sustainability-related matters, the headline claim should not itself be misleading and exceptions and qualifications should not be used to rectify an otherwise misleading impression';
 - *Have you explained how sustainability-related factors are incorporated into investment decisions and stewardship activities?*—it suggests that an entity's methodology or policy for integrating sustainability-related considerations into investment decisions and stewardship activities should be disclosed and clearly explained;
 - *Have you explained your investment screening criteria? Are any of the screening criteria subject to any exceptions or qualifications?*
 - *Do you have any influence over the benchmark index for your sustainability-related product? If you do, is your level of influence accurately described?*
 - *Have you explained how you use metrics related to sustainability?*—it suggests that, if a metric is used to evaluate new and existing investments, then the extent of use, the source of the metrics, a description of the

¹⁰¹ Australian Prudential Regulation Authority, *Prudential Practice Guide: CPG 229 Climate Change Financial Risks* (November 2021) <<https://www.apra.gov.au/sites/default/files/2021-11/Final%20Prudential%20Practice%20Guide%20CPG%20229%20Climate%20Change%20Financial%20Risks.pdf>>.

¹⁰² Australian Securities and Investments Commission (**ASIC**) in 'How to avoid greenwashing when offering or promoting sustainability-related products' (Information Sheet 271, June 2022) <<https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/#Prohibitionsagainstmisleadinganddeceptive/>>.

underlying data, and any risks or limitations arising from your reliance on the metrics should all be made clear;

- *Do you have reasonable grounds for a stated sustainability target? Have you explained how this target will be measured and achieved?*—it suggests this should include any assumptions relied on when setting that target or when measuring progress;
- *Is it easy for investors to locate and access relevant information?*

Advertising self-regulation

82. The regulatory frameworks of the ACCC and ASIC discussed above are supplemented by Australia's current system of advertising self-regulation. Ad Standards was established by the Australian Association of National Advertisers (AANA) in 1998.¹⁰³ Ad Standards functions as secretariat for the Ad Standards Community Panel and the Ad Standards Industry Jury, which are the two independent bodies established to determine consumer and competitor complaints against the AANA's various self-regulatory Codes.
83. Relevant to greenwashing is the *Environmental Claims Code (Environmental Code)*.¹⁰⁴ The code's object is to ensure advertisers and marketers develop and maintain rigorous standards when making 'environmental claims'.¹⁰⁵
84. Enforcement of the Environmental Code predominantly arises through complaints from consumers.¹⁰⁶ Ad Standards manages the advertising complaints process, assessing complaints for their appropriateness before submitting each to the Community Panel for determination. The Community Panel is comprised of members of the general population who are independent of the advertising industry.¹⁰⁷
85. Under the Ad Standards complaints process,¹⁰⁸ after determining a complaint is appropriate for determination, Ad Standards writes to the relevant advertiser and gives them the opportunity to respond. The complaint and response are considered by the Community Panel, which ultimately publishes its decision either upholding or dismissing the complaint in the form of a case report. Where a complaint is upheld, the advertiser is notified prior to the decision being published, and requested to provide a response. This is usually that the advertisement is modified or discontinued. There is no explicit enforcement mechanism beyond requesting a response from the advertiser.

¹⁰³ See Ad Standards, *About Us* (Web Page) <<https://adstandards.com.au/>>.

¹⁰⁴ Australian Association of National Advertisers, *Environmental Claims Code* (1 May 2018) <<https://aana.com.au/content/uploads/2018/03/180316-Environmental-Claims-Code.pdf>>. For completeness, in addition to the Environmental Code, section 1.4 of the general Australian Association of National Advertisers, *Code of Ethics* (1 February 2021) provides:

Advertising or Marketing Communications shall not exploit community concerns in relation to protecting the environment by presenting or portraying distinctions in products or services advertised in a misleading way or in a way which implies a benefit to the environment which the product or services do not have.

¹⁰⁵ Ibid.

¹⁰⁶ See Ad Standards, *Make a Complaint* (Web Page) <<https://adstandards.com.au/lodge-complaint>>.

¹⁰⁷ See Ad Standards, 'Community Panel', *About Us* (Web Page) <<https://adstandards.com.au/about/community-panel>>.

¹⁰⁸ See Ad Standards, *The advertising complaints process* (Web Page) <<https://adstandards.com.au/about/advertising-complaints-process>>.

86. There are three key principles that underpin the Environmental Code:¹⁰⁹
- truthful and factual representation—environmental claims in advertising must not be misleading or deceptive;
 - genuine benefit for the environment—environmental claims must clearly explain the significance and not overstate the claim; and
 - substantiation—environmental claims must be able to be substantiated and verified.
87. The standards applied under the Environmental Code are similar to, but are not intended to replicate entirely, the legal tests used to determine whether advertising is misleading or deceptive. Where truthful and factual representation is assessed, consideration is given to whether the average consumer in the target market would be likely to be misled or deceived by the material.¹¹⁰
88. At the time of writing, the Ad Standards Community Panel has considered 33 customer complaints relating to issues under the Environmental Code since the beginning of 2021.¹¹¹ As has happened in jurisdictions such as the United Kingdom and the Netherlands, consumers and advocacy groups have been raising climate-washing concerns about various advertisers on an increasingly regular basis.¹¹²
89. Most recently, the Community Panel considered complaints made under the Environmental Code against BHP, Ampol, Glencore Australia, Shell Company of Australia, Australian Gas Networks and ATCO. While only one complaint since January 2021 has resulted in a determination upholding the complaint, the various written case reports produced give useful guidance regarding the Community Panel's approach.¹¹³
90. The upheld complaint related to print advertising containing a claim that natural gas is better for the environment as it produces 70 per cent less greenhouse gas. In that case, the source offered as substantiation only supported the claim in relation to grid electricity (rather than all other forms of energy). The Panel considered the claim to

¹⁰⁹ Australian Association of National Advertisers, *Environmental Claims Code* (1 May 2018) <<https://aana.com.au/content/uploads/2018/03/180316-Environmental-Claims-Code.pdf>>.

¹¹⁰ See AANA Environmental Claims Code Practice Note, page 1

<<https://aana.com.au/content/uploads/2018/03/180316-Environmental-Claims-Code-Practice-Note.pdf>>.

¹¹¹ Ad Standards, *Ad Standards Community Panel Cases – Issue 'AANA Environmental Code'* as at 2 August 2023

<https://adstandards.com.au/cases?keywords=&advertiser=&start_date%5Bdate%5D=&end_date%5Bdate%5D=&determination=All&issue%5B%5D=223&grouping=4>.

¹¹² Elouise Fowler 'Advertising Standards loom as new front in climate wars', *Australian Financial Review* (online, 12 September 2022) <<https://www.afr.com/companies/media-and-marketing/advertising-standards-loom-as-new-front-in-climate-wars-20220908-p5bqh6>>.

¹¹³ See Ad Standards Community Panel, *Case Report* (Case Number 0292-22, 25 January 2023)

<<https://adstandards.com.au/sites/default/files/reports/0292-22.pdf>> regarding an advertisement by ATCO, which was upheld. This is one of only two complaints that have been upheld in total since the introduction of the Environmental Code – the other was in 2020 regarding advertising by Australian Gas Networks: *Case Report* (Case Number 0202-22, 8 July 2020) <https://adstandards.com.au/sites/default/files/reports/0202-20_0.pdf>. The Community Panel recently upheld several complaints against the food and beverage company, Grill'd, in relation to a television advertisement. However, this did not include the complaint brought under the Environmental Code regarding use of the term 'sustainable', which was dismissed: Ad Standards Community Panel, *Case Report* (Case Number 0276-21, 13 October 2021) <https://adstandards.com.au/sites/default/files/reports/0276-21_0.pdf>.

be misleading, as there are other energy sources that produce less greenhouse gas than natural gas.¹¹⁴ The advertiser removed the advertising from circulation.¹¹⁵

91. The Environmental Code is currently under review by the AANA. In announcing the review in November 2022, and seeking public submissions by late February 2023, the AANA noted:

*The review process will consider new standardised measures and restrictions on environmental claims being introduced globally, national environmental schemes and Australian Government regulatory activities, and the views of both the Australian community and industry.*¹¹⁶

92. While it is not clear when the outcomes of the review will be released, some key questions for consideration in the AANA discussion paper included:¹¹⁷
- Where broad, general claims of environmental benefit (e.g., 'sustainable', 'green') are made, should the product or company's overall environmental footprint be taken into account when assessing the accuracy of the claims?
 - Where claims of carbon emission reductions are made in advertising, should advertisers be required to specify the extent to which this is achieved by use of carbon offsetting?
 - Environmental claims can cover a range of complex issues including carbon emissions, waste diversion or reduction, increased circularity, ecosystem impact, biodiversity and more. What independent certification or substantiation standards, schemes or tests exist in relation to each type of environmental claim? Should any of these standards or tests be adopted in the Environmental Code to substantiate each type of environmental claim?
 - Where an environmental claim is made that relies on a certification mark or scheme which ceases to exist through no fault of the advertiser, what, if any, allowance should be made in the Environmental Code for such a scenario?

Certification

93. There are a vast range of voluntary certification bodies or private certification schemes that provide 'certification' if entities are assessed to comply with standards and/or specifications relating to concepts such as 'sustainability', 'green', and 'carbon neutrality'. However, there is no specific regulation for certification bodies that offer certifications, resulting in the possibility that there may be varying degrees of reputability and robustness in approach to certification amongst the various certification bodies.
94. Some certification bodies use certification trade marks (**CTMs**). CTMs are a registered symbol or logo that shows consumers that a product or service meets a

¹¹⁴ Ad Standards Community Panel, *Case Report* (Case Number 0292-22, 25 January 2023) <<https://adstandards.com.au/sites/default/files/reports/0292-22.pdf>>.

¹¹⁵ Ibid.

¹¹⁶ Australian Association of National Advertisers, 'Major review of the AANA Environmental Claims Code gts underway' (Media Release, 22 November 2022) <<https://aana.com.au/2023/02/07/aana-launches-review-of-environmental-claims-code/>>.

¹¹⁷ Australian Association of National Advertisers, *Environmental Claims Code Review: Discussion Paper for Public Comment* (November 2022) <https://info.aana.com.au/hubfs/Self-Regulation/20221122%20Environmental%20Claims/Discussion_paper_for_AANA_Environmental_Claims_Code_Final.pdf?hsCtaTracking=3a46952f-d5a7-4135-a874-a17e8491cc60%7C69d843d5-14ff-49da-8d6c-1b34d666469c>.

particular standard, usually regarding quality, composition, manufacturing, suitability, or place of origin, but increasingly used to convey environmental credentials. At the time of writing, there are 305 registered CTMs containing the word 'sustainable'.¹¹⁸ Many of these bodies offer licences to use their trademarked logos on websites and products if a business achieves certification, potentially providing a competitive advantage with environmentally conscious consumers.

95. The ACCC is required under the *Trade Marks Act 1995* (Cth) to consider all applications for registration of a CTM.¹¹⁹ Pursuant to section 173 of this Act, applications must contain a copy of the rules governing the use of the CTM, including specific information such as the process for determining certification of a product or service.¹²⁰ In order to issue a certificate of registration under section 175 of this Act, the ACCC must satisfy itself that the attributes of the proposed certifier render it competent for assessment of certification and that the rules for certification are satisfactory according to prescribed criteria and would not be detrimental to the public.¹²¹
96. There are two government-associated carbon neutrality certification bodies, the Climate Active Carbon Neutral Standard (**Climate Active**) and the National Australian Built Environment Rating Scheme (**NABERS**).
97. According to the Department of Climate Change, Energy, the Environment and Water website, Climate Active is a 'partnership between the Australian Government and Australian businesses to encourage voluntary climate action'.¹²² It states that 'Climate Active certification is awarded to businesses that have credibly reached net zero emissions', and is available for buildings, events, organisations, precincts and products and services.¹²³ The Department 'administers carbon neutral certification and maintains the Climate Active Carbon Neutral Standard, the framework that underpins that certification'.¹²⁴ At the time of writing, 507 brands are operating with Climate Active certification.¹²⁵
98. The Climate Active logo containing the term 'carbon neutral' is not currently a registered CTM, with the ACCC stating its application is under consideration,¹²⁶ and the register recording its status as 'under examination—deferred'.¹²⁷ In February 2023, the Australia Institute filed a complaint against Climate Active with the ACCC, alleging that the certification scheme may be misleading and deceptive under consumer law. The complaint particularly raises that Climate Active's approach to assessing carbon neutrality emphasises the use of emission offsets rather than reductions and has awarded a number of fossil fuel companies and retailers with

¹¹⁸ Australian Government, IP Australia, 'Search results', *Australian Trade Mark Search*, (Web Page, 2023) <<https://search.ipaustralia.gov.au/trademarks/search/result?s=d796bcf9-a090-44e7-a435-68fb5753a9ba>>.

¹¹⁹ *Trade Marks Act 1995* (Cth) s 175(1).

¹²⁰ *Ibid* s 173(2)(b).

¹²¹ *Ibid* s 175(2). The criteria are set out in reg 16.6 of the Trade Mark Regulations 1995 (Cth) and are framed as principles of competition, unconscionable conduct and consumer protection. See also Australian Competition and Consumer Commission, *Certification Trade Marks – The Role of the ACCC* (2011) <https://www.accc.gov.au/system/files/Certification%20Trade%20Marks_0.pdf>.

¹²² Australian Government, Department of Climate Change, Energy, the Environment and Water, 'Climate Active', *Climate Change* (Web Page) <<https://www.dccceew.gov.au/climate-change/climate-active>>.

¹²³ *Ibid*.

¹²⁴ *Ibid*.

¹²⁵ Climate Active, *Certified Brands* (Web Page) <<https://www.climateactive.org.au/certified-brands>>.

¹²⁶ Australian Competition and Consumer Commission, Submission to Senate Environment and Communications References Committee, *Inquiry into Greenwashing* <https://www.apc.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Greenwashing/Submissions> 6.

¹²⁷ Australian Government, IP Australia, 'Search Results: 'Climate Active'', *Australian Trade Mark Search* <<https://search.ipaustralia.gov.au/trademarks/search/quick/result?q=climate+active>>.

certification for offsetting a small portion of their emissions.¹²⁸ This complaint has not yet been resolved by the ACCC.

99. NABERS is a national program administered by the NSW Government and overseen by a National Steering Committee which includes representatives of all states and territories as well as 14 stakeholder members such as property councils, engineer institutions and sustainability councils.¹²⁹ NABERS is partnered with Climate Active and uses its methodology with a specific focus on buildings. It is also described as associated with the Green Building Council Australia, which offers the Green Star for the delivery phase of buildings and fit outs.¹³⁰

100. Other examples of certification bodies are:

- Climate Neutral: A non-profit international body focused on greenhouse gas emissions with a specific inclusion focus on Scope 3 emissions.¹³¹ It offers a licence to use the Climate Neutral label and ongoing reduction support over 12–24 months as part of its measure, reduce, compensate model.¹³²
- Climate Bonds Initiative: An international organisation that certifies bonds and debt instruments that address climate change and are 'consistent with the goals of the Paris Agreement'.¹³³ Its website outlines what information will be provided by applicants for assessment, as well as containing a database of approved verifiers and certified bonds.¹³⁴

101. There are also many smaller bodies offering sustainability certifications. They can be industry or product specific. For example:

- Climate Care Certified offered by the Swimming Pool & Spa Association of Australia verifies and promotes sustainable practices using a combination of third-party energy and water efficiency assessments and verification from an unidentified 'appointed panel'.¹³⁵

¹²⁸ Australia Institute, 'Australian Government Breaching Consumer Law Following Four Corners' (Media Release, 14 February 2023) <<https://australiainstitute.org.au/post/australian-government-breaching-consumer-law/>>.

¹²⁹ NABERS, 'Governance', *NABERS* (Web Page, 2023) <<https://www.nabers.gov.au/about/governance>>.

¹³⁰ Green Building Council Australia, 'What is Green Star?', *Exploring Green Star* (Web Page, 2023) <<https://new.gbca.org.au/green-star/exploring-green-star/>>.

¹³¹ Climate Neutral, 'Climate Neutral', *Climate Neutral* (Web Page, 2023) <<https://www.climateneutral.org/>>. <https://www.cleanenergyregulator.gov.au/NGER/About-the-National-Greenhouse-and-Energy-Reporting-scheme/Greenhouse-gases-and-energy#:~:text=Scope%20%20emissions%20are%20indirect,controlled%20by%20that%20facility's%20business>>.

¹³² Climate Neutral, 'How it works', *Climate Neutral* (Web Page, 2023) <<https://www.climateneutral.org/how-it-works>>.

¹³³ Climate Bonds Initiative, 'Climate Bonds Certification', *Climate Bonds Certification* (Web Page, 2023) <<https://www.climatebonds.net/certification/get-certified>>. Climate Bonds Initiative, 'The Climate Bonds expanded Standard and Certification Scheme' <https://www.climatebonds.net/files/page/files/climate_bonds_expanded_standard_and_certification_scheme_brochure_1.pdf>.

¹³⁴ Climate Bonds Initiative, 'Climate Bonds Certification', *Climate Bonds Certification* (Web Page, 2023) <<https://www.climatebonds.net/certification/get-certified>>.

¹³⁵ Climate Care Certified, 'The environmental sustainability benchmark', *Climate Care Certified* (Web Page 2023) <<https://www.climatecarecertified.com/>> and 'Frequently Asked Questions' <https://www.climatecarecertified.com/faqs>.

- The Sustainability Accreditation for a Greener Environment (**SAGE**) offered by Restaurant & Catering Australia is available to businesses that meet a series of criteria that are accessible on its website.¹³⁶
102. Industry-specific certification has the potential to help consumers understand the wide variety of sustainability actions in different industries. More generally, certification bodies can play a significant and valuable role assisting consumers to distinguish between products.
103. However, there is the potential for consumers to be confused or misled due to the;
- lack of clarity in credibility, methodology and impact of the various certifications offered by these bodies—one example is certifications for aspects of ‘sustainability’ that may not create benefit or reduce harm to the environment,¹³⁷ (like the use of large green logos with leaves, signifying only that a business is utilising a certification company’s environmental management system software);¹³⁸ and
 - inconsistencies in the way business utilise and promote the ‘certifications’ achieved by its products and services.
104. As the ACCC noted in its recent sweep of environmental claims by businesses:
- there are so many certification programs that are unclearly distinguished that the ACCC has ‘concerns that CTMs may be becoming meaningless, and no longer help consumers to distinguish between different products’;¹³⁹ and
 - certification bodies often market themselves as nationally-recognised or industry-recognised training organisations, with no clear evidence that their sustainability, environmentally conscious or ‘green’ products are nationally- or industry-recognised. Some businesses have created their own certification schemes for their own products, which creates further confusion for consumers.¹⁴⁰
105. Other reviewers have reached similar conclusions. A 2015 University of Queensland study assessing 15 certification bodies within the mining and minerals sector, concluded only one scheme had its annual report audited by an external auditor, and only 60 per cent of the schemes defined minimum requirements of compliance and consequences for non-compliance.¹⁴¹

Case study: the Australian Agricultural Sustainability Framework

106. The National Farmers Federation, under a Commonwealth grant provided as part of the Agricultural Biodiversity Stewardship Package, coordinated the development of an Australian Agricultural Sustainability Framework (**AASF**) by the Australian Farm

¹³⁶ Restaurant and Catering Industry Australia, ‘SAGE (Sustainability Accreditation (for a) Greener Environment) Accreditation’, *Restaurant & Catering* (Web Page, 2023) <<https://www.rca.asn.au/sage-sustainability-accreditation-greener-environment-accreditation>>.

¹³⁷ Australian Competition and Consumer Commission, *Greenwashing by businesses in Australia* (March 2023) 7.

¹³⁸ Australian Legal Sector Alliance, ‘Environmental Management System’, *Australian Legal Sector Alliance* (Web Page, 2023) <<https://www.legalsectoralliance.com.au/page-1862945>>.

¹³⁹ Australian Competition and Consumer Commission, *Greenwashing by businesses in Australia* (March 2023) 7.

¹⁴⁰ Ibid.

¹⁴¹ R. Mori Junior, D.M. Franks, D.M. and S.H. Ali, *Designing Sustainability Certification for Impact: Analysis of the design characteristics of 15 sustainability standards in the mining industry* (Report, Centre for Social Responsibility in Mining, University of Queensland, June 2015) 4.

Institute (**AFI**).¹⁴² Its objective was to '[draw] together information about Australian agricultural sustainability under a cohesive set of recognised principles and criteria'.¹⁴³

107. The AFI determined three themes: 'environmental stewardship; people, animals and community; and economic resilience'. Within those themes, the AFI determined the categories, principles and criteria 'describing Australian agricultural industry's sustainability status and goals' under a structure which 'reflects ESG reporting'. For example:

- the 'environmental stewardship' theme included the category of 'greenhouse gases and air', and within that the principle that 'net anthropogenic GHG emissions are limited to minimise climate change', and within that the criteria that 'GHG emissions are reduced throughout lifecycle' and '[c]arbon emissions are sequestered throughout lifecycle',¹⁴⁴ and
- the 'economic resilience' theme included the category of 'fair trading', and within that the principle that 'unconscionable conduct is eliminated from the supply chain via demonstrated transparency and accountability', and within that the criteria that '[p]roduct provenance information is readily available' (i.e., traceability) and '[c]arbon footprint accounting is harmonised'.¹⁴⁵

108. To inform the development of the AASF, the AFI conducted a 'review of standards, certification and assurance (**SCA**) schemes, and their relationship to current approaches to sustainability certification in Australian agri-food industries'.¹⁴⁶

109. The ASI noted there are no specific standards nor specific accreditation bodies for sustainability certification in Australia against which consumers and businesses can easily judge the various programs.¹⁴⁷ It identified a proliferation in SCA schemes in Australia, and indicated that the complexity arising from this, both from the perspective of food/agri-food enterprises and food consumers and retailers, means 'that there is substantial scope for the operators of sustainability standards to undertake arbitrary differentiation from other, similar standards'.¹⁴⁸ It found that this complexity is 'likely to be creating confusion amongst consumers leading both to lower values for certification (more competition) and lower trust as consumers are less able to determine which claims may be reliable'.¹⁴⁹

International developments

¹⁴² Department of Agriculture, Fisheries and Forestry, *Agriculture Biodiversity Stewardship Package* (Web Page) <<https://www.agriculture.gov.au/agriculture-land/farm-food-drought/natural-resources/landcare/sustaining-future-australian-farming#:~:text=The%20National%20Farmers%20Federation%20is%20leading%20the%20development,as%20part%20of%20the%20Agricultural%20Biodiversity%20Stewardship%20Package>>.

¹⁴³ K. McRobert, D. Gregg, T. Fox, R. Heath – Australian Farm Institute, *Summary report: Development of the Australian Agricultural Sustainability Framework 2021-22* 3 <https://www.farminstitute.org.au/wp-content/uploads/2022/06/AASF-development-report_AFI_JUNE-2022_FINAL.pdf>.

¹⁴⁴ Ibid 8.

¹⁴⁵ Ibid.

¹⁴⁶ Daniel Gregg, Australian Farm Institute, *Sustainability standards and certification: A review of concepts and international practices for Australian agri-food enterprises and industries; Literature review to inform the development of an Australian Agricultural Sustainability Framework* (Report, April 2021) 2. <https://www.farminstitute.org.au/wp-content/uploads/2021/05/AASF-Literature-review_Sustainability-standards-and-certification-April_2021.pdf>.

¹⁴⁷ Ibid 19.

¹⁴⁸ Ibid 20.

¹⁴⁹ Ibid 26.

110. Greenwashing has prompted various international players to develop regulations and measures to protect their consumers from misleading information on environmental sustainability.

European Union

111. The European Union's (EU) legislative framework requires 'large companies and listed companies to publish regular reports on the social and environmental risks they face, and on how their activities impact people and the environment'.¹⁵⁰ This assists 'investors, civil society organisations, consumers, and other stakeholders to evaluate the sustainability performance of companies'.¹⁵¹

EU's legislative framework and regulations

Unfair Commercial Practices Directive

112. The EU's Unfair Commercial Practices Directive (UCPD)¹⁵² works as a safety net ensuring a high level of consumer protection against unfair commercial practices can be maintained in all sectors, including by complementing and filling gaps in other EU law. The UCPD prohibits unfair commercial practices (Article 5); addresses misleading actions (Article 6); and addresses misleading omissions (Article 7).
113. A 2020 European Commission (EC) study found 53.3 per cent of environmental claims provided 'vague, misleading or unfounded information about products' environmental characteristics across the EU and across a wide range of product categories'.¹⁵³
114. There are two EC proposals generally directed to addressing greenwashing: the 'Proposal for a Directive on empowering consumers for the green transition and annex' (the **Green Transition Proposal**) and the 'Proposal for a Directive on substantiation and communication of explicit environmental claims' (the proposed **Green Claims Directive**).

EU's Green Transition Proposal

115. The Green Transition Proposal was introduced on 30 March 2022,¹⁵⁴ and would amend the UCPD (along with the Consumer Rights Directive) to increase restrictions on environmental claims.¹⁵⁵
116. Specifically, the Proposal would amend the prohibition on misleading actions in Article 5 of the UCPD to add the following to the list of commercial practice regarded as misleading if it causes or is likely to cause the average consumer to take a transactional decision that they would not otherwise have taken:

¹⁵⁰ European Commission, 'Corporate sustainability reporting', *Sustainable Finance* (Web Page) <https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en>.

¹⁵¹ Ibid.

¹⁵² Council Directive 2005/29/EC of 11 May 2005 on Unfair Business to Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22.

¹⁵³ Proposal for a Directive of the European Parliament on substantiation and communication of explicit environmental claims, COM (2023) 166 final, Explanatory Memorandum 3.

¹⁵⁴ Proposal for a Directive of the European Parliament regarding empowering consumers for the green transition through better protection against unfair practices and better information, COM (2022) 143 final <eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0143&from=EN>.

¹⁵⁵ Ibid.

(d) making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and without an independent monitoring system;

(e) advertising benefits for consumers that are considered as a common practice in the relevant market.¹⁵⁶

117. The Green Transition Proposal would also amend the list of those commercial practices regarded as unfair in Annex 1 of the UCPD to include, among several others:

Displaying a sustainability label which is not based on a certification scheme or not established by public authorities.¹⁵⁷

Making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim.¹⁵⁸

Making an environmental claim about the entire product when it actually concerns only a certain aspect of the product.¹⁵⁹

EU's Green Claims directive

118. The other relevant EC proposal is the Green Claims Directive, introduced on 22 March 2023.¹⁶⁰ The proposed Green Claims Directive aims to reduce greenwashing by establishing prescriptive rules for businesses that sell goods or services within the EU to substantiate and verify any voluntary explicit environmental claim or label such as 'eco-friendly', 'green', 'carbon neutral' or 'ecological'.
119. The proposed Green Claims Directive makes provision for the requirements to be monitored on a regular basis and enforced by one or more appointed authorities designated by each Member State.¹⁶¹ It is proposed that sanctions would apply for non-compliance, including fines, which, in some cases, may amount to four per cent of the business's total annual turnover.¹⁶² Additionally, it is proposed that certain consumer protection organisations and other public bodies representing consumers' interests will also be able to bring legal action to protect the collective interests of consumers.¹⁶³

¹⁵⁶ Ibid Article 1(2)(b).

¹⁵⁷ Ibid Annex (1).

¹⁵⁸ Ibid Annex (2).

¹⁵⁹ Ibid.

¹⁶⁰ *Proposal for a Directive of the European Parliament on substantiation and communication of explicit environmental claims*, COM (2023) 166 final.

¹⁶¹ Ibid Article 15.

¹⁶² Ibid [64].

¹⁶³ Ibid Article 16.

EU's ESG reforms

120. Included in the EU's ESG reforms is a Corporate Sustainability Reporting Directive (CSRD),¹⁶⁴ the proposed Corporate Sustainability Due Diligence Directive (CSDD),¹⁶⁵ and the EU taxonomy.¹⁶⁶
121. The EU taxonomy is a 'classification system that defines criteria for economic activities that are aligned with a net zero trajectory by 2050 and the broader environmental goals other than climate'.¹⁶⁷ This plays an important role in 'helping EU scale up sustainable investment, by creating security for investors, protecting private investors from greenwashing'.¹⁶⁸
122. The CSRD (which came into force on 5 January 2023), 'modernises and strengthens the rules concerning the social and environmental information that companies have to report'.¹⁶⁹ This directive will 'allow stakeholders to have access to the information they need to assess investment risks arising from climate change and other sustainability issues and create a culture of transparency about the impact of companies on people and the environment'.¹⁷⁰
123. The CSDD (adopted 23 February 2022),¹⁷¹ seeks to improve corporate governance practices to better integrate risk management and mitigation processes of human rights and environmental risks and impacts.¹⁷² Specifically, the CSDD establishes a 'corporate due diligence duty which requires companies to identify, bring to an end, prevent, mitigate and account for negative human rights and environmental impacts in the company's operations'.¹⁷³ The CSDD also introduces duties for directors, to set up and oversee the implementation of the due diligence processes and integrating due diligence into their corporate strategy.¹⁷⁴

EU Member States

124. EU Member States enforce jurisdiction-specific regulation. For example, in Germany, the Act against Unfair Competition prohibits false or misleading statements or omissions about commercially relevant criteria of a product or service. Claims can be lodged in a civil court by non-government organisations or competitors.¹⁷⁵

¹⁶⁴ Council Directive 2022/2464 of 16 December 2022 on corporate sustainability reporting, [2022] OJ L 344/15.

¹⁶⁵ Proposal for a Directive of the European Parliament regarding on Corporate Sustainability Due Diligence and amending Directive (EU) 201/1937, COM (2022) 71 final.

¹⁶⁶ European Commission, 'EU Taxonomy for sustainable activities', *Sustainable Finance* (Web Page) <https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en>.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ European Commission, 'Corporate sustainability reporting', *Sustainable Finance* (Web Page) <https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en>

¹⁷⁰ Ibid.

¹⁷¹ Proposal for a Directive of the European Parliament regarding on Corporate Sustainability Due Diligence and amending Directive (EU) 201/1937, COM (2022) 71 final.

¹⁷² Ibid.

¹⁷³ European Commission, 'Corporate sustainability due diligence', *Corporate sustainability due diligence* (Web Page) <https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en>

¹⁷⁴ Ibid.

¹⁷⁵ Gesetz gegen den unlauteren Wettbewerb – UWG [Act against Unfair Competition] (Germany) 10 August 2021 BGBl I, 2021, 1, Section 15 <https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html>.

125. The Netherlands developed five key rules for honest sustainability claims, which are similar to the current ACCC and ASIC guidance on how to avoid greenwashing.¹⁷⁶ The five key rules are:

- (a) make clear what sustainability benefit the product offers;¹⁷⁷
- (b) substantiate your sustainability claims with facts and keep them up to date;¹⁷⁸
- (c) comparisons with other products, services or companies must be fair;¹⁷⁹
- (d) be honest and specific about your company's efforts with regards to sustainability;¹⁸⁰ and
- (e) make sure that visual claims and labels are useful to consumers not confusing.¹⁸¹

United Kingdom

126. Greenwashing in the United Kingdom (**UK**) is addressed by general consumer protection laws and prohibitions on misleading marketing, combined with self-regulation.

UK's legislative framework and regulations

Legislation

127. The general consumer protection laws and prohibitions on misleading marketing are implemented through the Consumer Protection for Unfair Trading Regulations 2003 (**CPUT**)¹⁸² and the Business Protection from Misleading Marketing Regulations 2008 (**BPRs**).¹⁸³ These laws are administered by the Competitions and Markets Authority (**CMA**). There are also sector- or product-specific laws, such as the energy-labelling regime for energy-related products to ensure that clear and consistent information on energy usage is readily available to consumers.¹⁸⁴

Self-regulatory codes

128. In addition to the UK's legislative frameworks, there are also self-regulatory codes. These are overseen by the CMA and the Advertising Standards Authority (**ASA**) (an independent body that investigates complaints and determines whether advertising should be changed or withdrawn). They seek to reflect and supplement legislative requirements. The self-regulatory regime deals with most complaints by consumers and competitors. Advertisers that fail to respond to self-regulatory sanctions may be prosecuted under the legislation.

¹⁷⁶ Authority for Consumers and Markets, 'Guidelines regarding sustainability Claims version 2 2023', (Guideline) (2023) <<https://www.acm.nl/system/files/documents/guidelines-sustainability-claims-summary.pdf>>

¹⁷⁷ Ibid 2

¹⁷⁸ Ibid 3.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid 4

¹⁸¹ Ibid.

¹⁸² *Consumer Protection for Unfair Trading Regulations 2003* (UK) SI 2008/1277.

¹⁸³ *Business Protection from Misleading Marketing Regulations 2008* (UK) SI 2008/1276.

¹⁸⁴ *Ecodesign for Energy-Related Products Regulations 2010* (UK) SI 2010/2617 and

Regulation for a Directive 2010/30 of 4 July 2017 of the European Council setting a framework for energy labelling and repealing [2017] OJ L 198/1, Article 11 and 11A.

129. In September 2021, the CMA issued a Green Claims Code,¹⁸⁵ which provides guidance on compliance. The Green Claims Code is not binding, but organisations that follow the Green Claims Code are better placed to defend challenges brought by the CMA.
130. The UK's advertising industry has developed self-regulatory codes which are administered by the ASA. The codes were written by the Committee of Advertising Practice (**CAP**), with members that represent the advertising industry, covering advertiser's media owners and agencies. The relevant sections of the codes in the context of greenwashing are:
- (a) Section 11 of the *UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code)* which contains specific requirements for environmental claims;¹⁸⁶ and
 - (b) Section 9 of the *UK Code of Broadcasting Advertising* which contains specific requirements for environmental claims (**BCAP code**).¹⁸⁷
131. The CAP also provides guidance on the interpretation of the CAP Code and the Broadcast Committee of Advertising Practice offers guidance on the interpretation of the BCAP Code.¹⁸⁸

United States

132. The United States response to greenwashing is monitored by various regulators, such as the Federal Trade Commission (**FTC**), state specific regulators and the Securities and Exchange Commission (**SEC**).

US legislative framework and regulations

Federal Trade Commission

133. In general, section 5 of the Federal Trade Commission Act (**FTC Act**) prohibits deceptive acts and practices in or affecting commerce.¹⁸⁹ Specifically, a representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers' decisions.¹⁹⁰ Further, the FTC Act has a Penalty Offence Authority, which means that the FTC is able to obtain civil penalties against a company that has acted unfairly or deceptively under section 5 of the FTC Act. These penalties can be sought if the company knew the conduct was unfair or deceptive in violation of the FTC Act and, the FTC had already issued a written decision that such conduct is unfair or deceptive.

¹⁸⁵ Competition and Markets Authority, 'Making environmental claims on goods and services', (Code) (20 September 2021) <<https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services>>.

¹⁸⁶ Committee of Advertising Practice, 'The CAP Code – the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing' (Code) 1 September 2010 <<https://www.asa.org.uk/static/c6be0fb9-2c66-4248-ba5b824bf26fd3d3/1d744660-0b48-427e-8e09bddb267e5a39/The-CAP-Code.pdf>>.

¹⁸⁷ Committee of Advertising Practice and Advertising Standards Authority, '9 Environmental Claims' (Code) <<https://www.asa.org.uk/static/8268f454-89b5-4f9f-8e54b28a35dd42e6/36a972cd-b52a-456d-91e2b57c52bc6744/The-BCAP-Code-Environmental-claims.pdf>>.

¹⁸⁸ Committee of Advertising Practice, 'The environment: misleading claims and social responsibility in advertising – Advertising Guidance (non-broadcast and broadcast)', (Code) June 2023 <<https://www.asa.org.uk/resource/advertising-guidance-misleading-environmental-claims-and-social-responsibility.html>>.

¹⁸⁹ *Federal Trade Commission Act 2010*, 15 USC § 5 (2010).

¹⁹⁰ *Ibid.*

134. In 1992, the FTC introduced the *Guides for the Use of Environmental Marketing Claims (Green Guides)*¹⁹¹ to help businesses to avoid making environmental claims that mislead consumers.¹⁹² The Green Guides are non-binding, but can strengthen FTC cases when it takes legal action against companies, and the Green Guides are often referenced by courts.¹⁹³ The Green Guides include general principles applicable to all environmental marketing claims,¹⁹⁴ information as to how consumers are likely to interpret particular claims¹⁹⁵ and how claims can be substantiated,¹⁹⁶ and guidance as to how environmental claims can be qualified to avoid deceiving consumers.¹⁹⁷
135. The Green Guides have been revised and updated on several occasions in 1996, 1998 and 2012, and a further revision is presently underway with public consultation having closed in April 2023.¹⁹⁸ The FTC sought views specifically on claims relating to carbon offsets and climate change, and is currently considering the establishment of independently enforceable requirements concerning unfair and deceptive environment claims which would effectively transform the previously unenforceable guidance into federally enforceable law.¹⁹⁹

Securities and Exchange Commission

136. The Securities and Exchange Commission (**SEC**) oversees civil enforcement of the Securities Act of 1933 (**Securities Act**)²⁰⁰ and the Securities Exchange Act 1934 (**Securities Exchange Act**).²⁰¹ Specifically, section 11 of the Securities Act imposes strict liability on the issuer of a security for making material misstatements or omissions in connection with the issuance of that security.
137. In March 2021, the SEC launched the Climate and ESG Task Force to develop initiatives to proactively identify ESG-related misconduct, consistent with increased investor reliance on climate and ESG-related disclosure and investment.²⁰²

¹⁹¹ Federal Trade Commission, 'Environmentally Friendly Products: FTC's Green Guides', *Green Guides* (Web Page) <<https://www.ftc.gov/news-events/topics/truth-advertising/green-guides>> (**Green Guides**).

¹⁹² Ibid paragraph 260.1(a).

¹⁹³ Ibid. Also: The National Law Review, *FTC Requests Public Comment on Potential Updates to "Green Guides" for the Use of Environmental Marketing Claims* (January 20, 2023); Tom Perkins, 'A sea of misinformation': FTC to address industry greenwashing complaints', *The Guardian* (online, 4 May 2023) <<https://www.theguardian.com/environment/2023/may/04/federal-trade-commission-industry-recycle-regulation>>.

¹⁹⁴ Green Guides section 260.3.

¹⁹⁵ Ibid paragraph 260.1(d).

¹⁹⁶ Ibid section 260.2.

¹⁹⁷ Green Guides section 260.3.

¹⁹⁸ Federal Trade Commission, 'Guides for the Use of Environmental Marketing Claims', FTC-2022-0077-0077, (6 February 2023) <<https://www.regulations.gov/document/FTC-2022-0077-0077>>.

¹⁹⁹ Federal Trade Commission, 'Guides for the Use of Environmental Marketing Claims', FTC-2022-0077-0001 (20 December 2022) <<https://www.regulations.gov/document/FTC-2022-0077-0001>>.

²⁰⁰ *Securities Act of 1933*, 1 USC (1933).

²⁰¹ *Securities Exchange Act of 1934*, 15 USC (1934).

²⁰² U.S Securities and Exchange Commission, 'Enforcement Task Force Focused on Climate Change and ESG Issues', *Securities* (Web Page) <<https://www.sec.gov/securities-topics/enforcement-task-force-focused-climate-esg-issues>>.

138. The SEC has also proposed additional rules, not yet finalised, as follows:

- (a) The Enhancement and Standardization of Climate-related Disclosures for Investors,²⁰³ which proposes amendments under the Securities Act and the Securities Exchange Act to require a registrant to disclose any climate-related risks that are reasonably likely to have a material impact on the registrant's business, results of operation or financial condition, including disclosures regarding greenhouse gas emissions and its strategy for managing those emissions.
- (b) Investment Company Names, which seeks to improve and clarify the scope of the existing 'Names Rule'.²⁰⁴ The current Names Rule requires that registered investment companies whose name suggests a focus on a particular type of investment (i.e., a particular type of security, industry or geographic area), invest at least 80 per cent of their assets in those investments.²⁰⁵ The proposed change would require a registrant whose name indicates its investment decisions incorporate one or more ESG factors, to ensure that at least 80 per cent of the value of its assets is invested in investments that are made in accordance with those ESG factors.²⁰⁶ There are only limited periods of time and circumstances in which the fund may depart from its 80 per cent policy.²⁰⁷
- (c) Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social and Governance Investment Practices,²⁰⁸ which requires that certain advisers and funds that claim to follow ESG strategies provide specific information regarding their ESG investment practices in fund prospectuses, annual reports, and adviser brochures. The SEC proposes three categories of ESG funds (Integration Funds, ESG-Focused Funds and Impact Funds), each with varying different disclosure requirements.

Recommendations going forward

139. When strengthening regulatory frameworks, the Law Council acknowledges the need to promote the underlying objectives of compliance, prevention and protection, while maintaining a reasonable compliance burden on business.

140. The Law Council supports the development of regulation that is proportionate, consistent and effective. At the same time, it emphasises that a regulatory

²⁰³ Securities and Exchange Commission, 'The Enhancement and Standardization of Climate-Related Disclosures' (Proposal) 9 May 2022 <<https://www.sec.gov/files/rules/proposed/2022/33-11042.pdf>>.

²⁰⁴ Securities and Exchange Commission, 'Investment Company Names' (Proposal) 25 May 2022 <<https://www.sec.gov/files/rules/proposed/2022/33-11067.pdf>>.

²⁰⁵ Securities and Exchange Commission, 'Investment Company Names' (Final Rule) 2001 <<https://www.sec.gov/rules/2001/01/investment-company-names#names>>: 'The rule requires a registered investment company with a name suggesting that the company focuses on a particular type of investment (e.g., an investment company that calls itself the ABC Stock Fund, the XYZ Bond Fund, or the QRS U.S. Government Fund) to invest at least 80% of its assets in the type of investment suggested by its name.'

²⁰⁶ See also Securities and Exchange Commission, Amendments to the Fund "Names Rule" (Fact Sheet) <<https://www.sec.gov/files/ic-34593-fact-sheet.pdf>>: 'Under the proposal, a fund that considers ESG factors alongside but not more centrally than other, non-ESG factors in its investment decisions would not be permitted to use ESG or similar terminology in its name. Doing so would be defined to be materially deceptive or misleading.'

²⁰⁷ Ibid.

²⁰⁸ Securities and Exchange Commission, 'Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices' (Proposal) 25 May 2022 <<https://www.sec.gov/files/rules/proposed/2022/33-11068.pdf>>.

framework may include a broad range of measures designed to facilitate compliance, beginning at a level of persuasion and cooperation, with government and regulators best placed to support industry through guidance and capacity-building.

141. This reflects the concept of 'responsive regulation', which is often considered an ideal regulatory approach.²⁰⁹
142. Within this approach, illustrated by way of an 'enforcement pyramid', the powers of government and regulators are gradated, with less interventionist measures relied upon in the first instance with wide application, and coercive measures used 'only when less interventionist measures have failed to produce compliance', or to address serious breaches of the law or matters of significant public interest or concern.²¹⁰ At the base of the pyramid is training and education, guidelines and resources.²¹¹
143. The Australian Law Reform Commission has previously explained that, as a starting point, this regulatory approach:

*... requires the regulator to behave as though the organisations being regulated wish to cooperate, and ensure that it is economically rational for them to cooperate. Where breaches occur, the initial response should be to persuade and educate them as to the appropriate behaviour. Such an approach promotes self-regulation and the wish to preserve reputation.*²¹²

144. Specific investigation and enforcement powers then range on a continuum from cautions and warnings to enforceable undertakings, infringement notices, monetary penalties and injunctions, through to civil sanctions, and, finally, to criminal sanctions, which should be reserved for serious breaches of the law.
145. As its name suggests, the concept of responsive regulation 'is premised on an ongoing relationship between the regulator and regulatee',²¹³ and highlights that regulation should:
 - 'be responsive to industry structure in that different structures will be conducive to different degrees and forms of regulation';

²⁰⁹ See, e.g., Australian Law Reform Commission, *Principled Regulation* (2002) <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC95.pdf>> 111; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) <https://humanrights.gov.au/sites/default/files/document/publication/ahrc_free_equal_dec_2021.pdf> 96.

²¹⁰ Australian Law Reform Commission, *Principled Regulation* (2002) <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC95.pdf>> 111, citing John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, 1985).

²¹¹ Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) <https://humanrights.gov.au/sites/default/files/document/publication/ahrc_free_equal_dec_2021.pdf> 97-98.

²¹² Australian Law Reform Commission, *Principled Regulation* (2002) <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC95.pdf>> 112, citing Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 25, and quoted in Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) <https://humanrights.gov.au/sites/default/files/document/publication/ahrc_free_equal_dec_2021.pdf> 96.

²¹³ Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) <https://humanrights.gov.au/sites/default/files/document/publication/ahrc_free_equal_dec_2021.pdf> 96, quoting Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 97.

- 'be attuned to the differing motivations of regulated actors';
- 'speak to the diverse objectives of regulated firms, industry associations, and individuals within them'; and
- 'respond to industry conduct, to how effectively industry is making private regulation work'.²¹⁴

146. Drawing on this conceptual tool, the Law Council considers that the existing legislative frameworks and enforcement activities—working collectively and with the initiatives presently under development, such as climate-related financial disclosures, the Taxonomy Project, and the ACCC's draft guidance on environmental and sustainability claims—provide a solid foundation for the regulation of greenwashing. In the Law Council's view, the most significant 'missing piece' at present is uniformity of language, meaning and purpose across regulators, business, investors and consumers with respect to sustainability claims. Clearer and more consistent classification of key definitions, terms and standards would enable better overall regulation.

147. The Law Council suggests that government and regulators focus on strengthening the 'bright lines' that promote and support compliance with existing legal obligations—that is, strengthening the base of the enforcement pyramid—including by:

- maintaining the ACCC and ASIC focus on greenwashing under existing legal frameworks, and monitoring the success of these enforcement actions (including how existing legal frameworks are being interpreted and applied by the courts in relation to greenwashing);
- providing enhanced guidance on greenwashing to business, which is clear and consistent, and specific in relation to the expectations of regulators;
- giving particular attention in this enhanced guidance to:
 - commonly used terms such as 'green', 'carbon neutral' or 'bio-degradable' and the parameters of acceptable use (informed by research into consumer perceptions, as noted below); and
 - the process for and level of verification or substantiation required of claims, particularly future-looking claims, principles-based claims (e.g., claiming alignment with the Paris Agreement) and those which involve inherent uncertainty, such as net zero claims or the use of carbon offsets;
- giving particular consideration to addressing these issues through the development of a clear and consistent classification system of definitions, terms and standards relating to sustainability claims, potentially through the Taxonomy Project (depending on the scope of its design principles and objectives);
- encouraging self-regulating industries and sectors to monitor and update their practices and policies to address greenwashing;

²¹⁴ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 4, quoted in Australian Law Reform Commission, *Principled Regulation* (2002) <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC95.pdf>> 111.

- monitoring for gaps in the coverage of existing statutory frameworks to identify any areas ripe for future law reform, including following the establishment of a sustainable finance taxonomy to bring concepts and terms forming part of the taxonomy within these frameworks; and
- monitoring international developments to ensure that Australia is not out of step globally to the detriment of either businesses or consumers regarding greenwashing regulation.

Development of effective guidance

148. The Law Council provides the following additional observations about the development of effective guidance on greenwashing, informed by the Corporations Committee and the Competition and Consumer Committee of its Business Law Section, as well as the Superannuation Committee of its Legal Practice Section.
149. An important advantage of guidance over legislation, is that it will be more amenable to adaption to reflect fast-paced innovation and changes in community expectations and consumer understanding. It is important regulators consult regularly with key stakeholders when revisiting and updating guidance, to ensure guidance properly reflects innovative practices and evolving expectations. Regulators must engage with business at all stages through this process, including allowing them sufficient lead time to adapt approaches, where required.

Ensuring guidance is meaningful and industry or sector specific

150. Guidance should account for the overarching business challenges associated with making environmental and sustainability claims, including the need to encourage innovation and make projections into an uncertain future. Guidance should be tailored to specific industries or sectors, having regard to each sector's technical or practical parameters and limitations.
151. In particular, it will be important to balance the need to equip consumers with accurate information to make informed choices, while ensuring businesses have the ability to confidently communicate information to inform those choices in a meaningful and comprehensible way.

Superannuation Context

152. The superannuation industry is one where industry-specific practices might be better appreciated by the regulator.
153. It is common for superannuation trustees to identify which of their investment products take into account ESG concerns. The Superannuation Committee notes, however, that this is not necessarily intended to distinguish the ESG product of one superannuation fund from products offered by competitor funds. Rather, the purpose is to distinguish the ESG product from other products offered by the same superannuation trustee through the same superannuation fund, which take into account ESG matters to a different or lesser extent.
154. It is important that regulator settings continue to permit superannuation trustees to make ESG distinctions among their various products, because this information is important to superannuation fund members. Whether or not an investment product takes into account ESG matters can have a significant impact on the rate of investment returns (as well as risk and volatility) in a given period. The

Superannuation Committee considers that it would be to the detriment of members if future regulatory settings were such that:

- superannuation trustees were discouraged or disincentivised from differentiating products among their own product range; or
- the criteria for using relevant terminology were set so strictly that some investment products that genuinely take into account ESG considerations fell into the same generic category as products that did not; or
- ESG credentials were circumscribed to one type of investment approach (such as a 'positive screen' or a 'negative screen'), favouring products with that approach and not allowing other superannuation products to indicate that ESG matters were taken into account but in a different manner. This would not account for the variety of legitimate investment approaches that may be taken when having regard to ESG matters, and would leave members who choose products utilising those approaches without notice of the possible impact on returns, risk and volatility.

155. Labels in respect of investment products serve the purpose of succinctly flagging to members that a different approach has been taken for those products, which affects the level of market risk. A label serves as a prompt for the member to read an additional disclosure if they wish to know more. The technical details of specific approaches are often complex and cannot reasonably be encapsulated within the labelling classification system. There is merit in members being aware that a different approach has been taken, even if there is an imperfect understanding of what those differences are from the label.

156. Further in the superannuation context, environmental and sustainability claims typically pertain to investment strategies that are often managed or developed by third parties—such as investment managers, managed investment schemes, and manufacturers of benchmark indexes. Future regulatory settings should be designed having regard to the extensive reliance that superannuation trustees have on those third-party providers, which are outside of the control of the superannuation trustee.

157. Claims that a superannuation trustee is aiming to achieve net-zero emissions by a particular date are also dependent on third parties. Where analogous claims are made in other industries, the entities making those claims are operating entities responsible for their own emissions. In the superannuation context, achieving a future goal of net zero emissions is dependent on:

- the companies in which the superannuation fund invests collectively achieving net zero; and/or
- the superannuation fund selling its investments in companies that are net emitters of carbon (**divestment**).

158. Divestment is an option continuously available to a superannuation trustee in order to meet its net zero goal. From a legal perspective, therefore, a superannuation trustee would have a reasonable basis for claiming a commitment to achieve net zero by a certain date, even if its short to medium term strategies were less detailed or tangible than those necessary for an operating entity to have a reasonable basis for an analogous claim. Regulatory requirements around net zero goals should allow for this nuance in the superannuation context.

159. Finally section 1013DA of the Corporations Act already imposes a statutory obligation on issuers of financial products to comply with ASIC disclosure guidelines²¹⁵ as to how labour standards and environmental, social and ethical considerations are taken into account.

Ensuring guidance is not overly burdensome

160. The temptation for regulators in preparing guidance will be to request significant amounts of detail (including in relation to expectations for the verification of claims). However, there are real risks that businesses will:

- assess the risk or potential costs of making any environmental or sustainability claims as too high and vacate the space, stepping back from public climate commitments or withdrawing information about the sustainability benefits of their products—a phenomenon now known as ‘green hushing’;
- be disincentivised from developing more sustainable, ethical or nature-positive practices;
- face significant administrative, operational, financial and legal burdens from overly restrictive reforms, which will disproportionately affect small and medium-sized enterprises and may have anti-competitive consequences across a range of sectors; and
- make highly-qualified or caveated claims, or accompany claims with a level of scientific explanation or detail that reduces consumers’ understanding and ability to make comparisons with other products in any meaningful way.

161. None of these scenarios would result in consumers being better positioned to make informed choices about businesses or products by reference to their sustainability or environmental credentials, or to distinguish between competing offerings.

Accounting for consumer perceptions

162. In preparing guidance, regulators must consider changing consumer understanding of, and expectations for, environmental and sustainability claims. There is currently no clear baseline to inform regulators or businesses’ understanding of consumer expectation which have, without doubt, evolved over time.²¹⁶ Any guidance should be prepared following investigation of consumer attitudes and perceptions, and not based on regulator assumptions. This will be important to effectively focus regulator efforts—for example, by giving less attention to matters that do not influence consumer choices or where consumers are experienced in understanding certain language as sales hyperbole.

163. Guidance to business should be accompanied by efforts to educate consumers about environmental and sustainability claims and issues, to empower consumers to better understand the claims being made and distinguish between them.

²¹⁵ The relevant guidelines, which have statutory force, are found in ASIC Regulatory Guide 65: Australian Securities and Investments Commission, *Regulatory Guide 65: Section 1013DA disclosure guidelines* (November 2011) <<https://download.asic.gov.au/media/1239069/rg65-published-30-november-2011.pdf>>.

²¹⁶ The ACCC, for example, conducts ‘market studies’ and ‘analyses selected industries or market sectors to improve our understanding of industry practices and dynamics’, but it is unclear the extent to which this focuses on consumer knowledge and attitudes or is specific to greenwashing: see Australian Competition and Consumer Commission and Australian Energy Regulator, *2023-24 Compliance and Enforcement Policy and Priorities* (March 2023) <https://www.accc.gov.au/system/files/2023-24%20Compliance%20and%20Enforcement%20Policy_0.pdf> 6.

Emerging issues

164. Regulators should not focus only on environmental claims but should include guidance on ‘sustainability’ in a broad sense—that is, the maintenance of healthy environmental, social, economic and governance systems. For example, regulators should begin to formulate and publish guidance on their expectations for businesses when making social responsibility or human rights claims, such as claims against the SDGs, to reflect the increasing relevance and influence of these matters on investors and continued evolution of community expectations in this space.

Conclusion

165. The Law Council views capacity-building through new education and guidance materials as complementary to the strong enforcement action already occurring under existing legal frameworks. It supports the regulators’ current focus on greenwashing as an enforcement priority, noting that the use of coercive powers in appropriate cases is an integral part of the enforcement pyramid within the concept of responsive regulation, and will continue to be necessary to provide an element of general deterrence in this area.

Attachment A – Statutory overview

1. Financial institutions must comply with a range of obligations under the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), when they publish or make claims in relation to their ESG credentials.
2. These include:
 - prohibitions on making false and misleading statements and representations and engaging in dishonest or misleading and deceptive conduct;
 - an obligation to have reasonable grounds to make a representation about a future matter;
 - a requirement to include information about the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment, when making a Product Disclosure Statement about an investment product.
3. The prohibitions making false and misleading statements and representations and engaging in dishonest or misleading and deceptive conduct include:
 - prohibitions in the Corporations Act on:
 - **making false or misleading statements** in relation to **financial products**—that is, making a statement or disseminating information if:
 - the statement or information is false in a material particular or is materially misleading; and
 - induces persons to apply for, dispose of or acquire *financial products*,¹ or affects the price of trading for such products in relation to financial products; and
 - the person making the statement does not care, knows, or ought reasonably to have known it was false or misleading;²

¹ A *financial product* is a facility through which, or through the acquisition of which, a person makes a financial investment and/or manages a financial risk and/or makes no cash payments: Corporations Act section 763A. This can include shares, bonds, superannuation, interests in managed investment schemes and insurance: Australian Securities and Investments Commission (**ASIC**), 'Do you need an AFS licence; (webpage, accessed on 12 June 2023) <<https://asic.gov.au/for-finance-professionals/afs-licensees/do-you-need-an-afs-licence/#:-:text=Financial%20products%20include%20things%20such,derivatives%20and%20margin%20lending%20facilities>>.

² Corporations Act section 1041E.

- **engaging in dishonest conduct**³ or in **conduct that is misleading and deceptive** or is likely to mislead or deceive⁴ in relation to a financial product or *financial services*,⁵ **in the course of carrying on a financial services business**;
 - prohibitions in the ASIC Act on a person, **in trade or commerce**:
 - engaging in **conduct that is misleading and deceptive** or is likely to mislead in relation to a financial product or financial services;⁶
 - making **false or misleading representations** in various contexts, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services;⁷ and
 - engaging in conduct that is liable to **mislead the public as to the nature, the characteristics, the suitability** for their purpose or the **quantity of any financial services**.⁸
4. If a person makes a representation about a future matter, and the person does not have reasonable grounds for making the representation, that representation will be taken to be misleading.⁹
 5. A person is required to give a Product Disclosure Statement in certain circumstances, including in the provision of financial product advice¹⁰ and the issuance¹¹ or sale¹² of a financial product, and the provision of superannuation products.¹³ If the product has an investment component, the Product Disclosure Statement must include information about the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.¹⁴
 6. The Australian Securities and Investments Commission has published regulatory guidance in relation to how this requirement is to be complied with.¹⁵
 7. The following tables 1–3 are provided with thanks to the Competition and Consumer Committee of the Business Law Section.

³ Ibid section 1041G.

⁴ Ibid section 1041H.

⁵ A person conducts a *financial service* if they provide financial product advice, deal in a financial product, make a market for a financial product or engage in several other activities stated in section 766A of the Corporations Act.

⁶ ASIC Act section 12DA. The term 'trade or commerce' is not defined.

⁷ Ibid section 12DB

⁸ Ibid section 12DF.

⁹ Corporations Act section 769C; ASIC Act section 12BB.

¹⁰ Corporations Act section 1012A.

¹¹ Ibid section 1012B.

¹² Ibid section 1012C.

¹³ Ibid section 1012I.

¹⁴ Ibid paragraph 1013D(1)(l).

¹⁵ ASIC, 'Regulatory Guide 65 – Section 1013DA disclosure guidelines' (November 2011) <<https://download.asic.gov.au/media/1239069/rg65-published-30-november-2011.pdf>>.

Table 1: Remedies available to the ACCC or injured parties as part of proceedings alleging contravention of the ACL

8. The following remedies are available to the Australian Competition and Consumer Commission (**ACCC**) or injured parties (as specified) as part of proceedings alleging contravention of the above provisions of the Australian Consumer Law (**ACL**), prescribed in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**).

Order which may be made by a Court	Relevant section	Details
Penalties/fines	ACL sections 224, 228, Chapter 4 (offences)	The ACCC may seek the recovery of a pecuniary penalty or fine. ¹⁶
Damages	ACL section 236	The injured party may seek to recover amount of the loss or damage caused by the conduct.
Compensation orders	ACL sections 237—239 and 243	<p>section 237—The ACCC or injured party may seek orders to compensate for loss or damage or prevent or reduce loss or damage.</p> <p>section 238—The injured party may seek compensation orders arising out of other proceedings.</p> <p>section 239—The ACCC may seek orders for non-party consumer redress.</p> <p>A non-exhaustive list of the orders that a court may make under subsections 237(1), 238(1) or 239(1) is found in section 243 of the ACL. This includes orders such as declaring a contract void, varying a contract or arrangement as specified in the order, an order refusing to enforce the provisions of a contract or arrangement, an order directing the return of money by the respondent, etc.</p>
Declarations	section 21 of the <i>Federal Court of Australia Act 1976</i> (Cth)	The Court may make binding declarations of right.
Injunctions	ACL section 232	The ACCC and any other person may request the Court grant an injunction and the Court may do so in terms it considers appropriate.

¹⁶ Chapter 4 of the ACL provides offences that replicate many of the conduct obligations in Chapter 3 of the ACL. A contravention of Chapter 4 of the ACL gives rise to criminal liability and prosecutions for a contravention of Chapter 4 are conducted by the CDPP (although prosecutions are bought in the name of the ACCC). Neither fines nor penalties are available for contravention of section 18 of the ACL.

Order which may be made by a Court	Relevant section	Details
Non-punitive orders such as corrective advertising	ACL section 246	The ACCC may seek one or more non-punitive orders including community service, establishing compliance programs and/or education and training programs, requiring disclosure of certain information or publishing corrective advertising.
Adverse publicity orders	ACL section 247	The ACCC may seek an order that the person disclose specified information and publish an advertisement in the terms of the order. ¹⁷
Orders disqualifying a person from managing a corporation	ACL section 248	The ACCC may seek an order disqualifying a person from managing a corporation for a period the court considers appropriate. ¹⁸
Orders for the protection / preservation of property	CCA section 137F	The ACCC (and the Minister) may seek an order to preserve money or property in certain instances.

Table 2: Remedies available to the ACCC without Court action

Action the ACCC may take	Relevant section	Details
Undertakings	ACL section 218	The ACCC may accept written undertakings, enforceable by the Court.
Public warning notices	ACL section 223	The ACCC may issue a public written notice warning about the conduct of a person in certain circumstances.
Infringement notices (for payment of a penalty)	CCA sections 134A, 134C	The ACCC may issue an infringement notice for payment of a penalty if it has reasonable grounds to believe that a person has contravened an infringement notice provision. ¹⁹

¹⁷ Not available for contravention of section 18 of the ACL.

¹⁸ Not available for contravention of section 18 of the ACL.

¹⁹ Does not include section 18 of the ACL.

Table 3: Investigative and information-gathering tools available to ACCC

Information-gathering tools	Relevant section	Details
Substantiation notices	ACL section 219	The ACCC may give a person who made a claim or representation a written notice that requires the person to give the ACCC information and/or documents to substantiate the claim.
Information requested / provided voluntarily	N/A	The ACCC is free to request individuals and corporations respond to requests to provide information and documents voluntarily.
Power to obtain information, documents and evidence	CCA section 155	Section 155 notices may require recipients to produce information, documents and evidence in relation to matters that may constitute a contravention of the CCA (including of the ACL). The power is not limited to the person who is suspected to have engaged in the wrongdoing.
Enter premises / inspection with consent	CCA subsection 154D(1) and section 154E	If there are reasonable grounds to suspect that there is evidential material on the premises, the inspector (ACCC) may enter the premises with the consent of the occupier. Once on the premises, the inspector may search the premises, make copies of evidential material, remove the evidential material from the premises with consent, secure the evidential material pending obtaining a search warrant, etc.
Inspection with search warrant	CCA sections 154X, 154G, 154GA	An inspector (ACCC) may apply to a magistrate for a search warrant. The magistrate may issue the warrant if there are reasonable grounds for suspecting that there is evidential material on the premises or there may be evidential material on the premises within the next 72 hours. Under a search warrant, the executing officer (ACCC) may enter, search the premises and seize evidential material specified in the warrant, make copies, etc. The executing officer may also seize other material that is not specified in the warrant where there are reasonable grounds to believe that the material is evidence of an indictable offence against the CCA and seizure is necessary to prevent it from being destroyed or concealed.

Information-gathering tools	Relevant section	Details
Discovery / preliminary discovery / subpoena	<i>Federal Court Rules 2011</i> (Cth) rules 7.23, 20.13, 24.01(1)	The ACCC can apply for an order for discovery from parties to proceedings. It may also apply for preliminary discovery. The ACCC can also obtain documents from non-parties by issuing a subpoena, with the leave of the Court.