Governance Institute of Australia

Greenwashing

a governance perspective

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About us

A national professional association, Governance Institute of Australia advocates for a community of more than 43,000 governance and risk management professionals, equipping our members with the tools to drive better governance within their organisation. We tailor our resources for members in the listed, unlisted, not-for-profit and public sectors, and ensure our member's voice is heard loudly. As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study to help further the knowledge and education of the fast-growing governance and risk management profession. We run a strong program of thought leadership, research projects and news publications and draw upon our membership of the Chartered Governance Institute to monitor emerging global trends and challenges to ensure our members are prepared. Our members know that governance is at the core of every organisation — and in these tumultuous times, that good governance is more important than ever before.

This publication states the law as at August 2023.

This publication was adapted with permission from a CGI UK publication Tackling Greenwashing from a Governance Perspective. This publication has been prepared by Governance Institute's members with assistance from Matthew Thornton-Dibb at Clyde & Co. We would like to particularly thank them all for their efforts.

Foreword

The prevalence of greenwashing has increased in recent years, as has awareness of it amongst regulators, investors and the public both in Australia and globally. As the ASIC Chair noted in a recent speech, 'ASIC has made clear on many occasions, we must maintain high standards of governance and disclosure today, and ASIC will not overlook current misconduct — including greenwashing'[1]. ASIC has identified greenwashing as one of its strategic priorities and other Australian regulators including the ACCC are also monitoring the issue closely.

Globally a European Commission review of corporate websites found that 42 per cent of environment-related claims were exaggerated, false or deceptive.[2] While the potential for greenwashing arises with consumer and investor facing communications, it is not limited to marketing material or product disclosure statements — it arises with any publicly facing communications: communications on strategy, environmental performance, and resilience and transition plans. For this reason it is key that all parts of an organisation work together

Given the seriousness of the possible consequences of greenwashing it is essential that governance professionals equip themselves and their boards to tackle the issue. Organisation level governance factors have been demonstrated to be more important for the avoidance of greenwashing than external factors, such as public scrutiny.[3] Having robust governance structures in place means that organisations are less likely to fall foul of accusations of greenwashing.

This publication is designed to assist Governance Institute's members and others to understand the risks and governance issues around greenwashing and to develop governance structures to mitigate against the risk.

This publication has been adapted with permission from a CGI publication Tackling Greenwashing from a Governance Perspective with the assistance of Governance Institute members and Clyde & Co. I thank them for their assistance.

Megan Motto **FGIA FCG**

Chief Executive of Governance Institute of Australia Ltd
and of the Australian Division of The Chartered Governance Institute

[1] ESG: Major change is underway and we need to be ready, Speech ASIC Chair to CEDA, State of the Nation, 13 June 2023.
[2] Screening of websites (europa.eu)
[3] Greenwashing in environmental, social and governance disclosures - ScienceDirect

What is greenwashing?

Greenwashing is claiming that something – a product, practice, service or organisation — is more sustainable or environmentally friendly than it truly is.

Extent of the problem

In recent years, the prevalence of greenwashing has increased, and so too has awareness of it amongst regulators, investors and the public. A 2022 review of Australian corporate websites by the Australian Competition and Consumer Commission (ACCC) found that 57 per cent of businesses made concerning claims about their environmental credentials.[4] Similarly, a European Commission review of corporate websites found that 42 per cent of environment-related claims were exaggerated, false or deceptive.[5] The potential for greenwashing arises with consumer and investor facing communications, but is not limited to marketing material or product disclosure statements — it also arises with any publicly facing communications for example: communications on strategy, environmental performance, and resilience and transition plans.

Expectations of companies

Companies, both globally and in Australia, are facing increasing pressure to take action on environmental as well as social and governance (ESG) issues and to report on these in a balanced and accurate way, for example: producing a net zero transition plan; disclosing climate risk and opportunity according to the requirements of the accepted sustainability standards (such as Recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) or IFRS S2 *Climate-related Disclosures*), or reporting on their gender pay gap.

Regulatory reporting

On 27 June 2023, the International Sustainability Standards Board (ISSB) issued new financial reporting standards, IFRS S1 *General Requirements for Disclosure of Sustainability-related Financial Information (S1)* and *IFRS S2 Climate-related Disclosures* (S2).[6] While at the date of this publication compliance with these standards is not yet mandatory for Australian entities, the Australian Government has indicated that the requirement for certain Australian entities to report in terms of S2 will become mandatory. The Treasury Laws Amendment (2023 Measures No 1) Bill 2023 is likely to be enforced in early 2024, with climate-related financial disclosure reporting requirements projected to be phased in over a three year period. This movement toward global sustainability and climate-related reporting standards will see the quality and comparability of these disclosures increase. This should improve transparency and ultimately reduce the options available to those reporting — thus reducing the risk of greenwashing. Governance professionals will need to be aware of these developments and translate the impacts into specific guidance for their own boards.

Nature-related financial disclosure and human rights

Biodiversity and nature-related impacts of business operations are an increasingly prominent area of investor and stakeholder concern. As was seen in the climate-related financial disclosure movement with the TCFD, the Taskforce on Nature-related Financial Disclosures (TNFD) aims to develop and deliver a risk management and disclosure framework for organisations to report and act on evolving nature-related risks, with the ultimate aim of supporting a shift in global financial flows away from nature-negative outcomes and toward nature-positive outcomes. TNFD published its Framework in September 2023.[7] As nature-related disclosures become more prominent and sought after, the risk of greenwashing in this area also rises.

Investor expectations

At the same time as regulators increase pressure, investors are also demanding more from companies, with ESG rating agencies, exclusionary screening and environmental and other ESG-dedicated funds meaning that companies without the requisite credentials are becoming less attractive investment prospects. It has been predicted that global ESG assets could exceed $53T by 2025, representing more than one third of projected total global assets under management.[8] This publication focusses on environment, climate-change and sustainability, and associated greenwashing risk. However, several of the reputational, legal and financial considerations and guiding principles for governance professionals identified in this publication may be relevant to governance and social issues more broadly.

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4 ACCC 'greenwashing' internet sweep unearths widespread concerning claims | ACCC
5 Screening of websites (europa.eu)
6 IFRS - ISSB issues inaugural global sustainability disclosure standards
7 https://tnfd.global/about/
8 ESG assets may hit $53 trillion by 2025, a third of global AUM | Insights | Bloomberg Professional Services

Greenwashing comes in many forms

Greenwashing occurs in two key areas: disclosures and marketing.

- Disclosure — This relates to sustainability reporting, investor communications and other types of reports, and applies to climate, environmental or other sustainability-related disclosures, such as those produced by listed companies or by organisations in the financial services and asset management sectors.
- Marketing: This relates to product advertising, public relations and brand image, such as how fashion, transport or consumer goods are advertised.

While greenwashing may be deliberate, it can also be inadvertent, for example because of a lack of understanding on the part of management about the rigour required to produce high-quality disclosure. This misrepresentation, whether deliberate or not, is potentially misleading for investors and consumers.

The distinction between what constitutes genuine reporting of an organisation's legitimate attempts to address environmental and climate-related issues, or its aspirations to do so, and what constitutes greenwashing, is somewhat nuanced. The list below is not exhaustive but is intended to illustrate the distinction.

Form of greenwashing	Meaning
Selective disclosure	Failing to provide a holistic view of an organisation's environmental impact. This includes a bias towards reporting on successes and omitting negatives. It also includes a failure to disclose all material climate or other sustainability-related risks to which an organisation is exposed.
Meaningless targets	Committing to environmental targets, such as reducing carbon emissions, without putting in place the business practices or governance structures which are required to achieve these targets. Committing to targets without the investment required to implement them, or a reasonable prospect of obtaining that investment, renders those targets meaningless.
Virtue signalling or symbolic actions	Drawing attention to 'hot-topic' issues without any meaningful action to address the underlying issue. For example, a major fashion brand could promote itself as a sustainable business due to the use of synthetic materials that use less water in production than natural textiles without assessing the end-of-life impacts of its synthetic textiles.
Lobbying efforts	Lobbying governments and policy-makers to avoid increased regulation while creating the impression publicly that the organisation is addressing the issue.
Baseless claims	Using vague, unsubstantiated terms such as 'eco', 'climate positive', 'ethically sourced', 'environmentally friendly', 'conscious' and 'sustainable', without providing any specific information or supporting evidence.
Hidden trade-offs	Emphasising one positive credential, for example that a product has been packaged using recycled materials, while ignoring any negatives, such as that the same product was sourced from a supplier using coercive labour practices.
The 'green halo' effect	Using imagery, such as pictures of trees or solar panels, which is associated with 'being green' in reports and statements to 'colour' the reader's perception of the surrounding information.
Misrepresenting motivations	Taking action that is required under legal obligations, or in order to cut costs, but portraying this as if the organisation is acting on its own initiative in favour of the environment.
Exaggerated progress	Stating that an organisation has taken more action or made more progress than it has. This can include the use of data, figures and statistics which have been manipulated to mislead, or which exclude certain datapoints to produce more optimistic results.

Green hushing

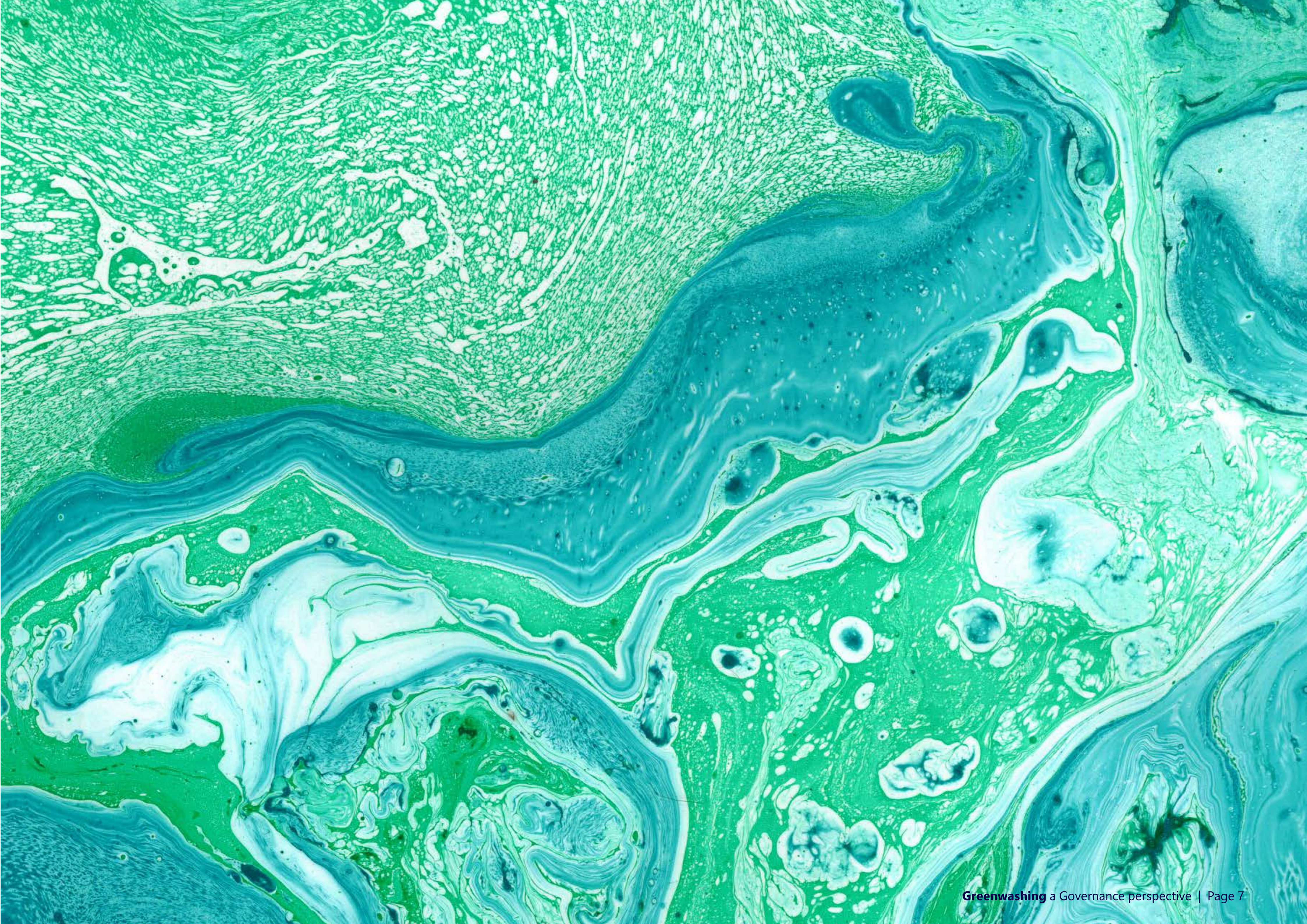
Another issue that has emerged is that of 'green hushing' namely avoiding publicising communications about environmental or climate-related activity in order to avoid scrutiny, defend against the risk of greenwashing accusations or to hide insufficient progress. For example, organisations may choose to not publicise information about their emissions' reductions goals in order to avoid scrutiny. There may be legitimate reasons for holding back information, but it can also have negative consequences for transparency.

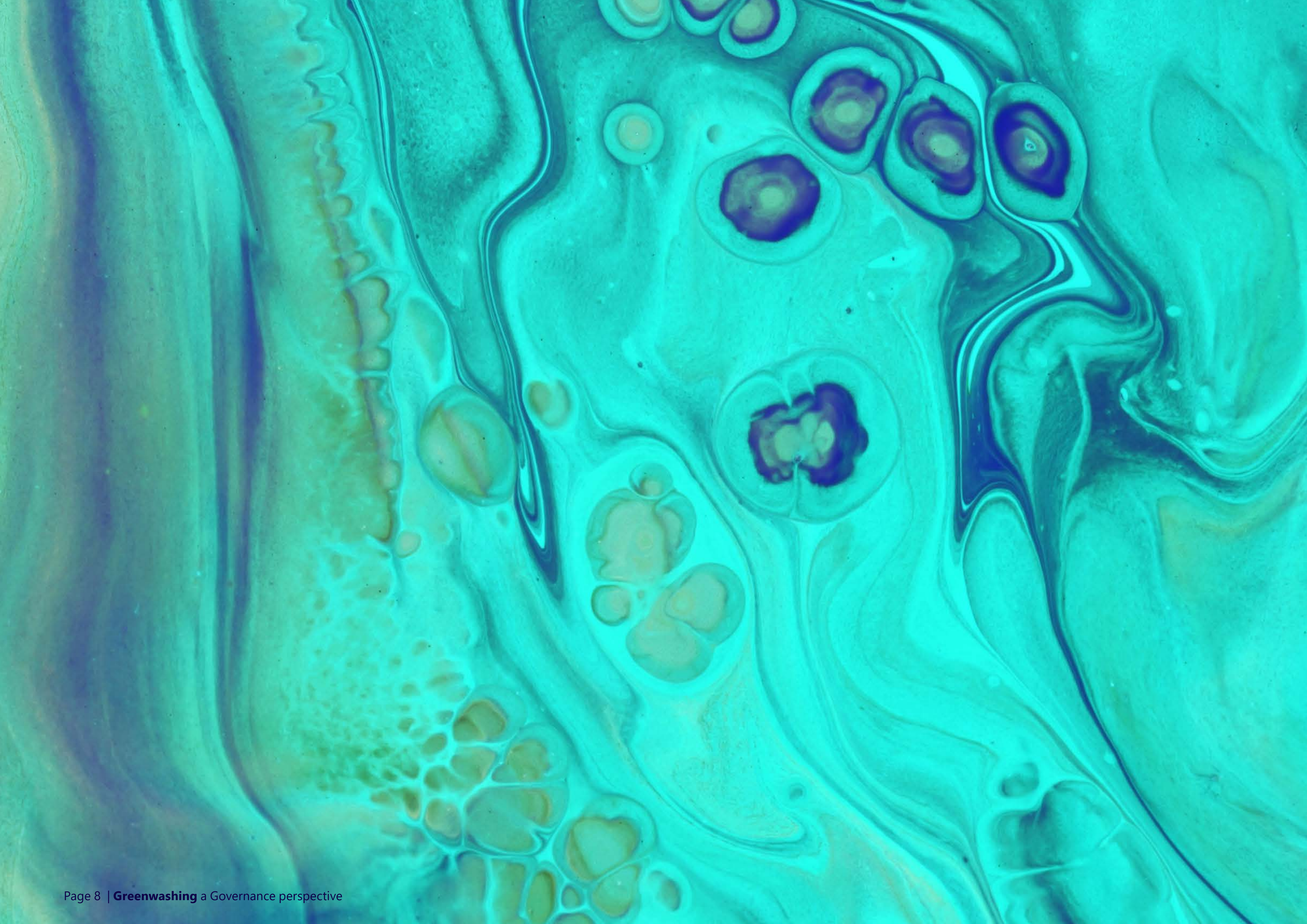
Greenwashing is claiming that something — a product, practice, service or organisation — is more sustainable or environmentally friendly than it truly is.

Other forms of 'washing'

As an awareness of greenwashing has become mainstream, a variety of related terms has emerged. While greenwashing refers to the *environmental* claims other forms of 'washing' (which tend to relate to product marketing and brand communications rather than to disclosures) include:

Spin-off term	Meaning
Blue-washing	Misrepresenting an organisation's efforts to develop ethical social practices, or hiding the social damage caused by an organisation, particularly around economic, supply chain and community issues. 'Blue' relates to the colour of the UN flag and logo; the phrase originated when companies were accused of 'piggy-backing' on the UN's Global Compact and its focus on human rights to improve their reputations without making meaningful change to their practices.
Social-washing	Implementing social responsibility initiatives which are not truly effective or taking action under the guise of social responsibility but with the ultimate goal of economic return. Topics which fall under this umbrella include labour, human rights, gender equality, modern slavery and supply chain ethics. 'Black-cladding' is social washing in relation to indigenous reconciliation.
Pink-washing	Superficially promoting LGBTQ+ rights or publicising messages which are sympathetic to LGBTQ+ causes, while not taking concrete action to support the inclusion of individuals identifying as LGBTQ+. For example, the commodification of Pride events through companies producing Pride merchandise which carries their own brand, despite these companies having little or nothing to do with LGBTQ+ rights.
Woke-washing	Appropriating and outwardly supporting socially progressive values, whilst not truly adhering to them, for the purposes of marketing and appealing to a socially-conscious consumer base. This overlaps with social- and pink-washing.
Purpose-washing	Presenting an organisation or brand as being driven by a social or ethical purpose, when in reality this purpose does not impact the organisation's strategy and is only used for marketing. An organisation may have a purpose statement claiming to 'put people and planet first' but then fail to consider its environmental and social impact in pursuit of greater profit.





How is greenwashing a governance issue?

Governance professionals play an important role in corporate reporting and advising boards on governance risk. The complexities of climate and sustainability-related reporting and marketing activities mean that boards require accurate and timely guidance. The consequences of getting it wrong can be significant. Organisation level governance factors have been demonstrated to be more important for the avoidance of greenwashing than external factors, such as public scrutiny.[9] Having robust governance structures in place means that organisations are less likely to fall foul of accusations of greenwashing. As with all governance concerns, accountability plays a key role in managing the risk associated with greenwashing. For example, ensuring key performance indicators for senior executives are aligned with disclosures and forward looking statements, and holding those executives accountable for meeting those indicators are important.

Whilst greenwashing is often understood as a marketing or public relations issue in many ways, it can most accurately be understood as a governance issue, in that it relates to:

- Board expertise: creating an environmental and climate-competent board and educating board members about the risks of greenwashing
- Reporting: meeting disclosure requirements about environmental issues
- Transparency: ensuring accuracy and completeness in reporting and in marketing
- Strategy: aligning environmental and climate-related goals with financial goals and organisational practices
- Audit: providing assurance on information reported about environmental and climate-related issues
- Reputation: ensuring that stakeholders feel that they can trust an organisation's environmental, climate-related and environmental statements
- Accountability: ensuring there are clear roles and responsibilities within the organisation for management of these issues
- Marketing: ensuring that those responsible for product advertising, public relations and brand image understand the risks of greenwashing
- Risk: understanding and managing climate and sustainability-related risk; and
- Ethics: demonstrating integrity and building trust.

The financial reporting environment is, of course, far more established than the environmental and climate-related reporting environment, meaning that financial disclosures are bound by far more stringent regulations around materiality, mandatory disclosure, comparability and assurance. Environmental and climate-related disclosure has been more fragmented across different reporting frameworks. Amidst widespread calls for accelerated consolidation of environmental and climate-related reporting, both from those who prepare these disclosures and those who use them, the ISSB issued new financial reporting standards to offer a global standard in sustainability and climate-related financial reporting.

Directors' duties

The governance concern in relation to greenwashing is highlighted by the fact that under Australian Consumer Law, specifically the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act), directors are exposed to several obligations relating to greenwashing. Directors have a duty to discharge obligations under this legislation by ensuring they satisfy their obligation firstly to disclose, and secondly not to make any false or misleading statements in disclosures.

In respect to climate risks, the 2016 Hutley SC and Hartford-Davis opinion considered the extent to which the duty of care and diligence imposed upon company directors by s 180(1) of the Corporations Act permitted or required Australian company directors to respond to climate change risks. Since this time, the Centre for Policy Development, published a second opinion, which, in summary, suggests that directors' exposure to the risk of climate change litigation has in fact increased.[10] Board governance focus has shifted from consideration and disclosure of risks towards planning and action to manage risks and opportunities in the transition to a zero carbon economy — the focus is increasingly on how the duty is discharged and disclosure alone is no longer sufficient.

[9] Greenwashing in environmental, social and governance disclosures - ScienceDirect
[10] https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf

Why is greenwashing problematic?

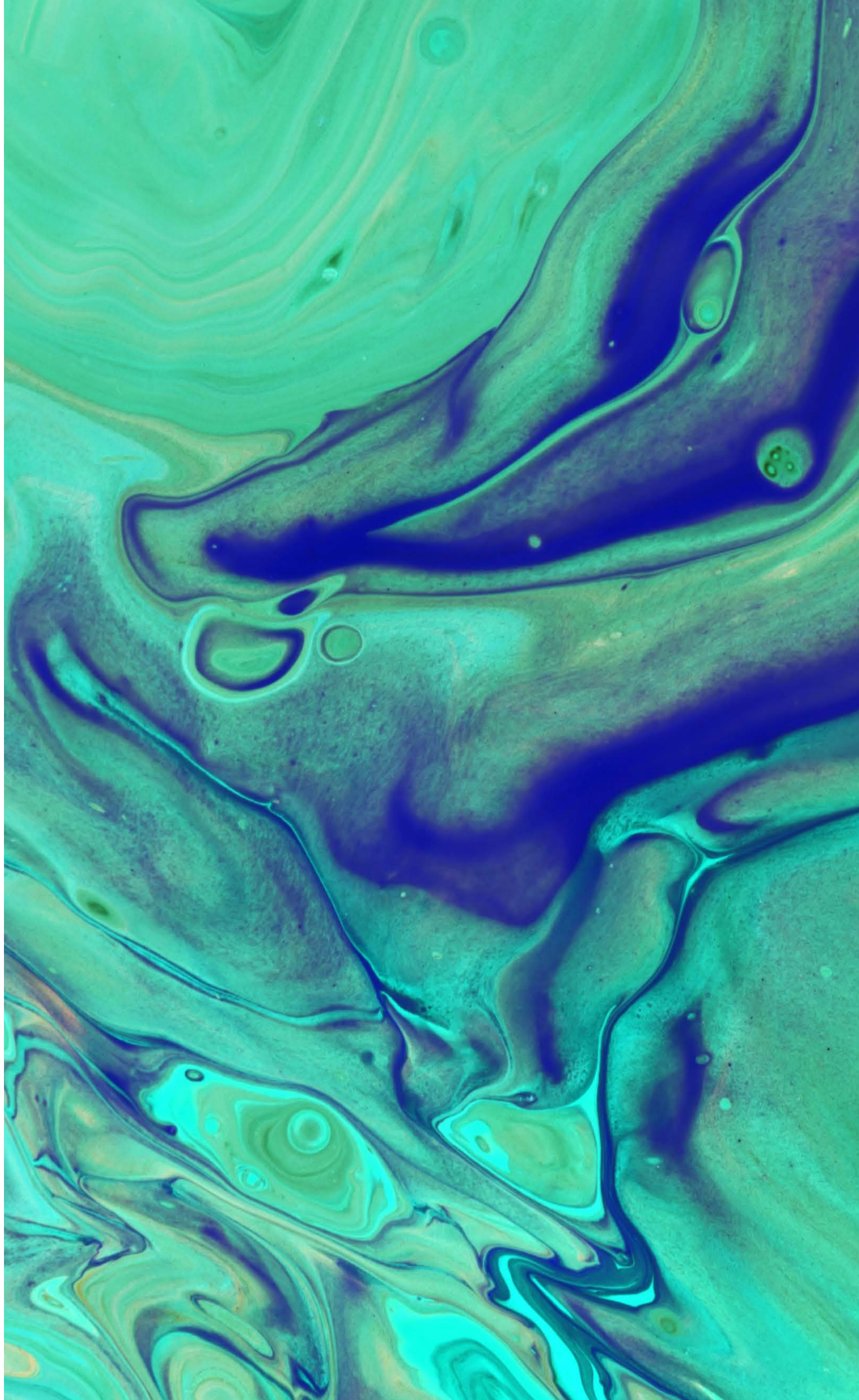
Greenwashing is problematic for many reasons. It misleads consumers about the environmental impacts of products or services they procure, creating distortions in the markets. It also delays companies from taking real actions to prevent environmental harms, including undermining efforts to tackle climate change. Undermining such efforts has the potential to create and contribute to adverse societal impacts. Further, greenwashing has negative consequences for capital markets, and for the organisations which engage in it.

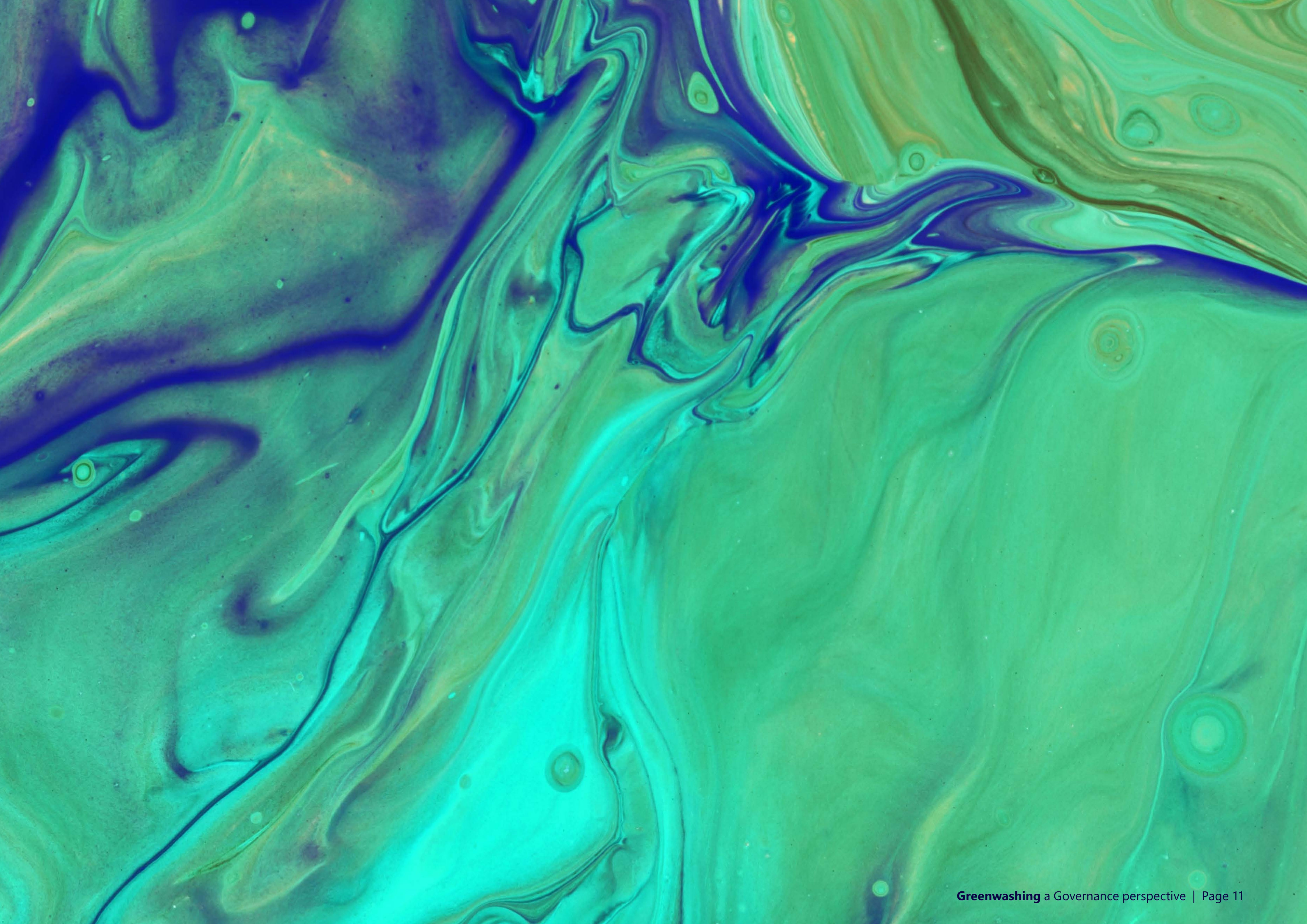
Greenwashing also has negative implications at a market level.
It is a form of inaccurate or distorted information, which can lead to poor investment decisions and to the misallocation of capital which has been intended for sustainable investments. Businesses can become overvalued based upon flawed information. In the long-term, this can contribute to economic and financial instability, through distorting capital market assumptions and undermining trust in the market.[11]

At the level of individual organisations, greenwashing also has potentially severe negative consequences: reputational, legal and financial. These are discussed in greater detail in the next section.

Greenwashing is problematic for many reasons. It misleads consumers about the environmental impacts of products or services they procure, creating distortions in the markets.

[11] Climate greenwashing liability: Key risks for boards in the transition to net zero | United Kingdom | Global law firm | Norton Rose Fulbright





Australian legal and regulatory environment

Tackling greenwashing is a priority for regulators globally, reflected by increasing the amount of regulation and legislation.[12] This section of the paper outlines key Australian developments.

Australian regulators

ASIC

The Australian Securities and Investments Commission (ASIC)'s role in relation to greenwashing arises in the context of its role as the regulator of corporate entities and due to obligations under Australian Consumer Law, specifically the Corporations Act and the ASIC Act. This legislation contains general prohibitions that directors and officers should take precautions to comply with when offering or promoting sustainability-related products, namely:

- making statements (or disseminating information) that are false or misleading; or
- engaging in dishonest, misleading or deceptive conduct in relation to a financial product or financial service.[13]

Further, companies need to be aware of the importance of acting consistently with statements where they are made.

ASIC also has regulatory oversight over corporate disclosure obligations under:

- s 1013D(1)(l) of the Corporations Act, which states that where a financial product has an investment component, its issuer must include in the Product Disclosure Statement (PDS) the extent to which labour standards or environmental, social or ethical considerations are taken into account in selecting, retaining or realising an investment, and
- the guidelines in Regulatory Guide 65 Section 1013DA *disclosure guidelines* (RG 65).[14]

Where an entity is listed on the Australian Securities Exchange (ASX) it may also breach its continuous disclosure obligations, which ASIC may enforce.

In July 2021, an ASIC Commissioner announced ASIC was conducting a review to establish whether greenwashing was occurring in the offering of ESG-related investment products by managed funds and superannuation funds.[15]

In July 2022, ASIC published Information Sheet 271 (INFO 271), *How to avoid greenwashing when offering or promoting sustainability-related products*. This Guidance document provides information about misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical for responsible entities of managed funds, corporate directors of corporate collective investment vehicles, and trustees of registrable superannuation entities. The guidance covers the following themes:

- what is greenwashing and why is it a concern
- the current regulatory setting for communications about sustainability-related products including prohibitions against misleading and deceptive statements and conduct, and disclosure obligations and
- how to avoid misleading or deceptive greenwashing practices.

Tackling greenwashing is a priority for regulators globally, reflected by increasing the amount of regulation and legislation.

[12] The greenwashing risk to corporate sustainability | Deloitte
[13] See ss 1041E, 1041G and 1041H of the Corporations Act, and sections 12DA and 12DB of the ASIC Act
[14] 3.1 and 3.1A of the ASX Listing Rules and section 674(2) of the Corporations Act, ASX, 'Corporate Governance Principles and Recommendations' (Fourth Edition), recommendation 7.4
[15] https://asic.gov.au/about-asic/news-centre/articles/what-is-greenwashing-and-what-are-its-potential-threats/

ASIC surveillance and enforcement Activities

Since the publication of INFO 271, ASIC has undertaken various surveillance and enforcement interventions to address the risk of greenwashing. On 10 May 2023, it released Report 763, *ASIC's recent greenwashing interventions*, which details the actions taken between July 2022 and 31 March 2023.[16] In that period, ASIC:

- surveyed the managed funds sector, including a review of the PDSs of 122 funds
- reviewed the investment processes of 17 funds
- surveyed the ESG-related disclosures in disclosure documents lodged with it by companies raising capital from retail investors
- responded to multiple reports of misconduct and breach
- issued 11 infringement notices
- achieved 23 corrective disclosure outcomes, and
- commenced civil proceedings against one superannuation fund.

An interesting aspect of ASIC's approach to greenwashing is that it defines the concept of greenwashing broadly, as being where an entity 'over represents the extent to which their practices are environmentally friendly, sustainable or ethical'.[17] This broad view of greenwashing includes the traditional environmental concepts associated with that term but also extends to conduct that speaks to the ethics of a business, thus incorporating the notion of 'bluewashing' — where an entity over represents its commitment to responsible social practices.[18]

Additional funds were allocated to ASIC for surveillance and enforcement activities in the 2023 Federal Budget to increase activity in relation to businesses making misleading claims about the sustainability or efficiency of their products.[19]

Looking to the future, ASIC states in its report: 'We will be progressing our surveillance on the superannuation fund sector and the wholesale green bond market, and will continue our surveillance of the managed fund and corporate sectors. We are continuing to investigate a number of entities in relation to suspected greenwashing and anticipate further enforcement action.

[16] REP 763 ASIC's recent greenwashing interventions | ASIC
[17] What is "greenwashing" and what are its potential threats? | ASIC
[18] The rise and risk of 'greenwashing'. Clyde & Co (clydeco.com): https://www.clydeco.com/en/insights/2023/04/the-rise-and-risk-of-greenwashing
[19] Investor Roundtable aligns efforts to deliver cleaner, cheaper energy | Treasury Ministers

ACCC

The role of the Australian Competition and Consumer Commission (ACCC) is to administer and enforce the *Competition and Consumer Act 2010* (CCA), Australian Consumer Law, and other legislation. In relation to greenwashing, the ACCC regulates the obligation of businesses not to engage in any conduct that is likely to mislead or deceive consumers.

In 2011 the ACCC published guidance material on green marketing, titled *Green marketing and the Australian Consumer Law* [20], which without mentioning the term greenwashing, provided guidance on avoiding misleading and deceptive conduct in relation to green marketing.

ACCC internet sweep

On 4 October 2022, the ACCC announced the launch of an internet sweep to identify 'misleading environmental and sustainability marketing claims'.[21] This was done as part of the ACCC's enforcement priorities being consumer and fair-trading issues in relation to environmental and sustainability claims. In announcing the internet sweep, ACCC Deputy Chair Delia Rickard said 'as consumers become increasingly interested in purchasing sustainable products, there are growing concerns that some businesses are falsely promoting their environmental or green credentials. Misleading claims about products or services undermine consumer trust and confidence in the market'.

Subsequently, the ACCC reported on 2 March 2023 that it will investigate several businesses for potential greenwashing following the internet sweep.[22] The ACCC reported that the sweep had identified that 57 per cent of companies investigated had made concerning claims about their environmental credentials.

The key concerns identified by the ACCC in the sweep were:

- using vague or unclear environmental claims to describe products, such as 'green', 'kind to the planet', 'eco-friendly', 'responsible' or 'sustainable'
- using absolute claims, such as '100 per cent plastics free' or '100 per cent recyclable'
- using comparisons that did not provide useful information to consumers to allow a proper assessment of the claims being made
- exaggerating sustainability benefits or omitting relevant information regarding negative attributes
- using third-party certification symbols in a confusing way, and
- setting environmental goals and making aspirational statements without clear plans for how these will be achieved.

The ACCC has statutory powers under s 155 of the CCA to obtain, from a company information, documents and evidence in relation to matters which may constitute a contravention of the CCA.

The ACCC plans to use these powers to enable it to undertake detailed investigations of environmental claims it finds concerning. The ACCC also indicated that it will be:

- producing updated economy-wide guidance material, as well as targeted guidance for specific sectors, and
- engaging directly with businesses and industry associations to improve compliance with the ACL.

Following the release of the report, the ACCC is also investigating complaints made by third parties in relation to greenwashing claims.[23]

[20] https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf
[21] https://www.accc.gov.au/media-release/accc-internet-sweeps-target-greenwashing-fake-online-reviews
[22] https://www.accc.gov.au/media-release/accc-greenwashing-internet-sweep-unearths-widespread-concerning-claims
[23] On 3 March 2023, Greenpeace lodged a greenwashing claim with the ACCC against Toyota. The claim alleges that Toyota's advertising gives the false impression that the company is leading the transition to clean cars, while Toyota is allegedly rather acting globally to block the take-up of electric vehicles. On 23 March 2023, Flight Free Australia lodged a greenwashing claim with the ACCC against Etihad Airways. The claim alleges that certain Etihad advertisements implied that flying with Etihad does not have a significant environmental impact and that Etihad either intends or reasonably expects to achieve net zero emissions by 2050. Flight Free Australia alleges that Etihad has no credible path to net zero, and that its own sustainability report forecasts an increase in carbon dioxide emissions to 2026 due to increased services, while its emissions reduction initiatives are un-modelled and rely on speculative technology and offsetting.

ACCC 2023 Guidance

Following its internet sweep, the ACCC consulted on draft Guidance for business in relation to environmental and sustainability claims. The final Guidance was released in December 2023 and replaces the 2011 Guidance. One of the explicit goals of the Guidance is to decrease instances of greenwashing, 'claims [that] misrepresent the environmental impact associated with a business or the goods and services it supplies'. It sets out the ACCC's view of good practice when making environmental claims, as well as making businesses aware of their obligations under the Australian Consumer Law'.[24]

The Guidance includes eight Principles:

1. Make accurate and truthful claims
2. Have evidence to back up your claims
3. Do not hide or omit important information
4. Explain any conditions or qualifications on your claims
5. Avoid broad and unqualified claims
6. Use clear and easy-to-understand language
7. Visual elements should not give the wrong impression
8. Be direct and open about your sustainability transition.

Australia's mandatory reporting regime

The ISSB's IFRS S1 and S2 standards are expected to come into operation from 1 January 2024. In 2022 and 2023, the Australian Government has also consulted on the potential system for the implementation of mandatory climate-related disclosure, which is expected to align with IFRS S2. The stated purpose of the consultation is to seek views on the Government's proposed positions for the detailed implementation and sequencing of standardised, internationally aligned requirements for disclosing climate related financial risks and opportunities in Australia.[25]

The proposals include:

- Reporting for large listed and unlisted companies and financial institutions
- A phased implementation of mandatory climate-related disclosure over the next three reporting periods commencing in 2024/25
- Financial materiality to be favoured over double materiality
- Specific requirements for scenario analysis, which are linked to the global temperature goal in the Climate Change Act 2023 (Cth)
- Scope 1, 2, and 3 emissions are to be reported, with a phased approach to Scope 3 emissions
- Assurance of information reported is to be phased in as capacity is built in the assurance sector over the next three reporting periods commencing 2024/25, and
- A modified liability regime will be implemented to provide scope and time limited protection from civil claims relating to forward looking statements, Scope 3 emissions disclosures, scenario analysis, and transition planning.[26]

The *Treasury Laws Amendment Bill* was also introduced to amend the ASIC Act to provide the Australian Accounting Standards Board with functions to develop and formulate sustainability standards. The Bill will also expand the Auditing and Assurance Standards Board's functions to include formulating auditing and assurance standards for sustainability purposes, and to expand the Financial Reporting Council's oversight and governance powers to account for the development of sustainability standards.

[24] See Media Release, ACCC releases eight principles to guide businesses environmental claims, 12 December 2023.
[25] https://treasury.gov.au/consultation/c2023-402245 accessed on 5 July 2023.
[26] See https://www.clydeco.co /en/insights/2023/07/treasury-commences-the-second-round-of-consultation

Senate inquiry into greenwashing

Against this backdrop of a sudden uptick in greenwashing enforcement by Australian regulators, the Australian Senate has launched an inquiry into greenwashing to be finalised by June 2024. The inquiry has invited submissions with particular reference to:

1. 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
2. the impact of misleading environmental and sustainability claims on consumers
3. domestic and international examples of regulating companies' environmental and sustainability claims
4. advertising standards in relation to environmental and sustainability claims
5. legislative options to protect consumers from green washing in Australia, and
6. any other related matters.[27]

AU sustainable finance taxonomy

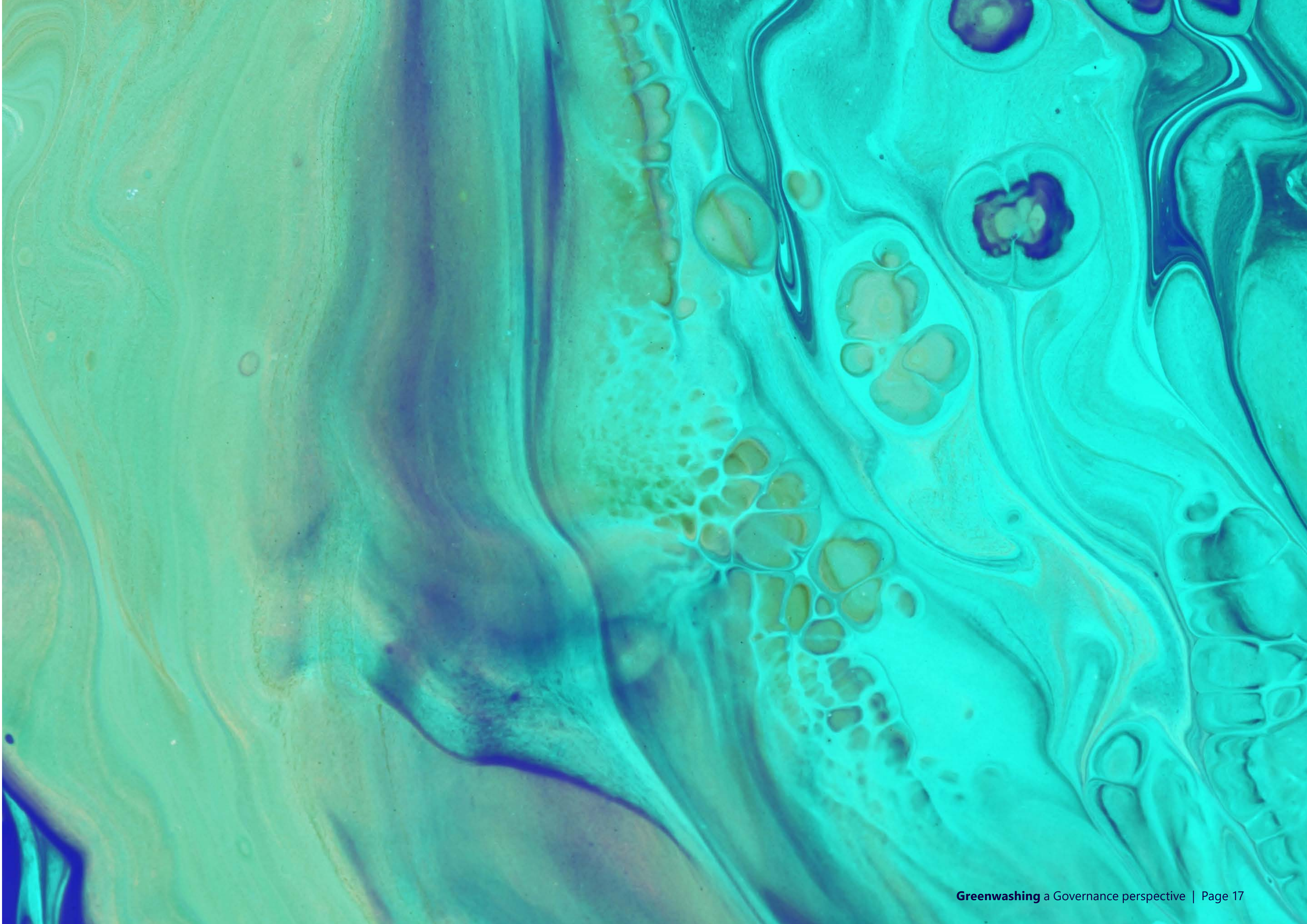
Sustainable finance taxonomies are systems to classify which parts of the economy may be marketed as sustainable investments. For example, there are taxonomies in the European Union and in Canada.[28] The Australian Government announced in April 2023 that it will co-fund the initial development phase of an Australian Sustainable Finance Taxonomy, in partnership with industry through the Australian Sustainable Finance Institute.[29] The taxonomy is intended to help tackle greenwashing in both the financial and non-financial sectors, and to ensure investors have access to consistent and comparable information when making investment decisions. Companies will need to consider how they apply the Taxonomy once it is deployed. For example, some banks in the European Union have adopted Sustainable Finance Frameworks, aligned with the European Union taxonomy but have also indicated areas where they need to deviate from the taxonomy or take a more stringent approach.

'The draft Guidance sets out what the ACCC considers to be good practice when making these claims, to help businesses provide clear, accurate and trustworthy information to consumers about the environmental performance of their business'

[27] Greenwashing – Parliament of Australia (aph.gov.au)

[28] For example, the EU taxonomy for sustainable activities and the Canadian Taxonomy Roadmap Report.

[29] Investor Roundtable aligns efforts to deliver cleaner, cheaper energy | Treasury Ministers



What are the risks of greenwashing: reputational, legal and financial?

This section examines some of the key risks of greenwashing for individual organisations. These are broken down into reputational, legal and regulatory, and financial. Organisations which are accused of greenwashing can certainly suffer reputational damage, but increasingly the consequences go much further. With tightening regulation and increased regulatory scrutiny, as noted above, organisations which greenwash are increasingly at risk of legal action or challenges from non-judicial oversight bodies. Greenwashing has also moved up the investor agenda, and companies are experiencing increased investor scrutiny and even shareholder activism around their environmental and climate-related claims. The possible consequences of greenwashing are serious, making it essential for governance professionals to equip themselves and their boards to tackle the issue.

Reputational risks

The most obvious consequence of a greenwashing accusation being levelled at an organisation is the impact on its reputation. Accusations of greenwashing can relate to both mandated disclosure, such as emissions reductions targets, and marketing materials or brand communications, such as product labels. Negative media coverage about greenwashing has implications for a company's image and can impact brand loyalty over the short and long term. It can lead to intensified stakeholder scrutiny, from the public, regulators, investors, suppliers and employees, or even to activity from social pressure groups and NGOs. As employees become more socially conscious, those organisations with a history of greenwashing may find it more difficult to recruit staff. Greenwashing has also been found to have an effect on consumer satisfaction, which could be particularly damaging for companies operating in competitive spaces where the fight for consumer attention is fierce.[30]

Legal and regulatory risks

Regulatory enforcement action, litigation and civil suits about greenwashing accusations are on the rise globally.[31] Greenwashing cases are often driven by activist groups and climate-focused NGOs — but these are not the only actors, as regulators increasingly take enforcement action. Overall, lawsuits based upon an accusation of greenwashing remain relatively rare outside the USA, but their numbers are steadily increasing.[32] Across Australia, the US, France, and the Netherlands, there have been at least 20 greenwashing cases filed between 2016 and 2021, and a further 27 cases before non-judicial oversight bodies[33] In recent years Australia has been one of the most active jurisdiction globally for climate related litigation after the US.[34] These cases have variously accused organisations of misleading communications about: the environmental impacts of their products; their environmental commitments and targets; their climate investments and the financial risks posed by climate change; and the amount of environmental damage they cause.

Unsurprisingly, the sector which has so far faced the largest share of such cases is the energy sector. Nevertheless, other sectors, including transport, finance, fast-moving consumer goods (FMCG), fashion, agriculture and mining, have also faced these actions. The legal and regulatory mechanisms for arguing such cases are varied and include securities regulation, advertising standards and consumer protection legislation.[35] In some cases, these actions are brought not by regulators but by social pressure groups and NGOs for the purpose of generating public debate and securing changes in company policies and positions, which means that actions that might traditionally have been considered 'novel' or carried a low prospect of success are nonetheless pursued. This impacts how directors need to consider the litigation landscape.

Contraventions of the law may carry significant pecuniary penalties and the risk of injunctions, corrective advertising orders, and court-enforceable undertakings. In addition, personal liability may arise for any director or executive who is involved in misleading conduct associated with greenwashing.

The table in **Appendix A** sets out a collection of recent and ongoing regulatory and legal cases relating to greenwashing. The cases included in this table are by no means exhaustive, nor fully representative of the different bases for such cases but demonstrate the range of the types of greenwashing cases which organisations across all sectors may need to be equipped to face.

[30] How Greenwashing Affects the Bottom Line (hbr.org)
[31] The rise of "greenwashing" litigation - the group proceedings trend to watch in 2023 - Lexology and Explore the Linklaters ESG Legal Outlook 2023
[32] Global trends in climate change litigation: 2022 snapshot - Grantham Research Institute on climate change and the environment (lse.ac.uk)
[33] CSSN Research Report 2022:1: Climate-Washing Litigation: Legal Liability for Misleading Climate Communications.docx
[34] See article Australia tops world in climate litigation, AFR 3 August 2023.
[35] Climate greenwashing liability: Key risks for boards in the transition to net zero | United Kingdom | Global law firm | Norton Rose Fulbright

Financial risks

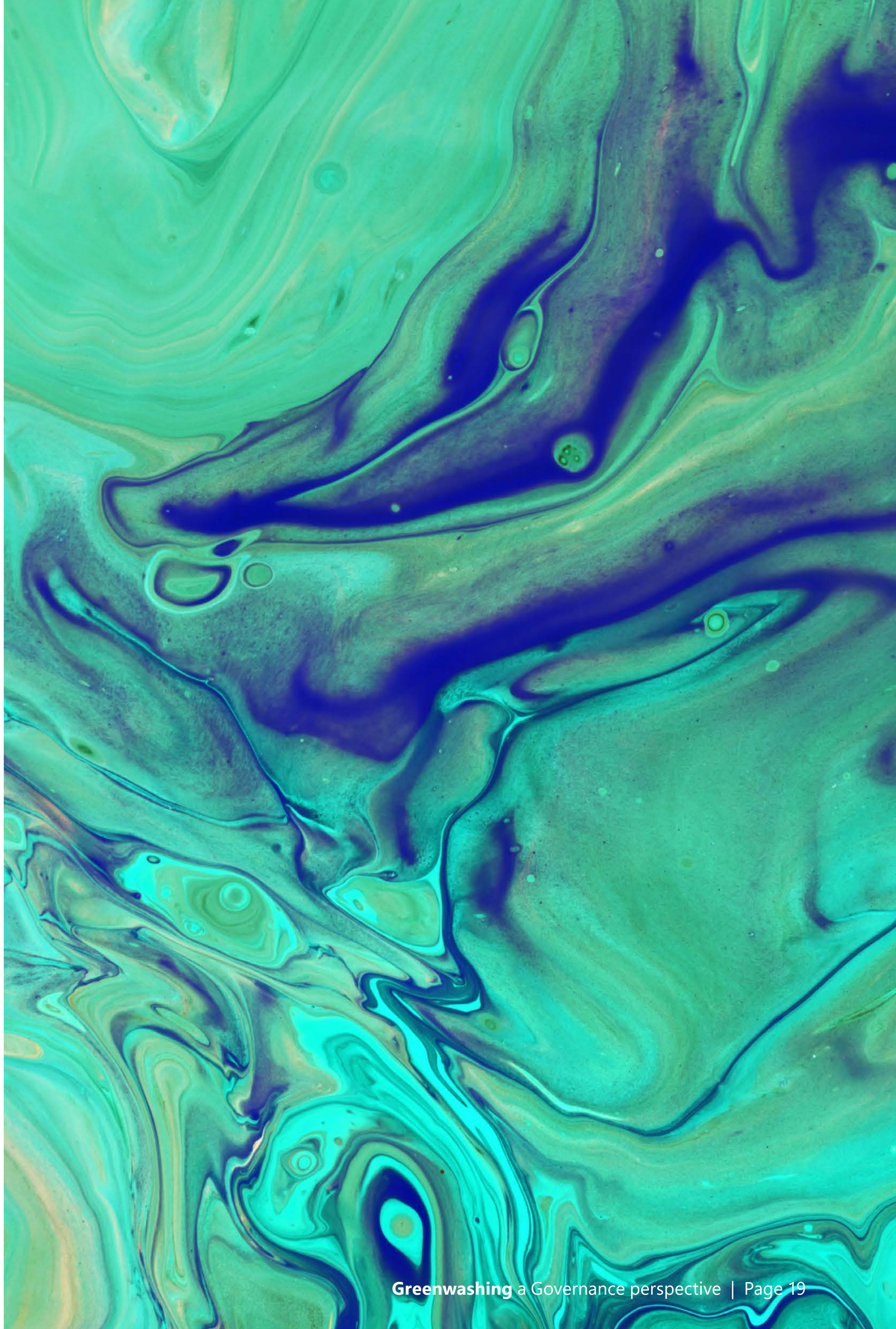
Apart from the risk of regulatory action in cases of deficient environmental disclosure, boards also run the risk of shareholder scrutiny. Investor scrutiny of environmental claims is not new and it is clear that many investors are sceptical of companies' environmental and climate-related statements and commitments. Indeed, 86 per cent of institutional investors in the USA believe that companies frequently exaggerate their action on these issues, and 72 per cent of investors globally do not believe that companies will meet their climate commitments.[36]

Companies which investors accuse of greenwashing — or of not taking enough action on climate change — open themselves up to the risk of hostile questions at AGMs and shareholder agitation or even activism. There has been a groundswell of interest in the quality and assurance of metrics on these issues, with more shareholders voting against boards and directors who they believe may be misleading them.[37] Investors are demanding higher quality data, and more consistency between the metrics and the narrative presented. The investor drive for data — and action — is underscored by the emergence, and high numbers of members, of groups such as the Institutional Investors Group on Climate Change, Net Zero Asset Managers and the Paris Aligned Investment Initiative.

One area of particularly intense investor scrutiny has been greenwashing within net zero transition plans. At COP27, the UN laid out the need for clear, short-term emission reduction targets to be embedded within organisations' plans for decarbonisation by 2050.[38] Investors are looking for accountability and credibility in companies' transition plans and are probing where it may seem lacking. For example, Swiss mining company Glencore faced questions from a group of over 60 investors about whether its continued development of thermal coal is in alignment with its net zero strategy.[39] More generally, a statement was published in 2021 by a group of 53 major investors ,representing over $14T assets under management, which called for consistency, for director accountability and for shareholder input to be sought in net zero transition plans.[40]

As the expansion of ESG ratings, exclusionary screening and ESG-focused funds continues, companies which greenwash or which do not meet certain ESG benchmarks may find themselves increasingly financially side-lined given the rapidly increasing pool of ESG assets.[41] The consequences of greenwashing activity — whether deliberate or not — can ultimately impact a company's bottom line.

[36] Special Report: Institutional Investors | Edelman
[37] Shareholder greenwashing backlash targets directors | ICAEW
[38] Net Zero Scrutiny Intensifies at COP27 – ESG Investor
[39] Glencore facing investor questioning over coal development and net-zero plans - edie
[40] $14 trillion investors call for consistency on 'corporate net zero alignment plans' and director accountability on climate targets – IIGCC
[41] ESG assets may hit $53 trillion by 2025, a third of global AUM | Insights | Bloomberg Professional Services



How should governance professionals manage greenwashing?

Greenwashing is a problematic practice with wide-ranging consequences. Tackling it requires collective effort and governance professionals have an important role to play. Firm-level governance factors are more important for the deterrence of greenwashing than country-level factors.[42] In many ways, any mismatch between an organisation's messaging and the reality of its actions can be seen as representing a failure of governance. Therefore, having robust governance structures in place is a foundational step in mitigating against the reputational, regulatory and financial risks of greenwashing. Governance professionals can also play a key role in helping to bring different teams together across a company and convening communities of practice.

This section lays out three guiding principles which those working in governance should consider when dealing with greenwashing. While these are particularly relevant to those working in the for profit sector and involved in climate and sustainability reporting, they can be applied more widely to those working in other sectors.

This section is designed to assist governance professionals answer questions such as:

- How should I address the topic of greenwashing with my board? What are the key issues that I should highlight to them?
- Which structures and processes can my organisation put in place to minimise the risk of greenwashing?
- How can I help my board to spot greenwashing, and what are the tell-tale signs of greenwashing?
- How can my organisation avoid greenwashing in its sustainability and climate related reporting?
- Where are the areas for improvement within my organisation regarding greenwashing?

Three guiding principles

Below is a summary table of three guiding principles for governance professionals to consider about greenwashing. Each principle is broken down into categories and corresponding actions. The section discusses each principle in detail and includes practical actions that governance professionals can implement to tackle greenwashing.

Principle	**1. High-quality, transparent disclosures**			**2. Board capacity and robust oversight**		**3. Change and accountability**	
Category	***Reporting frameworks***	***Materiality and metrics***	***Transparency***	***Board education***	***Monitoring and audit***	***Strategic/ operational change***	***Accountability***
Actions	Use reputable reporting frameworks	Conduct materiality analysis	Ensure balanced disclosure	Provide environmental and climate-related training and resources	Embed internal / external oversight procedures	Develop a climate strategy	Publish regular progress reports
	Ensure environmental and climate-related targets are science-based	Select relevant, specific metrics / KPIs	Substantiate claims and make them specific; verify data	Put greenwashing on the agenda	Create environmental and climate-related governance structures	Implement changes to business	Compare progress YoY and / or against peers

[42] Greenwashing in environmental, social and governance disclosures - ScienceDirect

'Having robust governance structures in place is a foundational step in mitigating against the reputational, regulatory and financial risks of greenwashing.'

1.Producing high-quality, transparent disclosures

Reporting frameworks

As noted above the ISSB has released IFRS S1 and S2 and Australia has committed to introducing S2. S2 builds on the TCFD Framework and in July 2023 the Financial Stability Board announced the completion of the TCFD's work.[43] The ISSB has indicated it is committed to continue supporting the implementation of IFRS S1 and IFRS S2 through activities such as developing further guidance and training materials.

As noted above the Australian Government is currently consulting stakeholders on introducing climate-related reporting requirements that would align with the ISSB's IFRS S2. Once the Australian equivalent of S2 is in force it will be mandatory for those companies to which it applies to report against that Standard.

Where relevant, other ESG disclosures should be made in accordance with reputable ESG reporting frameworks, to ensure that information is transparent, standardised, comparable and complete – just as is the case for financial disclosures when using financial reporting frameworks like GAAP or IFRS. Several ESG reporting frameworks exist, and each performs a slightly different role. The choice of framework should be made according to the location, size, type and sector of the organisation. Frameworks for ESG reporting include but are not limited to: the Global Reporting Initiative (GRI); the UN Principles for Responsible Investment (PRI), IFRS S1 and the UN Sustainable Development Goals (SDGs).

Whichever framework is used, there are certain universal elements which all good reporting should include to avoid greenwashing.

- The use of environmental resources, as well as any negative externalities, need to be clearly expressed and, ideally, quantified.
- Significantly, reports should identify all the risks posed to a company by climate change, including to its finances, compliance, reputation, competitive advantage and operations. Reports should then lay out the means for mitigating and managing these risks where possible.
- Narrative should be substantiated and underpinned by data.
- Targets for climate action should be science-based. This is particularly important in the case of net zero transition plans.

Fundamentally, avoiding greenwashing in corporate disclosures requires being clear and transparent about both the material good and bad environmental impacts of a business and its products or services. At the level of the board, achieving this will involve input from cross-functional teams covering finance, reporting, risk, legal, marketing, sustainability, and others to:

- avoid any inaccurate statements or disclosures (requiring very close attention to the accuracy of statements/disclosures made)
- ensure that the company is not relying on flawed scenario analysis, and
- ensure that there is (at least) a 'reasonable basis' for any commitments made

Materiality

The issue of materiality is a complex one, as is the sourcing of high-quality data. A materiality assessment is beneficial to understand fully an organisation's risk level, its resilience and the key impacts that it has on the environment, as well as the impacts that climate change will have on it. Through this, priority areas for action and risk mitigation can be determined, and appropriate metrics sourced.

The data sourced should underpin the report's narrative. To avoid greenwashing, organisations should avoid making vague and unsubstantiated claims. Ensure that any commentary — whether about actions taken, existing initiatives, or future ambitions — is underpinned by metrics — see below.

The recent Australian Treasury's consultation notes that in determining whether climate-related financial information is material the threshold question is whether omitting, misstating or obscuring that information could reasonably be expected to influence decisions that the primary users of general purpose financial reports (existing and potential investors, lenders and other creditors) make on the basis of the reports.[44] Treasury indicates this approach to materiality aligns with the anticipated position on materiality from the ISSB and ensures harmonisation with existing definitions of financial materiality in the Australian and international standards to ensure consistency for reporting entities.[45] The proposed position envisions that climate-related financial disclosure will be limited to reporting on financial materiality only (that is, single materiality), and non-financial external climate-related impacts of a company will not need to be reported (that is, double materiality is not proposed in Australia). These aspects may also be voluntarily reported.

[43] See FSB Roadmap for Addressing Financial Risks from Climate Change Progress report, July 2023.
[44] Climate-related financial disclosure in Australia: Treasury commences second round of consultation : Clyde & Co (clydeco.com): https://www.clydeco.com/en/insights/2023/07/treasury-commences-the-second-round-of-consultation
[45] See Climate-related financial disclosure Consultation Paper, Australian Treasury, June 2023 at page 11.

Metrics and targets

The objective of disclosures on metrics and targets is to enable users of information to understand how an entity measures, monitors and manages its significant climate-related risks and opportunities. The expectation is that these disclosures will enable users to understand how the entity assesses its performance against targets. Metrics should be framed as KPIs, which need to be material, specific and verifiable. KPIs should be quantified against a baseline, to allow robust comparison and the assessment of progress.

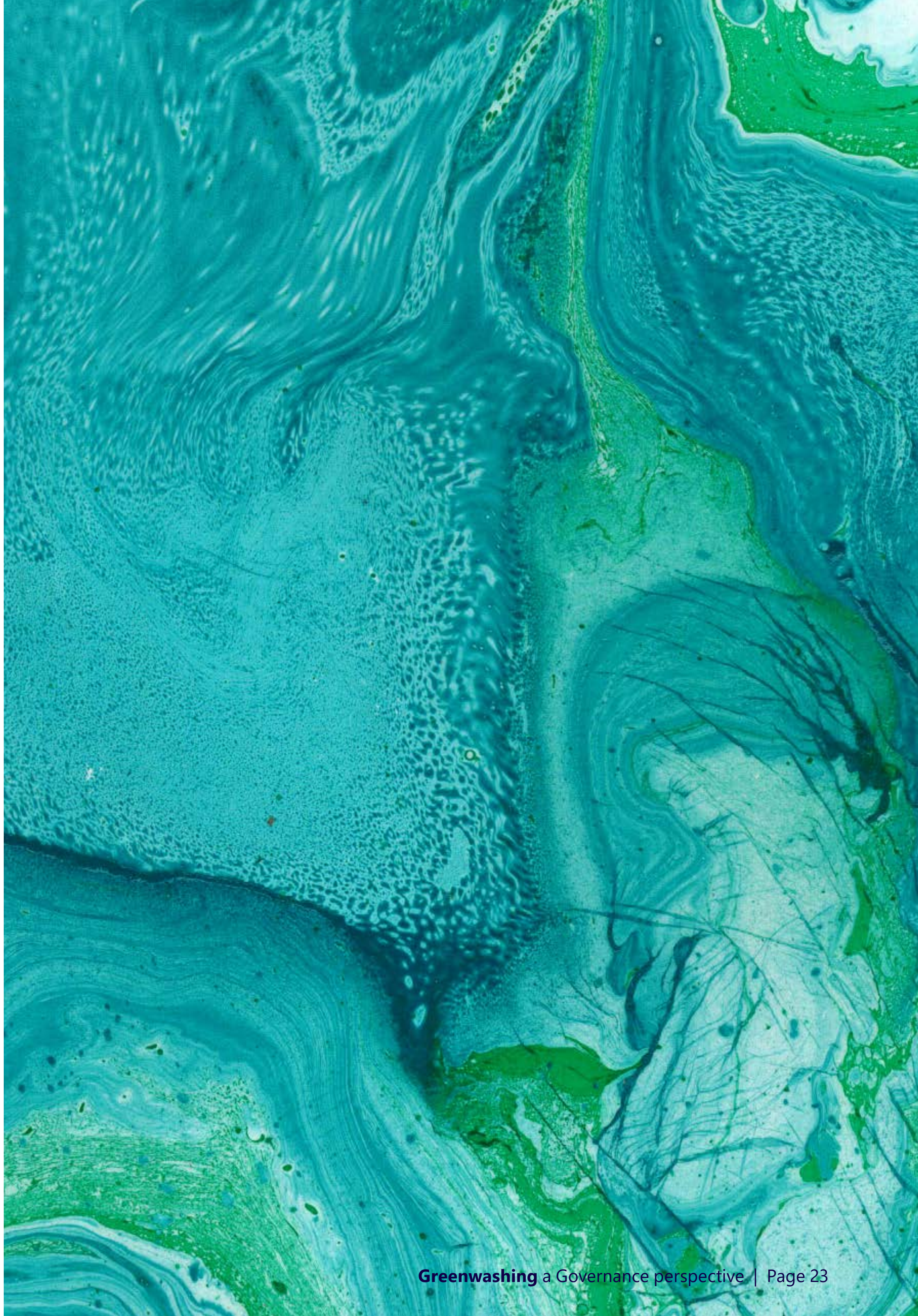
Climate-related targets should be science-based. Science-based targets provide a pathway for companies to reduce greenhouse gas emissions in line with what climate science considers necessary to meet the Paris Agreement goals. The Science Based Target Initiative, a partnership between the Carbon Disclosure Project, the United Nations Global Compact, the World Resources Institute (WRI) and the World Wide Fund for Nature (WWF) provides information about science-based targets.

Transparency

Committing to transparency in all disclosures, and environment-related marketing claims, is essential to avoid greenwashing. Disclosures should cover all material climate risks, and not focus solely on positive aspects. It is important not to hide the negative environmental impacts of a business practice or product and, similarly, not to exaggerate its environmental benefits.

There are several tests that environmental claims should pass in order to pass the 'greenwash' test. They must be:

- based on robust evidence and backed up by data
- specific, and avoid the use of vague or absolute terms without explanation
- verifiable
- supported with qualifying information which is easily accessible and displayed prominently, and
- in proportion to the efforts made by an organisation.



2.Increasing board capacity and robust oversight

Board education

Governance professionals should equip board members to deal adequately with the complexities of climate and other sustainability requirements. This will enable boards to make informed decisions about these issues and to communicate accurately about the activity they have undertaken or are planning to undertake. Governance professionals should ensure that they provide board members with timely updates about developments in anti-greenwashing regulation, at both a local and international level, as needed. Additionally, they should periodically highlight key environmental and climate efforts, as well as claims, made across all parts of the business, to allow the board to weigh these against the latest regulatory requirements and the evolving expectations of investors and other stakeholders. The board should also regularly review its directors' and officers' liability insurance to ensure it provides sufficient cover for their level of exposure to environmental, climate and other sustainability greenwashing risks.

It is important to allocate time at board and committee meetings to review any potential mismatch between an organisation's environmental, climate and sustainability efforts and its claims about these efforts. Further, environment and sustainability claims training should be conducted within organisations to educate all those responsible for making statements and claims on behalf of the organisation. This should be offered at all levels – that is, to areas such as marketing and communications, or finance, and legal for example. In other words, greenwashing should be 'on the agenda'. These conversations may require working cross-functionally with other teams within the organisation, including legal and marketing, in order to get the fullest possible picture of what types of environmental and climate-related claims an organisation is making.

Monitoring and audit

The International Accounting and Assurance Standards Board is working on the development of a global baseline for obtaining assurance on sustainability-related disclosures. The Australian Treasury has also indicated it proposes to introduce assurance requirements for climate-related financial disclosure on a phased-in basis.

Individuals responsible for governance should have a clear understanding of the means and methods of oversight, monitoring, verification, reporting and audit that exist within their organisation with regard to claims. Where these are lacking, it is important for governance professionals to suggest and support the creation of specific and robust oversight mechanisms. Depending on the type and size of organisation, this may require internal or external monitoring and audit.

These mechanisms could include the embedding of verification processes and procedures for environmental and climate-related claims. They could also include the establishment of specific board-level committees looking at climate and sustainability, with responsibility for anti-greenwashing activity. Similar committees can be established at management level. Additionally, employees working in internal risk, audit and compliance functions should be provided with adequate training and resources – particularly as more stringent assurance of disclosures becomes the norm.

3. Implementing change and creating accountability

Strategic and operational change

To avoid greenwashing long-term and to comply with regulatory, investor and stakeholder demands, boards must implement the strategic and operational change necessary for an organisation to make progress on climate action. After carefully considering which issues are of the greatest importance and relevance for their organisation, boards should develop an overarching climate strategy. This must be supported by short, medium and long-term implementation plans with clear targets and priorities.

These strategic developments must be matched with the implementation of the requisite business practices needed to achieve them. This might include:

- restructuring the most environmentally damaging parts of a business' activities
- sourcing new funding options, such as sustainability bonds and other green financing
- ceasing lobbying efforts where these are fundamentally out of alignment with an organisation's outward-facing posture on the environment
- rethinking marketing strategies to ensure all environmental claims are specific and substantiated

- assessing and reducing the environmental impact of products across their entire life cycle, rather than focusing on token, marketable gestures, and adjusting research and development priorities to focus on the tools needed to facilitate the energy transition.

Each organisation will have its own priorities and challenges dependent on its sector and business practices. It is essential that all environmental and climate-related plans are clear, well-documented, implementable and verifiable. This will mean that stakeholders are not misled about the organisation's climate ambitions and the steps it will take to achieve them.

Accountability

A final key element in the avoidance of greenwashing is accountability: taking responsibility for what progress has or has not been made towards the ambitions an organisation has laid out. There are several ways of increasing accountability.

- Regular reporting: Organisations should report on which parts of their climate action plan they have made progress, and where progress may still be lacking. Ideally, these reports should include aggregated data and metrics to demonstrate the breadth of action undertaken. The best reports also utilise examples and case studies to demonstrate the depth of particular activities and their impact.
- Proactive engagement between boards, shareholders and other stakeholders: This could include, voluntarily, putting net zero transition plans before shareholders at an AGM for a vote. By taking a collaborative, transparent approach organisations may avoid potential shareholder agitation or activism.
- Linking progress to executive remuneration: This is an increasingly common approach to incentivising action on environmental and climate-related issues, and can also drive up the quality of reporting. It is essential to use relevant, measurable and specific KPIs.
- Benchmarking progress: The progress made each year towards an organisation's goals should be reported upon and compared year-on-year to demonstrate long-term commitment. Additionally, progress can be benchmarked against peers to ensure an organisation is staying on track. This should instil a culture of continuous improvement.

- Organisation-wide general awareness training.
- Taxonomy of statements the organisation can make ensuring that you have obtained appropriate advice.
- Making sure the website is consistent with other statements the company makes publicly.

Through following these three principles, individuals working in governance can have a significant impact on whether their organisations engage in greenwashing, or are equipped to avoid it.

'Individuals responsible for governance should have a clear understanding of the means and methods of oversight, monitoring, verification, reporting and audit that exist within their organisation with regard to claims.'

Annexure A

Company involved	Sector	Claimant / regulator / complainan	Legal / regulatory basis for case	Jurisdiction of case	Summary of case
Australia					
Glencore Australia Pty Limited **(Glencore)**	Mining	Lock the Gate Alliance and The Plains Clan of the Wonnarua People	Corporations Act, consumer law	Australia	• Lock the Gate Alliance (an NGO) and The Plains Clan of the Wonnarua People (an indigenous government) have brought a legal complaint to the Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investments Commission (ASIC) against mining company Glencore. • The claim accuses Glencore of misleading stakeholders about its decarbonisation plans and about its engagement with Traditional Owners (indigenous groups). • It suggests this could amount to greenwashing under the Corporations Act and / or Australian consumer law. • A Glencore spokesperson said the company has been 'very transparent about our climate change commitments and the responsible managed decline of our global coal business.'
Vanguard Investments **(Vanguard)**	Investment	ASIC	s 12GX of the ASIC Act	Australia	• In December 2022, Vanguard paid $39,960 in relation to 3 infringement notices issued to it by ASIC. • ASIC's action was in relation to Product Disclosure Statements for the Vanguard International Shares Select Exclusions Index Funds (the Vanguard Funds), which ASIC viewed as having the potential to mislead the public by overstating an exclusion, otherwise known as an investment screen, claimed to prevent investment in companies involved in significant tobacco sales. • ASIC's view was that the Vanguard Funds were structured to exclude certain investments in tobacco, however, while this screen applied to exclude manufacturers of cigarettes and other tobacco products, it did not exclude companies involved in the sale of tobacco products.

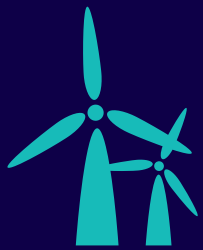
Black Mountain Energy Limited **(BME)**	Gas	ASIC	s 12GX of the ASIC Act	Australia	In January 2023, BME paid $39,960 in relation to 3 infringement notices issued to it by ASIC. ASIC's action was in relation to statements contained in three ASX announcements made by BME which claimed that:
					  • BME was creating a natural gas development project with 'net-zero carbon emissions'; and
					  • the greenhouse gas emissions associated with Project Valhalla would be net zero.
					• ASIC was concerned that BME either did not have a reasonable basis to make the representations, or that the representations were factually incorrect

Mercer Superannuation (Australia) **Limited (Mercer)**	Investment — Superannuation	ASIC	s 12DB(1)(a) and/ or s 12DF(1) of the ASIC Act	Australia	• On 28 February 2023, ASIC announced that it has filed proceedings in the Federal Court against Mercer in relation to alleged statements on its website about seven 'Sustainable Plus' investment options offered by the Mercer Super Trust, of which Mercer is the trustee. These statements marketed the Sustainable Plus options as suitable for members who 'are deeply committed to sustainability' because they excluded investments in companies involved in carbon intensive fossil fuels like thermal coal. Exclusions were also stated to apply to companies involved in alcohol production and gambling.
					• However, ASIC alleges members who took up the Sustainable Plus options had investments in companies involved in industries the website statements said were excluded. For example:
					  • 15 companies involved in the extraction or sale of carbon intensive fossil fuels (including AGL Energy Ltd, BHP Group Ltd, Glencore PLC and Whitehaven Coal Ltd);
					  • 15 companies involved in the production of alcohol (including Budweiser Brewing Company APAC Ltd, Carlsberg AS, Heineken Holding NV and Treasury Wine Estates Ltd); and
					  • 19 companies involved in gambling (including Aristocrat Leisure Limited, Caesar's Entertainment Inc, Crown Resorts Limited and Tabcorp Holdings Limited).
					• In doing so, ASIC alleges Mercer made false and misleading statements and engaged in conduct that could mislead the public.
					• ASIC is seeking declarations and pecuniary penalties from the Court.
					• ASIC also seeks injunctions preventing Mercer from continuing to make any of the alleged misleading statements on its website, and orders requiring Mercer to publicise any contraventions found by the court.

Company involved	Sector	Claimant / regulator / complainan	Legal / regulatory basis for case	Jurisdiction of case	Summary of case
Future Super Investment Services Pty Ltd **(Future Super)**	Investment — Superannuation	ASIC	s 12GX of the ASIC Act	Australia	• ASIC issued an infringement notice to Future Super for greenwashing by way of social media representations that overstated its positive environmental impact. • Using Facebook, the fund stated, “Naysayers don’t join together to move nearly $400 million out of fossil fuels”. • This statement was found by ASIC to have no basis to represent this prior to those $400 million in funds actually being invested in fossil fuels. • Notably, Future Super self-reported the post to ASIC, removed the offending post and paid the infringement fine. • The post in question was made on the 29 May 2019 and reportedly – according to Facebook analytics – was only viewed by 28 people prior to its removal in October 2022. • This case serves as an important warning on the importance of applying the same vigilance when it comes to taking precautions against greenwashing and the use of social media, as ASIC demonstrates its prioritisation of enforcement of greenwashing regulation. • Future Super was issued a $13,320 infringement notice.

Toyota Motor Corporation Australia **(Toyota)**	Motor Corporation	Greenpeace, represented by the Environmental Defenders Office (**EDO**), lodged claim with the ACCC	ss 18 and 29 of the Australian Consumer Law (**ACL**)
			(Schedule 2 of the Competition and Consumer Act 2010 (Cth))
				Australia	• On 3 March 2023, Greenpeace, represented by EDO, lodged a greenwashing claim with the ACCC against Toyota to investigate whether environmental claims are misleading or deceptive.
					• The claim alleges that Toyota’s advertising gives the false impression that the company is leading the transition to clean cars, but the truth is Toyota is not leading the transition but is acting globally to block the take-up of electric vehicles.
					• Examples include:
					  • Toyota’s net zero by 2050 plans appear inconsistent with its current plans for car production
					  • Toyota is not seeking a rapid transition to eco-friendly cars and has a global track record of lobbying to delay, block or weaken vehicle emissions standards, and
					  • Toyota’s vehicles may not meet emission standards in real-world use as opposed to test conditions.
					• Toyota could face fines of up to A$50 million.

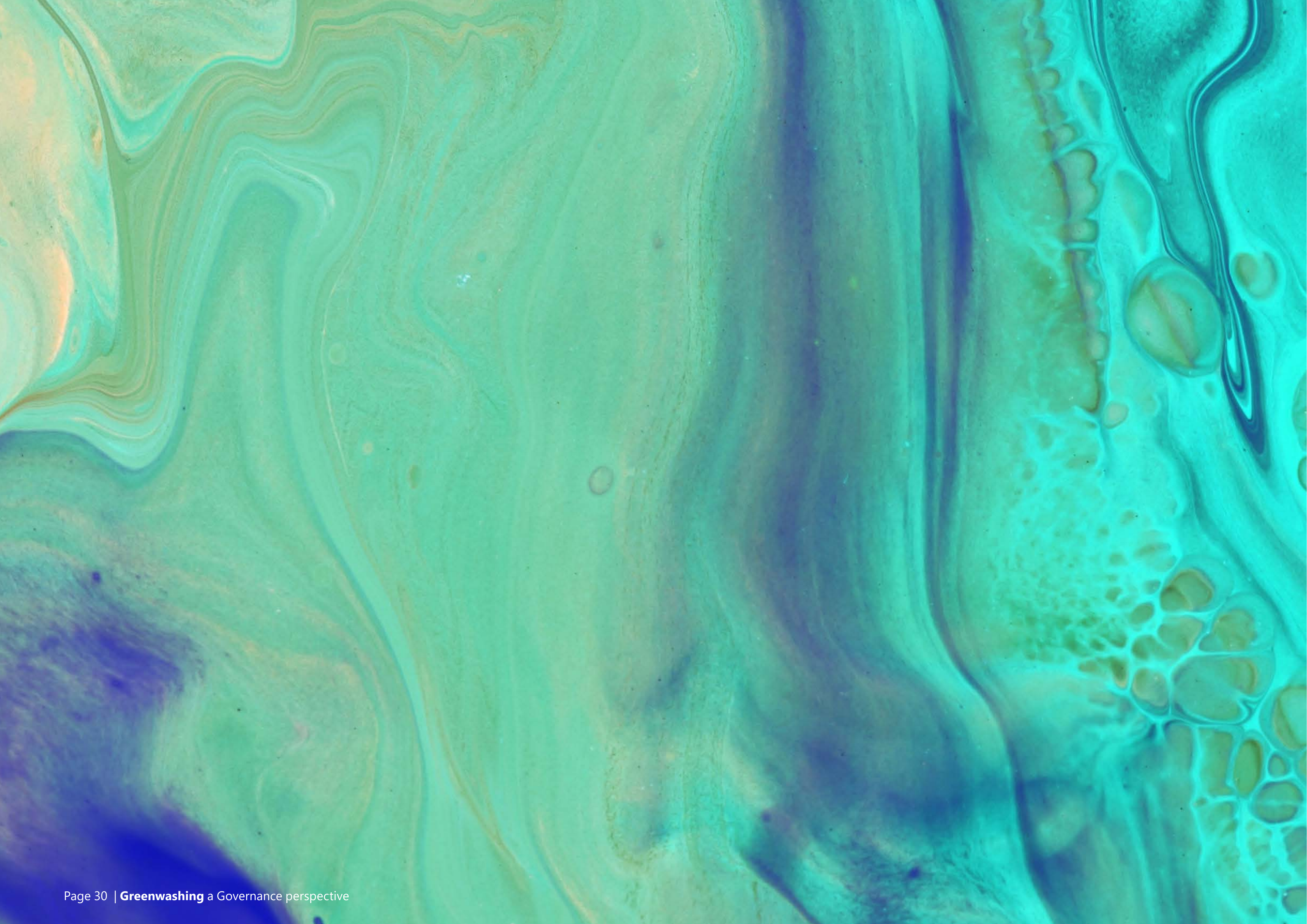
Etihad Airways **(Etihad)**	Airline	Flight Free Australia, represented by EDO, lodged claim with ACCC	ss 18 and 29 of the Australian Consumer Law (ACL) (Schedule 2 of the Competition and Consumer Act 2010 (Cth))	Australia	• On 23 March 2023, Flight Free Australia, represented by EDO, lodged a greenwashing claim with the ACCC against Etihad Airways to investigate alleged misleading and deceptive conduct. • The claim alleges that certain Etihad advertisements implied that flying with Etihad does not have a significant environmental impact and that Etihad either intends or reasonably expects to achieve net zero emissions by 2050. • Flight Free Australia alleges that Etihad has no credible path to net zero, that its own sustainability report forecasts an increase in carbon dioxide emissions to 2026 due to increased services, while its emissions reduction initiatives are un-modelled and rely on speculative technology and offsetting.



‘ASIC issued an infringement notice to Future Super for greenwashing by way of social media representations that overstated its positive environmental impact.’

Company involved	Sector	Claimant / regulator / complainan	Legal / regulatory basis for case	Jurisdiction of case	Summary of case
APAC Region					
Alliance to End Plastic Waste **(AEPW)**	Not-for-profit Waste Management	Reuters / Greenpeace	The Consumer Protection (Fair Trading) Act **(CPFTA)**	Singapore	• In 2019, AEPW claimed to be spending US $1.5 billion on cleaning up plastic waste in developing countries. • A 2021 investigation discovered that published achievements in relation to this claim – such as collecting 450 tonnes of waste from the Ganges River in 2020 when no waste was actually recovered — were falsified. • Further investigation revealed that other publications contained misleading claims regarding waste management and plastic production, with Greenpeace eventually labelling the matter as an 'industry scam designed to allow for endless plastic production'.
SK E&S Co	Gas provider	Solutions for our Climate through the Korea Fair Trade Commission and the	Development and Support for Environmental Technology Act	South Korea	• This case marks the first claim in South Korea against a company on its emissions. • The legal action arose due to allegations that the company falsely advertised the green credentials of a project off the northern coast of Australia was marketed as 'CO2-free'. • The Barossa gas project is expected to produce a total of 13.5 million tons in annual greenhouse gas emissions, including final consumption of natural gas, despite the 'CO2-free LNG' slogan. • The company ultimately changed the wording on its website to say the Barossa gas project off Australia's northern coast was 'low-carbon'.
Outside APAC Region					
KLM	Aviation	Fossielvrij NL	Consumer protection law	Netherlands	• Fossielvrij NL, supported by ClientEarth and Reclame Fossielvrij, has brought a lawsuit against Dutch airline KLM under the EU's Unfair Commercial Practices Directive, alleging that its 'Fly Responsibly' advertising campaign is misleading. • The campaign highlights the use of carbon offsets to balance out the emissions produced by flying. • The carbon offsetting schemes used by KLM do meet certification standards, but a previous decision from the Dutch Advertisement Code Commission stated that these were not enough to claim that personal flight footprints could be brought 'down to zero' as the adverts claimed. • A court decision has not yet been reached.
FIFA	Sport	International NGOs	Advertising standards	Switzerland	• Five separate complaints have been brought by NGOs in the Netherlands, France, the UK, Switzerland and Belgium against FIFA's promotion of the 2022 World Cup as carbon neutral. • These cases rest upon advertising standards in their respective jurisdictions. They argue that the carbon neutral claim has not been independently verified, that FIFA's methodology for measuring its carbon neutrality was flawed and that FIFA was over-reliant on offsets, which were themselves of poor quality. • All five complaints are to be examined jointly by the Swiss authorities.
Shell	Oil and gas	Global Witness	Securities regulations	USA	• Global Witness has filed a complaint with the US Securities and Exchange Commission (SEC), alleging that Shell is misleading investors. • Shell reports spending 12% of annual expenditure on renewable energy. Global Witness claims it is actually only 1.5% which is spent on solar and wind power, and that much of the 12% is spent on gas-related activities, billed as a 'transition fuel'. • Global Witness has asked the SEC to determine if Shell has 'violated relevant US securities laws' and if so, to issue fines. • Shell has stated that it is 'confident that its financial disclosures are fully compliant with all SEC and other reporting requirements.'

Company involved	Sector	Claimant / regulator / complainan	Legal / regulatory basis for case	Jurisdiction of case	Summary of case
Shell	Oil and gas	ClientEarth	Companies Act, directors' duties	UK	• ClientEarth, an environmental organisation turned activist Shell investor, is taking action against Shell's Board of Directors and in February 2023 filed a lawsuit at the UK High Court. • It claims Shell's board has set a net zero by 2050 target, but has failed to implement the necessary changes to the company's operations or budgets to achieve this. • ClientEarth argues that directors are in breach of their duties under section 172 and 174 of the Companies Act 2006. • This case is novel in that it seeks to hold Shell's 11 directors personally liable for failing to manage climate risks or to adopt a transition strategy aligned with the Paris Agreement. • The action has received support from certain institutional investors, holding 12 million Shell shares between them (out of Shell's approximately total 7 billion shares). • Shell has rejected the accusations, saying its climate targets are ambitious and its directors are acting in the company's best interest.
Drax	Renewable energy	International NGOs	OECD guidelines	UK	• A group of six NGOs from the UK, Canada, Estonia and USA filed a complaint with the UK National Contact Point (NCP), alleging that Drax, a biomass and hydroelectric company, has made misleading statements about its carbon emissions. • The complaint alleged that Drax breached the OECD Guidelines for Multinational Enterprises, specifically chapters about the environment and consumer interests. • In July 2022, the NCP accepted that this complaint merited further examination and will offer mediation to the two sides to further investigate. If this offer of mediation is turned down by either side, the NCP will itself investigate whether Drax has breached OECD guidelines. • Drax has stated that its business practices are in line with industry best practice and meet or exceed applicable standards.
Hyundai	Automotive	Advertising Standards Authority (ASA)	Advertising standards	UK	• Hyundai launched a hydrogen-powered car (the Nexo) in the UK in 2019 and the adverts stated it was 'so beautifully clean' that 'it purifies the air as it goes'. • In June 2021, the ASA ruled that this claim was misleading, as Nexo cars still produce pollution, for example, through brake and tyre wear. • Hyundai stated that 'our own internal tests' and the 'air purification system' in the Nexo's hydrogen fuel system 'corroborated relevant claims'.
Ithaca	Oil and gas	ClientEarth	Listing rules, prospectus regulation	UK	• ClientEarth has issued a judicial review claim against the FCA in the High Court. • This claims that the Financial Conduct Authority (FCA) acted unlawfully in approving Ithaca's listing documents, because the documents do not give sufficient detail about the climate risks that Ithaca faces to meet requirements under prospectus regulation. • The case argues that this could mislead investors, because it fails to account for how partial or full achievement of the Paris Agreement goals would impact Ithaca's finances and business model. • The FCA is opposing ClientEarth's petition. The High Court will decide whether or not to grant permission to bring the claim.
Innocent	FMCG (beverages)	ASA	Advertising standards, consumer protection law	UK	• ASA found Innocent to be making claims in its advertisements which made it seem as if its products had a net positive environmental impact. • Innocent defended the advertisements, suggesting that they reflected an aspirational customer journey and a 'purpose-led message' which aimed to encourage recycling. • The advertisements were ruled to be misleading in February 2023, as they did not consider the whole lifecycle of the product and could not be substantiated.



Glossary

Assurance (limited versus reasonable)

Assurance is the verification of a company's reports according to particular standards. For financial reporting, this is according to accounting standards. For ESG reporting, such standards are not yet so widely accepted or standardised, although there are significant efforts to establish globally-recognised frameworks.

Limited assurance is when an assurance provider states that they are not aware of any misstatements; in other words, that a report is not misleading. Reasonable assurance is the highest level of assurance (and is implied by a financial statement audit); in other words, that a report is accurate.

Carbon neutral

When the amount of carbon dioxide emissions produced by a company, country or entity, is equal to or cancelled out by the amount of emissions absorbed. This should largely be achieved through the reduction of emissions, as well as through carbon offsetting where emissions cannot be reduced.

Carbon offsets

The purchase of part of a scheme or project which aims to compensate for carbon dioxide (and other greenhouse gas) emissions. These schemes reduce or remove emissions elsewhere through activities such as reforestation, mangrove protection and carbon capture and storage.

Climate risk

Risk assessments based on analysis of the consequences of climate change for an organisation's finances and operations, as well as an organisation's vulnerability or resilience to these consequences. These risks can be physical (e.g. adverse weather events) or transitional (associated with the structural changes needed in the transition to a net zero economy).

Climate-related disclosure

Public information about an organisation's environmental impact, the climate risks it faces and its ability or activity to mitigate these. Climate-related disclosure requirements aim to ensure that companies are routinely assessing their preparedness for climate change and are transparent about their activity to tackle it.

COP27

COP (Conference of the Parties) is an international climate meeting held annually between the countries that signed up to the United Nations Framework Convention on Climate Change, and COP27 was the 27th such meeting. It took place in Sharm El Sheikh, Egypt, from 6 to 20 November 2022. One of the most significant developments at COP27 was a decision to establish a loss and damage fund, through which developing countries will be able to access financial assistance to rebuild infrastructure after extreme weather events.

Decarbonisation

Reducing the amount of carbon (and other greenhouse gas) emissions produced as a result of an activity. This can be applied to a company, a product, an economy, a country, or globally.

Double materiality

An extension of the accounting principle of materiality, which is that any information about a company which a reasonable person would consider important should be reported publicly. Double materiality applies to sustainability reporting, and states that both 1) climate-related impacts on a company and 2) a company's impacts on the climate are material and should be reported.

Emission reduction targets

Targets which a company (or country) sets to direct how much its fossil fuel emissions should be reduced by and by when. Such targets should be clearly defined, timebound, quantifiable and comparable.

ESG rating agencies

Ratings providers which evaluate companies based upon their ESG policies, systems, reports and performance. They gather data from multiple sources, including sustainability reports, other company publications, governmental data, survey questionnaires, the media and NGOs.

These ratings are often used by investors to evaluate the ESG performance of an investment. Companies which provide these ratings include MSCI, Sustainalytics, Thomson Reuters and Bloomberg.

Exclusionary screening

A process used by investors to eliminate exposure to investments which do not align with their preferences or social values. For example, ESG funds will use exclusionary screening to avoid investing in any stocks which do not perform highly enough according to particular ESG metrics.

Global Reporting Initiative (GRI)

An independent, international organisation which works to produce the GRI Standards, a set of standards for corporate sustainability reporting. These are currently used by over 10,000 organisations in over 100 countries.

International Financial Reporting Standards (IFRS) Foundation

A non-profit accounting organisation which develops and promotes the IFRS Standards, a set of accounting standards which are used in 167 countries globally (outside of the USA which uses GAAP, generally accepted accounting principles). The IFRS Foundation also oversees the International Sustainability Standards Board (ISSB) which was founded in November 2021 and is responsible for the development of standards for sustainability disclosures.

Interoperability

The ability of different products or systems to work together, or for different sources of information to be compared and intertwined. For example, different sustainability disclosure standards are 'interoperable' if they are based upon similar data and do not require significant duplication from the companies producing the disclosures.

LGBTQ+

An acronym standing for: lesbian, gay, bisexual, transgender, queer, plus. This refers to people who identify as being part of a gender, sexual or romantic minority and is considered to be a more inclusive term than LGBT.

Life cycle (of a product)

The entire process of sourcing, creating, using and disposing of a product from start to finish. When making environmental claims about a product, the environmental impact across its entire life cycle must be considered.

Nature-related disclosure

Public information about both an organisation's impact on and dependencies on the natural environment. These often particularly focus on biodiversity, which is the range of animals, plants and other life which exist within an ecosystem. They can also cover topics such as land use, water use or water scarcity, ground or water pollution, and other forms of environmental degradation.

Net zero

Avoiding adding to the total amount of greenhouse gases in the atmosphere. This is to be achieved through reducing the amount of emissions produced, and by offsetting or balancing out any which remain by removing an equivalent amount.

Net zero transition plan / strategy

A corporate (or national) strategy which lays out steps needed to achieve net zero. In the UK, the Transition Plan Taskforce, launched in April 2022, is developing a disclosure framework for private sector transition plans and their implementation.

NGOs

An acronym standing for: non-governmental organisations. These are typically non-profit organisations whose core purpose is to address a political, social or humanitarian issue.

Purpose (corporate/organisational)

A long-term guiding principle around which an organisation's operations should be organised and towards which its priorities should aim. Purpose usually goes beyond profit-making.

Qualifying information (qualified / unqualified)

Information provided which makes a statement or claim more specific and limited in its meaning. A 'qualified' claim has extra information included which clarifies its meaning and makes it less widely applicable than an 'unqualified' claim. The inclusion of qualifying information is often specified in regulation – including regulation relating to greenwashing.

Science Based Targets Initiative (SBTi)

A collaboration between several environmental organisations which aims to promote the use of science-based targets in environmental reporting. The initiative encourages companies to make a commitment to set targets in a way which is compatible with the latest science on climate change. To date, over 2,000 companies have done so.

Social license to operate

The acceptance of a company and its practices by the general public, the media and civil society. As a company builds trust with its stakeholders and the community in which it operates, it builds its social license. This license can be threatened in cases where a company is seen to be acting poorly or disingenuously — for example, through greenwashing.

Substantiated/unsubstantiated

A claim is substantiated if there is evidence or information provided to support the truthfulness of the claim. It is unsubstantiated if this evidence is lacking, inaccurate or insufficient. To avoid greenwashing, companies should ensure that environmental claims are substantiated.

Task Force on Climate-related Financial Disclosures (TCFD)

An industry-led group created in 2015 which seeks to help investors understand their exposure to climate risk and to help companies disclose their climate risk in a consistent and clear way. The group published a set of recommendations for climate disclosures in 2017, which were then adopted and enshrined into law by the UK government in October 2021. The TCFD framework focuses on four key pillars: governance, strategy, risk management and metrics and targets. In July 2023 the Financial Stability Board announced the completion of the TCFD's work. [46]

UN Principles for Responsible Investment (PRI)

An international organisation supported by the United Nations (UN) which promotes the incorporation of ESG factors into decision-making by investors. It is made up of a network of financial institutions which aim to implement six principles of ESG investing. There are over 4,800 signatories from over 800 countries.

UN's Global Compact

A voluntary initiative launched by the United Nations (UN) which is based on commitments from CEOs to implement sustainability principles and to support UN goals. Firms which choose to sign up to the Global Compact commit to undertaking organisational change and to reporting on this change. The Global Compact lays out 10 principles under the topics of human rights, labour, environment and anti-corruption.

[46] See FSB Roadmap for Addressing Financial Risks from Climate Change Progress report, July 2023.

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