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# Australian Regulator Emphasizes Focus on Greenwashing Claims

**June 27, 2023**

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In a **speech** delivered at the Australian Finance Review's ESG summit on June 5, 2023, the Australian Securities and Investments Commission's (ASIC) Chair, Joe Longo, warned companies that greenwashing is an ongoing concern for the regulator. Longo also highlighted the ASIC's focus on the practice of not reporting or underreporting ESG credentials or initiatives due to uncertainty around emerging reporting frameworks – so-called "greenhushing."

While Australia is yet to enact legislation specific to greenwashing, the ASIC greenwashing enforcement actions to date have been conducted under existing securities laws, which contain general, broad prohibitions against misleading and deceptive statements and conduct. ASIC has **published guidelines** for companies on how to avoid greenwashing under existing securities law, identifying **four main categories** of "problematic behavior:" unfounded net zero statements and targets; misleading terms like 'carbon neutral', 'clean' or 'green'; overstatement or inconsistent application of sustainability-related investment screens; and inaccurate labelling or vague terms in sustainability-related funds. ASIC also emphasized that, in order to avoid greenwashing and to prepare for ESG reporting, companies need to integrate sustainability considerations into their governance structures and address questions about the integration of sustainability and financial reporting, cohesion in sustainability-related claims, and board confidence in the information being disclosed.

In his speech, Longo stated that ASIC is aware that some companies may be tempted to engage in "greenhushing," i.e. ceasing or reducing disclosure in response to increased regulatory scrutiny of greenwashing. In a **study** conducted by carbon finance consultancy company South Pole in 2022, nearly a quarter of the 1,200 companies surveyed had elected not to publish information about their progress towards net zero. Longo acknowledged that the Australian Government's sustainable finance agenda, which includes mandatory climate disclosure and a sustainability taxonomy, is not yet "fully enacted." However, he warned that ASIC is preparing to police disclosure obligations and "will not hesitate to enforce the existing legal obligations as they stand."

ASIC's latest greenwashing action was against superannuation fund promoter Future Super Investment Services Pty Ltd (Future Super). ASIC issued an **infringement notice** on May 2, 2023 due to concerns that a Facebook post by Future Super "overstated the positive environmental impact of the Fund." ASIC alleged that the post -- "Naysayers don't join together

and move nearly $400 million out of fossil fuels" – conveyed to readers that nearly $400 million had been moved out of fossil fuels, but Future Super did not have evidence to substantiate the statement. ASIC's Deputy Chair, Sarah Court, emphasized that the action against Future Super "sends a message that ASIC is continuing to focus on greenwashing broadly," including social media promotions.

**Taking the Temperature: The speech delivered by Longo demonstrates ASIC's ongoing focus on scrutinizing climate-related risk disclosures and potentially misleading statements. Between July 2022 and March 2023, ASIC reportedly resolved 23 corrective disclosure matters, issued 12 infringement notices, and commenced one civil penalty proceeding relating to companies' sustainability statements. The key takeaway for companies is that the ASIC is actively investigating greenwashing in all its forms. In the absence of mandatory disclosure, no enforcement action has been taken against greenhushing but ASIC clearly is focused on this as a future area for potential enforcement activity.**

**The Australian regulator continues to aggressively pursue greenwashing enforcement actions. Recent examples include a civil proceeding against Mercer Super in March for allegedly misleading statements about the sustainability of seven of its so-called Sustainable Plus investment options and the issuance of infringement notices to: the oil and gas company Black Mountain Energy in January for claiming that it "was creating a natural gas development project with 'net-zero carbon emissions'," and that the greenhouse gas emissions associated with the project would be net zero; the Australian unit of asset manager Vanguard in December 2022 for allegedly overstating the exclusion criteria meant to prevent investments in companies involved in significant tobacco sales; and the energy company Tlou in November 2022 for allegedly incorrect claims regarding its natural gas-fired power plant in Botswana.**

**Similar developments can be observed in Europe and the UK. Earlier this year the European Securities and Markets Authority announced the launch of a common supervisory action in partnership with EU Member State national competent authorities, which will cover the application of MiFID II (Markets in Financial Instruments Directive) disclosure rules to marketing communications for financial products across the EU. The UK Financial Conduct Authority is expected to introduce a Policy Statement later this year addressing greenwashing in response to the Sustainable Disclosure Requirements and investment labels consultation. And, we recently reported on the UK Advertising Standards Authority banning ads by three different energy companies touting certain sustainability efforts on the grounds that they were misleading (even though factually accurate) in the context of the companies' overall business operations.**

# UK Government Sued Over Inadequate Assessment of Environmental Impacts of the UK-Australia Free Trade Agreement

**June 27, 2023**

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In May 2023, Global Feedback, an environmental advocacy group based in the UK and the Netherlands, announced that it had filed legal proceedings against the UK government, claiming that it failed to adequately assess the environmental impacts of the UK-Australia Free Trade Agreement (the UKAFTA). The UKAFTA allows Australian producers access to the UK market in order to sell beef, lamb, mutton and dairy. Such imports will become tariff-free after a number of years and in the transition period until then, certain products will be subject to a specific tariff-free quota.

The UKAFTA, signed in December 2021 and effective at the end of May 2023, was one of the UK's first post-Brexit bilateral free trade agreements. It has come under criticism in the UK for being rushed through and offering significant concessions without securing appropriate benefits in return. According to Global Feedback, the UKAFTA will allow the UK market to be flooded with meat and dairy products, leading to an increase in consumption against recommendations made by, among others, the Climate Change Committee that reductions in meat and dairy consumption are essential to achieving climate change goals.

Global Feedback has issued its claim under judicial review. This judicial process under the law of England and Wales allows a claimant to challenge the lawfulness of a decision made by a government authority. In its claim, Global Feedback has alleged that the UKAFTA will ultimately have a negative material impact on the UK's ability to meet publicly-stated emissions reductions targets, including its legally-binding requirement, pursuant to the Climate Change Act 2008 (CCA), to reach net zero emissions by 2050, and its commitment under the Paris Agreement to reduce emissions by 68% by 2030 compared with 1990 levels. To prevail in its action, Global Feedback will have to show that the UK government's decision to enter into the UKAFTA was unlawful on one of the following three grounds:

1. **Illegality:** a decision, action or inaction was beyond the powers available to the government authority or contrary to the Human Rights Act 2008.
2. **Irrationality:** a decision, action or inaction was so unreasonable that no reasonable person acting reasonably could have made it.
3. **Procedural Impropriety:** a decision, action or inaction was taken improperly i.e. without a fair hearing, with bias or against legitimate expectations.

However, court permission is required in order to proceed with a judicial review hearing, a result obtained in relatively few cases. Permission will be refused if Global Feedback is unable to convince the Court that there is an arguable ground for the review which has a realistic prospect of success. The UK government maintains that the emissions impact of the UKAFTA is unmeasurable, **despite a report** commissioned by the government in 2021, which found that the carbon footprint of Australian beef was 50% higher than in the UK. If Global Feedback's judicial review application reaches a full hearing and is ultimately successful, the Court has the power to grant a number of remedies, including a mandatory order (requiring the government body to carry out its legal duties), a prohibitory order (preventing the government body from acting beyond its powers), a declaration by the court of what the law actually is or, as is likely in this case, a quashing order which would set aside the government's decision. In that case, the challenged decision would no longer have legal force and the government would be required to reconsider the matter and reach a fresh decision.

**Taking the Temperature: This is not the first time Global Feedback has filed legal proceedings against the UK government. In 2022, the group sought judicial review of the government's food strategy, claiming it failed to take into account advice that cutting meat and dairy consumption is essential in achieving its net zero targets. The court refused Global Feedback's application for permission to proceed with that review although the group is appealing this decision.**

**The action regarding the UKAFTA is the latest in a series of legal proceedings filed against the government in the UK on environmental issues. In July 2022, the High Court ruled in favor of ClientEarth and others holding that the government's net zero strategy was legally insufficient as it failed to satisfy the relevant provisions under the CCA. Activist groups are increasingly taking legal action to hold the government accountable for a perceived mismatch between net zero targets and the UK's progress towards achieving them.**

**The UKAFTA action will increase calls for legislators to carry out more comprehensive impact assessments when negotiating bilateral trade agreements with other countries. The UK government's priorities in 2023 include progressing negotiations with India, Canada, Mexico, Israel and the Gulf Cooperation Council, and its net zero targets will likely be a topic of extensive consideration.**

**Beyond the UK, activist groups are also increasingly exercising the right to challenge the decisions of public bodies when it comes to ESG-related matters. This is in line with a report commissioned by the EU Forum of Judges for the Environment in 2022, which found a surge in administrative law challenges to policies and projects by environmental groups and predicted that the prevalence of such actions would only increase in the future.**

# European Commission Action on Climate Taxonomy and ESG Rating Provider Regulation

**June 27, 2023**

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On June 13, 2023, the European Commission **published** "a new package of measures to build on and strengthen the foundations of the EU sustainable finance framework." The aim is to ensure that the EU sustainable finance framework continues to support companies and the financial sector in connection with climate transition, including making the framework "easier to use" and providing guidance on climate-related disclosure, while encouraging the private funding of transition projects and technologies. These measures are **summarized in a publication**, "A sustainable finance framework that works on the ground." Overall, according to the Commission, the package "is another step towards a globally leading legal framework facilitating the financing of the transition."

The sustainable finance package includes the following measures:

- **EU Taxonomy Climate Delegated Act:** amendments include (i) new criteria for economic activities that make a substantial contribution to one or more non-climate environmental objectives, namely, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, and protection and restoration of biodiversity and ecosystems; and (ii) changes expanding on economic activities that contribute to climate change mitigation and adaptation "not included so far – in particular in the manufacturing and transport sectors." The EU Taxonomy Climate Delegated Act has been operative since January 2022 and includes 107 economic activities that are responsible for 64% of greenhouse gas emissions in the EU. In addition, "new economic sectors and activities will be added, and existing ones refined and updated, where needed in line with regulatory and technological developments." "For large non-financial undertakings, disclosure of the degree of taxonomy alignment regarding climate objectives began in 2023. Disclosures will be phased-in over the coming years for other actors and environmental objectives."
- **Proposed Regulation of ESG Rating Providers:** the Commission adopted a proposed regulation, which was based on 2021 recommendations from the International Organization of Securities Commissioners, aimed at promoting operational integrity and increased transparency in the ESG ratings market through organizational principles and clear rules addressing conflicts of interest. Ratings providers would be authorized and supervised by

the European Securities and Markets Authority. The regulation "provides requirements on disclosures around" ratings methodologies and objectives, and "introduces principle-based organizational requirements on" ratings providers activities. The Commission is also seeking advice from ESMA on the presentation of credit ratings, with the aim being to address shortcomings related to "how ESG factors are incorporated into methodologies and disclosures of how ESG factors impact credit ratings."

- **Enhancing Usability:** the Commission set out an overview of the measures and tools aimed at enhancing the usability of relevant rules and providing implementation guidance to stakeholders. The **Commission Staff Working Document** "Enhancing the usability of the EU Taxonomy and the overall EU sustainable finance framework" summarizes the Commission's most recent initiatives and measures. The Commission also published a new **FAQ document** that provides guidance on the interpretation and implementation of certain legal provisions of the EU Taxonomy Regulation and on the interactions between the concepts of "taxonomy-aligned investment" and "sustainable investment" under the SFDR.

**Taking the Temperature: As previously discussed, the Commission is increasingly taking steps to achieve the goal of reducing net greenhouse gas emissions by at least 55% by 2030, known as Fit for 55. Recent initiatives include the adoption of a carbon sinks goal, the launch of the greenwashing-focused Green Claims Directive, and now, the sustainable finance package.**

**Another objective of these regulatory initiatives is to provide increased transparency for investors as they assess sustainability and transition-related claims made by issuers. In this regard, the legislative proposal relating to the regulation of ESG rating agencies is significant. As noted in our longer survey, there is little consistency among ESG ratings providers and few established industry norms relating to disclosure, measurement methodologies, transparency and quality of underlying data. That has led to a number of jurisdictions proposing regulation, including (in addition to the EU) the UK, as well as to government inquiries to ratings providers in the U.S.**

## ISSB Requests Consultations on Sustainability Research Priorities and Jurisdiction-Specific Disclosure Metrics

**June 27, 2023**

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Following completion by the International Sustainability Standards Board (ISSB) of IFRS S1 (General Requirements for Disclosure of Sustainability-related Financial Information) and IFRS S2 (Climate-related Disclosures), on May 4, the ISSB issued a **request for consultation** on its priorities for its next two-year work plan (the Agenda Consultation).

Over the next two years, the ISSB has identified four potential projects, focused on: 1) biodiversity, ecosystems and ecosystem services; 2) human capital; 3) human rights and 4) integration in reporting. The ISSB identifies a number of reasons for the selection of these projects, including their importance to investors; deficiencies in the way companies currently disclose sustainability information; and the prevalence and pervasiveness of these subjects.

The Agenda Consultation will be open for comments until September 1, 2023 with stakeholders asked to provide feedback on the:

- strategic direction and balance of the ISSB's activities;
- criteria for assessing those sustainability-related matters to prioritize, such as topics, industries and activities; and
- scope and structure of potential new research and standard-setting projects.

In addition to the Agenda Consultation, the ISSB also has requested feedback from stakeholders on its **proposed methodology for enhancing the international applicability** of the Sustainability Accounting Standards Board (SASB) Standards. Approximately 20% of the metrics included in the SASB Standards incorporate references to specific jurisdictional laws and regulations. According to the ISSB, "revising these references will help improve international applicability and remove regional bias."

The **"Exposure Draft Methodology for Enhancing the International Applicability of the SASB Standards and SASB Standards Taxonomy Updates"** will be open for comments until August 9, 2023.

**Taking the Temperature: We previously reported that ISSB IFRS S1 (General Requirements for Disclosure of Sustainability-Related Financial Information) and IFRS**

**S2 (Climate-Related Disclosures) will take effect in January of 2024. We have observed that competing climate-related disclosure standards pose a significant challenge for companies operating around the world. As the countdown to IFRS S1 and IFRS S2 taking effect continues, stakeholders now have the opportunity to guide ISSB's research agenda for the next two years. Consultations such as these are an essential step towards alignment of standards and efficiency and scalability of efforts to create harmonized ESG standards that meet the information needs of investors on sustainability topics. It is notable that the first proposed reporting project is focused on biodiversity and ecosystems. As we have recently reported, nature and biodiversity are becoming an increasingly prominent feature of sustainability initiatives, including as evidenced by the recent UN-convened bank-led working group to promote nature and biodiversity-related target setting aligned with the agreement on a Global Biodiveristy Framework reached at the conclusion of COP15.**

# Sustainable Markets Initiative Private Equity Group Issues Guidance on ESG Metrics

**June 27, 2023**

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In May 2023, the Sustainable Markets Initiative (SMI) **published a new guide** setting out how to use ESG-related metrics effectively in private markets (the ESG Metrics Guide), and how measuring and monitoring these metrics can help drive resilience, growth and value. Launched at The World Economic Forum's 2020 Annual Meeting in Davos, the SMI is a CEO-led global forum through which industries coordinate efforts to achieve sustainability goals. The Private Equity Task Force, which compiled the Guide, was launched a year later to "align on ways the industry can effect change" across the group's three priorities: (i) climate change, (ii) biodiversity and (iii) ESG-related metrics.

The SMI describes the ESG Metrics Guide as neither a framework nor a standard, but a thought process informed by various market participants to address a fundamental question: "How to identify ESG metrics relevant to decision-making that have the ability to influence business strategy, investment opportunity, risk mitigation, and value creation." The ESG Metrics Guide is intended to complement and leverage metrics used in existing standards, frameworks and regulations. The "ultimate objective" is to make the industry "more resilient to a range of factors over the long-term, in line with the industry's fiduciary duties, and achiev[e] enhanced business outcomes." The Task Force hopes to achieve this goal by "suggesting an industry-led approach to ESG metrics," which in turn promotes "greater consistency, comparability, and understanding of the role of ESG as part of the investment process."

The ESG Metrics Guide focuses on the following three concepts:

1. **Data:** ESG data is an important aspect of investment analysis and portfolio company management in private markets;
2. **Materiality:** Materiality, which is defined by the ESG Metrics Guide as "information so important that its absence or misstatement could be reasonably expected to influence investor decisions," offers a lens to help private equity firms, investors and portfolio companies leverage sector-specific ESG metrics for value creation and risk mitigation; and
3. **Structure:** Private equity offers a structure to facilitate data collection and active engagement to further sustainable development in private markets.

These concepts are then considered and applied in the context of ten areas: climate change; circular economy; biodiversity; diversity and inclusion; human capital and employee engagement; product quality and stewardship; health and safety; business resilience and supply chain management; data governance and cybersecurity; and corporate governance. The SMI states that these ten themes allow the considerations in the report to be made in the context of the wider regulatory environment and to leverage metrics in existing frameworks and standards.

**Taking the Temperature: The important role that the private equity sector can play in data collection and active engagement is increasingly being highlighted. Industry wide collaborations as well as partnerships across asset classes have the potential of creating a more efficient process of measurement and valuation. A number of such collaborations are currently underway (including between Cadwalader, the Loan Market Association and the Loan Syndications and Trading Association with a focus on private debt, private equity and portfolio companies).**