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ENSURING IMPACTFUL PERFORMANCE IN GREEN BONDS AND SUSTAINABILITY-LINKED LOANS

Abstract

This article examines the revolution of socially responsible approaches to financing in the sustainable debt market, primarily in green bonds and sustainability-linked loans. Specifically, this article considers the risk of greenwashing, and the regulatory governance and contractual mechanisms in place that attempt to ameliorate this risk. The concept of 'impact' is also examined to demonstrate the difficulty market participants face in measuring and managing outcomes. To ensure systemic legitimacy and thereby sustained growth in sustainable debt financing, it is contended that contracting parties to these debt instruments need to incorporate performance-based provisions within the relevant legal documentation to better ensure that positive social and environmental externalities are achieved from their investments. Relatedly, market participants must continually strive to develop a comprehensive, tailored understanding of how 'impact' is most relevantly measured. A better understanding of 'impact' will then inform the contractual targets to be set, as well as provide standardisation for future sustainable investments.

I Introduction

The spectre of climate change poses some of the most significant and disruptive challenges for our generation. Its impact is to be felt on a global scale and will be disproportionately borne by the poorest and most marginalised communities.[1] While the dual adoption of the *Paris Agreement* and the United Nations' Sustainable Development Goals ('SDGs') signalled that countries, both large

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1 Jerry Melillo, Terese Richmond and Gary Yohe, *Climate Change Impacts in the United States: The Third National Climate Assessment* (Report, 2014) 7–13 <https://www.nrc.gov/docs/ML1412/ML14129A233.pdf>; William Nordhaus, *The Climate Casino: Risk, Uncertainty, and Economics for a Warming World* (Yale University Press, 2013) 3–4.

and small, are committed to taking measures in halting climate change,[2] the road thereafter has not been without difficulties. For example, the decision by the United States of America to withdraw from the *Paris Agreement* in 2017 highlights that international, voluntary regimes can often clash with political will, competing policy priorities, and tight budgets.[3] Indeed, several multilateral development banks, including the World Bank Group, have recognised that the implementation of climate mitigation strategies cannot be solely left to governments.[4] Trillions of dollars will need to be invested into green technologies and infrastructure to realise our carbon emission goals, and the private sector must involve itself in bridging this enormous financial gap.[5]

At the forefront of this siren call is the sustainable debt market, which in 2019 reached a market size record of USD465 billion, up 78% from the previous year. The two most issued debt instruments are currently sustainability-linked loans ('SLLs')

2 *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) ('*Paris Agreement*'); *Sustainable Development Goals*, UN Doc A/RES/70/1 (25 September 2015). Article 2 of the *Paris Agreement* expressly commits to:

a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and

c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

3 'Lean, not Green: America's Proposed Budget Cuts Will Be Bad for the Environment', *The Economist* (online, 23 May 2017) <https://www.economist.com/international/2017/03/23/americas-proposed-budget-cuts-will-be-bad-for-the-environment>; Georgia Levenson Keohane and Saadia Madsbjerg, 'The Innovative Finance Revolution: Private Capital for the Public Good', *Foreign Affairs* (Web Page, July–August 2016) <https://www.foreignaffairs.com/articles/2016-06-05/innovative-finance-revolution>.

4 Multilateral Development Banks, *Joint Report on Climate Finance* (Report, 2019) <http://www.ebrd.com/2019-joint-report-on-mdbs-climate-finance>; OECD, *Supporting the Implementation of the Paris Outcome* (Report, May 2016) <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=env/epoc(2016)8/rev1&doclanguage=en>; OECD, *Green Bonds: Mobilising the Debt Capital Markets for a Low-Carbon Transition* (Report, December 2015) <https://www.oecd.org/environment/cc/Green%20bonds%20PP%20%5Bf3%5D%20%5Blr%5D.pdf>; Daniel Puig et al, *The Adaptation Finance Gap Report* (Report, UNEP, 2016) <https://backend.orbit.dtu.dk/ws/files/198610751/Adaptation_Finance_Gap_Report_2016.pdf>.

5 OECD, *Green Bonds: Mobilising the Debt Capital Markets for a Low-Carbon Transition* (n 4) 2.

and green bonds.[6] SLLs, which are loans linked to the borrower's performance on defined environmental, social or governance ('ESG') criteria, are in their infancy compared to green bonds. Yet despite their first issuance in 2017, SLLs have quickly become the second most popular thematic debt type in the sustainable debt market,[7] growing 168% to USD122 billion in issuances in 2019.[8] On the other hand, the green bond, also known as a climate bond or climate awareness bond, was established more than a decade ago in 2007 by the European Investment Bank as an innovative way to fund renewable energy projects. Since then, the green bond market has accelerated to become the most issued sustainable debt instrument amongst investors, constituting more than half of the entire sustainable debt market in 2019, with USD271 billion issued.[9] While governments and developmental banks were the pioneers in issuing these types of bonds, they have become increasingly prevalent amongst private corporations.[10] Although the sustainable debt market is still dwarfed by the USD100 trillion global debt market, the level of growth of these debt instruments signifies an incipient revolution in socially responsible approaches to financing, otherwise known as sustainable financing.[11]

Sustainability has a broad definition, encompassing all types of social welfare.[12] Sustainable finance is the manifestation of mobilised financial capital in a manner where economic growth, environmental protection and social justice are promoted,

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6 Veronika Henze, 'Sustainable Debt Sees Record Issuance at $465Bn in 2019, Up 78% from 2018', *Bloomberg NEF* (Web Page, 8 January 2020) <https://about.bnef.com/blog/sustainable-debt-sees-record-issuance-at-465bn-in-2019-up-78-from-2018/>. Sustainable finance can also be observed in private equity and public equity, which is becoming a popular avenue for impact investors: Rachel Bass et al, *The State of Impact Measurement and Management Practice* (Report, Global Impact Investing Network, 21 January 2020) 18 <https://thegiin.org/research/publication/imm-survey-second-edition>.

7 Henze (n 6). See also Nathaniel Bullard, 'The Sustainable Debt Market Is All Grown Up', *Bloomberg Green* (Web Page, 14 January 2021) <https://www.bloomberg.com/news/articles/2021-01-14/the-sustainable-debt-market-is-all-grown-up>. Other debt instruments within the sustainable debt market include sustainability-linked bonds, green loans, and sustainability bonds.

8 Henze (n 6).

9 Ibid.

10 Stephen Kim Park, 'Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution' (2018) 54(1) *Stanford Journal of International Law* 1, 4; Michael Doran and James Tanner, *Green Bonds: An Overview* (Presentation, Baker McKenzie, May 2019) 4; Justin Pugsley, 'Regulators Starting to Catch Up with Green Bond Boom', *Global Risk Regulator* (Web Page, 13 September 2016) <https://www.globalriskregulator.com/Subjects/Capital/Regulators-starting-to-catch-up-with-green-bond-boom>.

11 Park (n 10) 4. See also Gerald F Davis and Suntae Kim, 'Financialization of the Economy' (2015) 41(1) *Annual Review of Sociology* 203, 213–14, stating that financial markets have enabled social activism.

12 Park (n 10) 5.

or at the very least, not harmed.[13] These concepts are often found within a corporation's corporate social responsibility ('CSR') policy, which is in turn governed by quasi-regulatory tools in the form of voluntary principles, reporting, certification, and process standards.[14] These standards are complemented by a broader range of actors such as third-party experts and reviewers, consulting organisations, and ratings and ranking schemes.[15] Regulation of the green bond and SLL market can be characterised as decentralised and heavily influenced by market participants that trade or assess these instruments.[16] Fundamental concerns that such regulation seeks to address are the slippery definition of 'green', and whether the proceeds raised from the debt instrument are resulting in positive environmental or social impacts.

These conceptual concerns highlight the risk of greenwashing, a major vulnerability and threat to the future of the sustainable finance market. In the context of sustainable finance, greenwashing is where firms engage in environmental rhetoric to gain reputational leverage with investors without the borrowed funds achieving some level of positive, sustainable impact.[17] For the market to survive, systemic legitimacy of the instrument's purpose is paramount. Issuers and borrowers alike need to be able to sell more green bonds or acquire loan funding, and investors and lenders of these instruments require confidence in their economic value and desired impact.[18] Without systemic legitimacy, the success of the sustainable finance revolution will stall. After an overview of the sustainable debt market in Part II, Part III will address the heart of these legitimacy concerns, examining the main private mandates that govern green bonds and SLLs, as well as the use of, or lack of, performance-based provisions or impact provisions in SLL and green bond documentation.

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13 Catherine Gwin and Mai Le Libman, *Banking on Sustainability: Financing Environmental and Social Opportunities in Emerging Markets* (Report, International Financial Corporation, 2007) 7 <https://documents1.worldbank.org/curated/en/434571468339551160/pdf/392230IFC1Bank1tainability01PUBLIC1.pdf>.

14 Amiram Gill, 'Corporate Governance as Social Responsibility: A Research Agenda' (2008) 26(1) *Berkeley Journal of International Law* 452, 464–5; Dirk Ulrich Gilbert, Andreas Rasche and Sandra Waddock, 'Accountability in the Global Economy: The Emergence of International Accountability Standards' (2011) 21(1) *Business Ethics Quarterly* 23, 25–30.

15 Sandra Waddock, 'Building a New Institutional Infrastructure for Corporate Responsibility' (2008) 22(3) *Academy of Management Perspectives* 87, 93–103; Cherie Metcalf, 'Corporate Social Responsibility as Global Public Law: Third Party Rankings as Regulation by Information' (2010) 28(1) *Pace Environmental Law Review* 145.

16 Park (n 10) 6; Benjamin J Richardson, 'Keeping Ethical Investments Ethical: Regulatory Issues for Sustainability' (2009) 87(4) *Journal of Business Ethics* 555, 559.

17 Miriam A Cherry and Judd F Sneirson, 'Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing after the BP Oil Disaster' (2011) 85(4) *Tulane Law Review* 983, 985.

18 Climate Bonds Initiative, *Green Bond Pricing in the Primary Market: Q4 2016 Snapshot* (Report, 2017) 1.

However, for these innovative contractual provisions to have substance, what must follow is a comprehensive discussion of what exactly the concept of 'impact' means in the sustainable finance sphere. As the marketplace for sustainable debt instruments continues to grow, so too does the expectation from investors that their funds are leading to measurable environmental or social impact. However, the concept of impact, much like the meaning of 'green', is continually evolving. Part IV will demonstrate that tracking and evaluating investments in terms of their non-financial performance or social returns is complicated by many factors, such as disagreements over the metrics used to measure impact and who should be involved in formulating impact measurement methodology. Looking towards the future, Part V proposes a range of short- and long-term considerations that are necessary for the enduring success of the sustainable debt market.

II Emergence of Sustainable Private Debt Products

Sustainable finance involves both a range of financial products as well as investments in green technologies and projects.[19] Sustainable finance, however, is not inherently altruistic. Institutional and individual investors, as well as the firms whose operations they finance, view sustainability as a means of self-preservation, acknowledging that the risks posed by climate change will have pervasive effects on all levels of the global economy.[20] This notion that investors seek to minimise their exposure to environmental costs is reflected by the growth of signatories to the Principles for Responsible Investment ('PRI'), a commitment drafted by a United Nations-supported network that advances environmental, social, and governance ('ESG') issues in investment decision-making: the PRI went from 20 signatories in 2006 to over 3,100 signatories now.[21]

Green bonds can be broadly defined as a debt security issued by a government entity, multilateral institution, or corporation in order to raise capital from investors for the

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19 George Inderst, Christopher Kaminker and Fiona Stewart, *Defining and Measuring Green Investments: Implications for Institutional Investors Asset Allocations* (Working Paper No 24, OECD, 2012) 9. 'Financial products' can be understood as the issuing, trading, and holding of equity securities and debt securities.

20 Gregory Unruh et al, *Investing for a Sustainable Future* (Report, MITSloan Management Review, 11 May 2016). See also Park (n 10) 8: 'Over seventy percent of mainstream institutional investors consider sustainability as central to their investment decisions'.

21 Principles for Responsible Investment, 'About the PRI' (Web Page, 2020) <https://www.unpri.org/pri/about-the-pri>; Christa Clapp et al, *Green Bonds and Environmental Integrity: Insights from CICERO Second Opinions* (Report, CICERO Centre for International Climate and Environmental Research Oslo, 2016) 4. This approach may be in alignment with the 'universal owner' theory, in that highly diversified, long term portfolios represent a slice of the global capital market, making their investment returns dependent upon the continuing good health of the economy. As such, it is in their interest to promote sustainable finance: See PRI: Principles for Responsible Investment, *The SDG Investment Case* (Report, 2017) 7.

financing of green projects, assets, or business activities.[22] An essential component of the green bond is the practice of earmarking funds, in which the issuer, during the solicitation of finance and sale of the debt instrument, allocates funds raised to a specific earmarked project.[23] In addition to financing new projects, green bonds can also be used to refinance existing debt, which may bring about benefits in reducing costs of capital or attracting additional financing.[24]

The green bond marketplace is maturing. As noted above, the very first green bond was issued in 2007 by the European Investment Bank, and for a period of time, such instruments were only issued by multilateral development banks and other public development agencies.[25] However, green bonds have since attracted public and private issuers of all sizes.[26] Australia has been a major participant in the green bond market, issuing approximately AUD15.6 billion in 2019, ranking 10th globally and third in Asia.[27] The types of issuers have also been diverse. For example, the state treasury corporations for Queensland, New South Wales, and Victoria have issued totals of AUD2.48 billion, AUD1.8 billion, and AUD300 million in green bonds, respectively.[28] In recent years, Australian banks such as National Australia Bank have issued over

22 Inderst, Kaminker and Stewart (n 19) 28.

23 World Bank, *Green Bond Process Implementation Guidelines* (Report, 2017) 2.

24 Park (n 10) 12.

25 Clapp et al (n 21) 5; Altaf Nanji, Matthew Kolodzie and Andrew Calder, *Green Bonds: Fifty Shades of Green* (Report, RBC Capital Markets, 26 March 2016) 6.

26 A publicised example of corporate involvement is the issuances of green bonds from Apple, amounting to over USD4.7 billion. The proceeds will be used to lower carbon emissions across their supply chain as well as support energy efficient projects: Sustainalytics, *Second Party Opinion: Apple Green Bond Framework* (Evaluation, 6 November 2019). Starbucks Corporation recently issued a USD1 billion green bond to finance the purchase and development of sustainable coffee: Sustainalytics, *Second Party Opinion: Starbucks Sustainability Bond* (Evaluation, May 2019). The governments of Poland and France have also issued sovereign green bonds in recent years: Helene Durand, 'Poland Puts Stakes in the Ground for First Sovereign Green Bond', *Reuters* (Web Page, 6 December 2016) <https://www.reuters.com/article/bonds-markets/update-1-poland-puts-stake-in-the-ground-for-first-sovereign-green-bond-idUSL5N1E04UD>; Anna Hirtenstein, 'Green Bond Giant Awakened by Countries Spending to Save Climate', *Bloomberg* (online, 20 January 2017) <https://www.bloomberg.com/news/articles/2017-01-20/green-bond-giant-awakened-by-countries-spending-to-save-climate>.

27 Climate Bonds Initiative, *Australia: Green Finance State of the Market 2019* (Report, 2019).

28 Queensland Treasury Corporation, *Green Bond Annual Report: Supporting Queensland's Transition to a Low-Carbon, Climate Resilient and Environmentally Sustainable Economy* (Annual Report, 2020) 3; New South Wales Treasury Corporation and NSW Sustainability Bond Programme, *Creating a Sustainable Future* (Annual Report, 2019) 1; Treasury Corporation of Victoria, *TCV Annual Green Bond Report* (Report, December 2020) 3–4.

AUD2 billion in domestic and offshore green bonds.[29] Similarly, Macquarie Group issued an offshore green bond valued at AUD883 million.[30] Recent green bond issuances from corporations include Brookfield Australia, AUD880 million, and Woolworths Group, AUD400 million.[31] The Queensland Investment Corporation Shopping Centre Fund issued a AUD300 million green bond in 2019 — the first to be issued by a retail property landlord.[32] Monash University issued a green bond in 2016, raising over AUD218 million, making it the first university in the world to raise funds by issuing a climate bond.[33] It has since issued an additional two green bonds with a cumulative value of AUD172 million.[34]

The allure of green bonds can be attributed to a variety of reasons. Green bonds serve as a convenient avenue for governments and private issuers to appeal to a new group of socially conscious investors, and demonstrate to the wider public that issuers are incorporating climate change related risks in their long term financial strategies.[35] Indeed, it has been shown that firms integrating environmental and social concerns as part of their corporate strategy tend to outperform those that do not.[36] On the demand side of the market, green bonds have been characteristically known by their over-subscription, resulting in a premium for green bonds in which holders of these debt instruments are able to sell them at higher prices compared to conventional bonds.[37]

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29 National Australia Bank, *NAB Annual Green Bond Report* (Annual Report, September 2018) 3 <https://capital.nab.com.au/docs/2018-NAB-Green-Bond-Report.pdf>.

30 Rachel Alembakis, 'Australia's Green Bond Issuance Tops $15 Billion', *Pro Bono Australia* (Web Page, 3 September 2019) <https://probonoaustralia.com.au/news/2019/09/australias-green-bond-issuance-tops-15-billion/>.

31 Ibid.

32 'QIC GRE Delivers World First Green Bond for the Retail Property Sector', *Queensland Investment Corporation* (Web Page, 2019) <https://www.qic.com.au/knowledge-centre/qscf-green-bonds-20190807>.

33 'Monash University Raises over $200 Million in US Market to Tackle Climate Change', *Monash University* (Web Page, 8 December 2016) <https://www.monash.edu/news/articles/monash-university-raises-over-$200-million-in-us-market-to-tackle-climate-change>.

34 'Monash University', *Climate Bonds Initiative* (Web Page, 2021) <https://www.climatebonds.net/certification/monash-university>.

35 See, eg, Chris Flood, 'Green Bonds Need Global Standards', *Financial Times* (online, 8 May 2017) <https://www.ft.com/content/ef9a02d6-28fe-11e7-bc4b-5528796fe35c>; Echo Kaixi Wang, 'Financing Green: Reforming Green Bond Regulation in the United States' (2018) 12(2) *Brooklyn Journal of Corporate, Financial and Commercial Law* 467, 472.

36 It has been reported that well-governed firms are more likely to be socially responsible, and that they outperform traditional firms in the long term: Allen Ferrell, Hao Liang and Luc Renneboog, 'Socially Responsible Firms' (2016) 122(3) *Journal of Financial Economics* 585; Robert Eccles, Ioannis Ioannou and George Serafeim, 'The Impact of Corporate Sustainability on Organizational Processes and Performance' (2014) 60(11) *Management Science* 2835.

37 Climate Bonds Initiative (n 18).

Green bonds also serve as an ideal diversification investment. Not only do they provide investors a stable hedge against climate risk, but due to the bonds' typically high investment grade, they serve as a substitute to conventional bonds that may comprise part of an investor's core bond portfolio.[38] Multilateral development banks, such as the World Bank, have been able to leverage their AAA credit ratings to attract swathes of investors.[39] Even with the entrance of new corporate and municipal issuers, no green bond has been issued a rating lower than BBB.[40] Finally, risk exposure in green bonds is low. These instruments, similar to conventional bonds, rank pari passu, meaning that investors will have recourse to issuers in the event that the issuer fails to make interest payments or pay principal on the bond.[41]

While the green bond market has grown significantly, there has been a noticeable lagging of corporate issuances of green bonds. This may be primarily attributed to the high barriers to entry required in satisfying the 'green' label of these bonds. Moreover, there exist rising expectations and requirements in meeting the acceptable 'green' definition.[42] The Centre for International Climate and Environmental Research Oslo's ('CICERO') 'shades of green' methodology demonstrates a green spectrum, where less environmentally conscious bonds are lighter green and more environmentally conscious bonds are darker green. Under this methodology, investors are beginning to expect earmarked projects to be of a darker green character, such as long-term, environmentally sustainable infrastructure.[43] SLLs have been a powerful instrument in bridging this gap in the green marketplace. For borrowers who operate in industries that are not within close commercial proximity to green projects or expenditures, or those that have limited assets or expenditures

38 Wang (n 35). See also VanEck, 'The Investment Case for Green Bonds', *Seeking Alpha* (Web Page, 27 March 2017) <https://seekingalpha.com/article/4058210-investment-case-for-green-bonds>; Rochelle J March, 'Six Benefits to Companies That Issue Green Bonds', *GreenBiz* (Web Page, 5 May 2017) <https://www.greenbiz.com/article/6-benefits-companies-issue-green-bonds>.

39 Luke Trompeter, 'Green Is Good: How Green Bonds Cultivated into Wall Street's Environmental Paradox' (2017) 17(2) *Sustainable Development Law and Policy Brief* 4, 5; Bridget Boulle, 'The Dawn of an Age of Green Bonds?', *Green Economy Coalition* (Web Page, 11 March 2014) <https://www.greeneconomycoalition.org/news-and-resources/dawn-age-green-bonds>.

40 Trompeter (n 39) 5.

41 George G Triantis and Ronald J Daniels, 'The Role of Debt in Interactive Corporate Governance' (1995) 83(4) *California Law Review* 1073, 1104–5; 'Explaining Green Bonds', *Climate Bonds Initiative* (Web Page, 2021) <https://www.climatebonds.net/market/explaining-green-bonds>; Park (n 10) 14.

42 Catherine Snowdon, 'Green Bonds Survey: What Investors Want', *Euromoney* (Web Page, 25 April 2015) <https://www.euromoney.com/article/b12knjfmnwsctf/green-bonds-survey-what-investors-want>.

43 CICERO, *Shades of Green* (Fact Sheet, 2015) 1 <https://static1.squarespace.com/static/5bc5b31a7788975c96763ea7/t/5bffc53370a6addcd6cd9541/1543488824244/Shades+of+green+factsheet_2018.pdf>. An example of a dark green project, as provided by CICERO, is wind energy projects.

capable of being thematically classified as 'green', the SLLs enable corporations of this nature to access the sustainable finance market. Broadly speaking, SLLs are a debt financial instrument that provide borrowers with capital for the use of proceeds of *general* corporate purposes, with financial incentives (such as margin rates) that are tied to the borrower's sustainability performance throughout the life of the loan.[44] The sustainability performance, which can be either environmental, social, or both, allows for an unprecedented level of flexibility in how the proceeds of the loan are used.

A critical distinction to note is that SLLs do not require an earmarking of funds for eligible, thematic projects. The first SLL was completed in 2017 by Royal Philips, a health technology company.[45] Despite its first issuance only three years ago, the SLL has seen spectacular growth, and is now the second most popular thematic debt type in the debt market.[46] In Australia, notable SLLs have been in the airport sector, with Adelaide Airport signing Australia's first SLL in late 2018, an AUD50 million lending facility from ANZ Banking Group.[47] Sydney Airport closely followed in much larger fashion, agreeing to an AUD1.4 billion SLL with ANZ Banking Group and BNP Paribas.[48] Shortly after, Queensland Airports Limited secured an AUD100 million SLL from Westpac for its Gold Coast Airport redevelopment.[49] Outside of the airport industry, prominent SLLs in recent years include Wesfarmer's conversion from an existing debt facility into an AUD400 million SLL with Commonwealth Bank,[50]

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44 Loan Market Association, Loan Syndication and Trading Association and Asia Pacific Loan Market Association, *Sustainability Linked Loan Principles* (Report, May 2020) 1 <https://www.lsta.org/content/sustainability-linked-loan-principles-sllp/#> ('LMA, LSTA, APLMA').

45 ING, 'ING and Philips Collaborate on Sustainable Loan' (Web Page, 19 April 2017) <https://www.ing.com/Newsroom/News/ING-and-Philips-collaborate-on-sustainable-loan.htm>; KangaNews, 'The SLL Door Opens in Australia' (Web Page, 2019) <https://www.kanganews.com/news/10561-the-sll-door-opens-in-australia>.

46 Henze (n 6).

47 Adelaide Airport, 'Adelaide Airport Secures Australia's First Sustainability Loan with ANZ' (Media Release, 20 December 2018) <https://www.adelaideairport.com.au/corporate/wp-content/uploads/2018/12/SU-MISC-ESG-Loan-Media-Release-2018-web.pdf>.

48 Sydney Airport, 'Sydney Airport Successfully Delivers Innovative Sustainability Linked Loan' (Media Release, 23 May 2019) <https://www.asx.com.au/asxpdf/20190523/pdf/4459h8vb22w48z.pdf>; ANZ Bank, 'Apac's Biggest Sustainable Loan Takes Flight' (Media Release, May 2019) <https://institutional.anz.com/insight-and-research/apacs-biggest-sustainable-loan-takes-flight>.

49 Westpac, 'Westpac Supports Sustainability-Linked Loan: First of Kind for Australian Airport' (Media Release, 17 July 2019) <https://www.westpac.com.au/about-westpac/media/media-releases/2019/17-july/>.

50 Commonwealth Bank, 'Rewarding Businesses for Doing the Right Thing' (Media Release, 13 March 2020) <https://www.commbank.com.au/guidance/newsroom/cba-wesfarmers-sustainability-loan-202003.html>.

and AGL Energy's AUD600 million syndicated SLL with ANZ Banking Group and BNP Paribas.[51]

The SLLs are fertile ground for innovative financing mechanisms and have 'whetted the appetites' of a wide variety of borrowers seeking to be a part of the emerging revolution of social responsibly approaches to financing.[52]

III Governance for Green Bonds and Sustainability-Linked Loans

The significant interest in sustainable finance, both for its financial and reputational benefits, has demonstrated that environmental or social-centric debt instruments are likely to become a mainstream form of investing in the future. To ensure this social revolution continues, the risk of greenwashing needs to be dealt with appropriately by governance and contractual mechanisms.

Governments typically struggle to regulate cross-jurisdictional transactions conducted by multinational corporations. As noted by Stephen Park:

> Government regulators struggle to address the wide range of environmental and social impacts attributable to global commercial activity. Further, governments are limited in their ability to implement tax and social welfare policies due to the ability of multinational corporations to shift capital to other jurisdictions through offshoring, re-incorporation, or other means.[53]

As a result, private governance and self-regulation have become cornerstones in regulating international business[54] driven by 'governance clubs' of firms that are normally industry specific.[55] Membership of these private governance regimes is

[51] Herbert Smith Freehills, 'Herbert Smith Freehills Advises AGL Energy Limited on Its Innovative A$600 Million Sustainability-Linked Loan' (Web Page, 11 December 2019) <https://www.herbertsmithfreehills.com/news/herbert-smith-freehills-advises-agl-energy-limited-on-its-innovative-a600-million>.

[52] Ibid.

[53] Park (n 10) 17–18. See also Cynthia A Williams, 'Corporate Social Responsibility in an Era of Economic Globalization' (2002) 35(3) *UC Davis Law Review* 705, 724–5, 746–50; Stephen Kim Park, 'Bridging the Global Governance Gap: Reforming the Law of Trade Adjustments' (2012) 43(3) *Georgetown Journal of International Law* 797, 829–30.

[54] Cynthia A Williams, 'A Tale of Two Trajectories' (2006) 75(3) *Fordham Law Review* 1629, 1639–41; Andreas Georg Scherer and Guido Palazzo, 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and Its Implications for the Firm, Governance, and Democracy' (2011) 48(4) *Journal of Management Studies* 899, 909.

[55] Park (n 10) 18.

voluntary, but requires compliance with their policies.[56] Their objective, most relevantly here, is to produce positive social and environmental returns from investments.[57]

These regimes will vary in their degree of inclusiveness of stakeholders and their level of enforcement. Private governance regimes are normally exclusively created by the market participants, such as issuers, investors, ratings agencies, and various financial intermediaries. Other regimes, however, may include a wider spectrum of stakeholders such as government agencies, advocacy groups, and local communities.[58] Private governance regimes often do not possess the same level of enforcement as public regimes due to the absence of government coercion.[59] Rather, they rely on market-signalling mechanisms such as peer pressure and reputational leverage, and emphasise transparency and accountability by way of review and reporting mechanisms.[60] The level of prescriptiveness will depend on the specific private governance regime. For regulatory frameworks that are more permissive in nature, such as those with flexible, broadly defined principles, a contravention of such will simply be left to the market in how it should respond.[61] On the other end of the spectrum, in regimes with prescriptive rules and strictly defined benchmarks for corporate behaviour, a violation would result in exclusion from membership or certification benefits.[62]

The primary private governance regimes that have domain over the green bond market and SLL market will now be analysed. These are the Green Bond Principles,[63] the Climate Bonds Standards,[64] and the Sustainability Linked Loan Principles.[65]

A *Green Bond Principles*

The Green Bond Principles ('GB Principles') can be classified as a 'process standard', meaning that they provide a process that public and private entities can use to develop

56 Ibid. See also Matthew Potoski and Aseem Prakash, *Voluntary Programs: A Club Perspective* (MIT Press, 2009) 1–2.

57 Park (n 10) 18.

58 Kevin Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' (2015) 36(3) *Michigan Journal of International Law* 425, 438; Oren Perez, 'The Green Economy Paradox: A Critical Inquiry into Sustainability Indexes' (2016) 17(1) *Minnesota Journal of Law, Science and Technology* 153, 216–17.

59 Jody Freeman, 'Private Parties, Public Functions and the New Administrative Law' (2000) 52(3) *Administrative Law Review* 813, 824–5.

60 Park (n 10) 20.

61 Ibid 21.

62 Lesley K McAllister, 'Harnessing Private Regulation' (2014) 3(2) *Michigan Journal of Environment and Administrative Law* 291, 313–16.

63 International Capital Market Association, *Green Bond Principles: Voluntary Process Guidelines for Issuing Green Bonds* (Report, June 2018) ('ICMA').

64 Climate Bonds Initiative, *Climate Bond Standards Version 3.0* (Report, 2019).

65 LMA, LSTA, APLMA (n 44).

their own operational frameworks.[66] More relevantly, they assist issuers in launching a credible green bond and informing what their obligations are towards investors and underwriters.[67] Voluntary disclosure and transparency serve as the primary means of promoting the integrity of the green bond market.[68]

The GB Principles comprise four core components. First, the utilisation of the bond's proceeds should be towards green projects to give peace of mind to investors that their funds will be used for the purpose as promised by the issuer, and not according to the whims of corporate management.[69] While the GB Principles make clear that they do not attempt to strictly define appropriate green projects, they provide a list of non-exhaustive green project categories eligible for selection.[70] Second, issuers should clearly communicate to investors the environmental sustainability objectives of the green project, and the process of how that project was evaluated and selected, including any exclusion criteria used. Third, issuers should manage and track the green bond proceeds by appropriately separating them from proceeds of any other bonds issued. This may be done by crediting these funds into a separate sub-account. Finally, the issuers are to provide up-to-date, publicly available reports, and information on the use of green bond proceeds, the earmarked project, and expected environmental and social impacts effectuated by the investment. Such reports are to be released annually and for any significant developments. Comprehensive qualitative and quantitative indicators of performance and impact of the green projects should be public, although this may be tempered by confidentiality agreements and market competition considerations.

The GB Principles recommend that issuers organise an external review to confirm that the bond framework is aligned with these four components. Such a review can be undertaken in the form of second party opinions, green bond scoring/rating, verification or third-party assurance, and certification. Second-party opinions are generally taken pre-issuance of the bond and will assess how aligned the issuer's green bond framework is with the GB Principles.[71] Providers of second-party opinions may also give a rating of the 'shade of green' (light, medium, dark

66 Gilbert, Rasche and Waddock (n 14) 29.

67 ICMA (n 63) 3.

68 Ibid: 'The GB Principles emphasise the required transparency, accuracy and integrity of information that will be disclosed and reported by issuers to stakeholders'.

69 Gilbert and Tobin, 'Green Bond Market in Australian and Overseas', *Gilbert and Tobin* (Web Page, 20 February 2019) <https://www.gtlaw.com.au/insights/green-bond-market-australia-overseas> ('Green Bond Market').

70 International Capital Market Association (n 63). Eligible green project categories may be: renewable energy including production, transmission and products; energy efficiency and energy storage in new and refurbished buildings and smart grids; pollution prevention greenhouse gas control and soil remediation; sustainable management of living natural resources; terrestrial biodiversity conservation; clean transportation; sustainable water management; climate change adaptation; and eco-efficient processes.

71 Gilbert and Tobin (n 69).

green bonds).[72] Green bond ratings are typically provided pre-issuance.[73] Credit rating agencies such as Moody's released a framework for green bond assessments in 2016, assessing the 'relative likelihood that bond proceeds will be invested to support environmentally friendly projects'.[74] Standard and Poor's have similarly published a green evaluations framework that assesses the expected lifetime environmental impact of a bond, along with other factors such as reporting mechanisms and compliance with environmental regulations.[75] Independent verifications are taken pre-issuance or post-issuance, where the bond's alignment is tested against a designated set of internally- or externally-set criteria. Independent verifications are less onerous than second-party opinions, in that verifications serve as a rubber stamp of approval of compliance, rather than an entire review process.[76] Finally, certification is taken post-issuance, and allows for an issuer to have their green bond certified against a recognised, external, and GB Principles-aligned standard. Certification is determined by an accredited third party, and perhaps the most widely accepted in the industry is the Climate Bond Standards (addressed in more detail below).

The implementation of the GB Principles is led by an Executive Committee that holds wide-reaching authority over the content of these principles.[77] The Executive Committee consists solely of investors, issuers, and underwriters.[78] While other stakeholders, such as consultants, auditors, and academics may participate in relevant discussions to the formulation of GB Principles, they are limited in their capacity as non-voting observers.[79] The International Capital Market Association ('ICMA') serves as the GB Principles' secretariat.[80] It is clear that the GB Principles subscribe to a market-participant led governance structure, meaning it may be difficult for stakeholders outside of the Executive Committee to participate in the formulation and implementation of the GB Principles.[81] The absence of mandatory language in

72 Ibid.

73 Ibid.

74 See Moody's, *Green Bond Assessment Methodology* (Report, 30 March 2016) <https://www.moodys.com/research/Moodys-publishes-methodology-on-Green-Bonds-Assessment--PR_346585>.

75 See Standard and Poors, *Green Evaluations* (Report, 2017).

76 Gilbert and Tobin (n 69).

77 International Capital Market Association, *The Governance Framework of the Principles* (Report, 5 May 2020) 3 <https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/GBP-SBP-GovernanceFinal5-May-2020-110520.pdf>. The Executive Committee: appoints and oversees the Secretariat; approves formal GB Principles communications; votes on amendments to the GB Principles; and can propose and validate issue-specific working groups including Members and Observers.

78 Ibid.

79 Ibid.

80 Park (n 10) 24.

81 Ibid. Market-led regimes typically lack deliberation across a broad scope of parties: Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42(2) *Vanderbilt Journal of Transnational Law* 501, 556–7.

the GB Principles is indicative of their permissive nature.[82] Without strict guidelines as to what is 'green' or what is 'impact', there is concern that the GB Principles do not significantly ameliorate the risk of greenwashing, and allow issuers easy access to reputational benefits of participating in the green bond market.[83] While these claims are valid, it must also be remembered that burdensome regulatory costs are capable of drying up the green bond market, as many of the suggested mechanisms are not only expensive but are not required in conventional bond instruments.[84] The GB Principles are intended for broad use of the market, expressly stating that their overarching mission for market participants is to expand the green bond market through private standards.[85] This is reflected by ICMA's Resource Centre, which serves as a repository for disclosure templates and standard templates that have been used by past issuers and external reviewers.[86] The Resource Centre also provides a plethora of impact reporting guidance documents, such as suggested reporting metrics and reporting templates for projects.

B *Climate Bond Standards*

The Climate Bond Initiative ('CBI'), an international, investor-focused not-for-profit organisation, produced the Climate Bonds Standards and Certification Scheme ('CBS'). The standards are much stricter than the GB Principles, in that their purpose is to develop industry-agreed and scientifically-driven definitions and standards for climate integrity, management of proceeds, and transparency. The CBS requirements are founded upon the long-term target of net zero emissions by 2050 as provided by the *Paris Agreement*. From the issuer's perspective, the CBS aims to ensure that the internal processes, controls, reporting processes, and any other relevant criteria in the issuance and maintenance of the green bond are appropriately established. Issuers who attain this certification demonstrate that their bond meets science-based standards for climate integrity, and best practice standards for management of proceeds and transparency.[87] From the investor's perspective, the CBS hopes to provide investors the ability to identify and prioritise low-carbon and climate-resilient investments with a high level of confidence.[88] The certification lowers the transaction

82 Park (n 10) 23–4. See also ICMA (n 63) 7, where the disclaimer states: 'The Green Bond Principles are voluntary process guidelines that neither constitute an offer to purchase or sell securities nor constitute specific advice of whatever form (tax, legal, environmental, accounting or regulatory) in respect of Green Bonds or any other securities'.

83 Trompeter (n 39) 6.

84 Ibid.

85 ICMA (n 63) 3.

86 ICMA, 'Resource Centre' (Web Page, 2021) <https://www.icmagroup.org/sustainable-finance/resource-centre/>; ICMA, *Launch of Green Bond Principles Resource Centre FAQs* (Media Release, 12 August 2016) <https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Resource-Centre/GBP-RC_FAQ_08_2016%20150816.pdf>.

87 Climate Bonds Initiative, *Climate Bonds Standards Version 3.0* (n 64) 4.

88 Ibid.

costs and uncertainty of subjective judgements during an investor's due diligence on the 'green-ness' of the proposed investment. In short, issuers who achieve the CBS certification signal to potential investors that their funds will be, to a greater extent when compared to the GB Principles, used to achieve positive environmental or sustainable externalities.

The CBS comprises the Climate Bonds Standard, market-wide Climate Bonds Taxonomy ('Taxonomy') and Sector Eligibility Criteria.[89] The Taxonomy identifies the assets and projects needed to deliver a low-carbon economy and gives greenhouse gas emissions screening criteria consistent with the 2°C degree global warming target set by the *Paris Agreement*.[90] To date, projects and assets that are available for CBS certification fall under the categories of: renewable and alternative energy; energy efficiency; low-carbon transport; sustainable waste; waste; recycling and pollution; sustainable agriculture and forestry; and climate-resilient infrastructure and climate adaptation. In addition, the Taxonomy sets out certain projects and assets that are ineligible for certification as they are not in line with achieving the *Paris Agreement*.[91] The Sector Eligibility Criteria, which are developed by CBI's Technical Working Groups ('TWGs'), which are comprised of scientists, engineers, and technical experts, have developed to date 10 specific sector criteria available for certification.[92] In tandem with the Taxonomy, these Sector Eligibility Criteria provide a further layer of detailed definitions of 'green-ness' specific to assets and projects in each respective sector.

The certification process for issuers consists of the following steps.[93] First, the issuer must prepare the bond, creating a green bond framework setting out the use of proceeds for the bonds, and also identify assets that meet the relevant sector criteria. Second, it must engage an approved verifier for pre- and post-issuance certification and provide them with the relevant information. The verifier will then provide a verifier's report giving assurance that the CBS requirements are met. Third, the verifier's report is then submitted to the CBI, upon which the bond will receive a pre-issuance certification. Fourth, within 12 months of issuance, the verifier will

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89 Ibid 5.

90 Climate Bonds Initiative, *Climate Bonds Taxonomy* (Report, January 2021) <https://www.climatebonds.net/files/files/CBI_Taxonomy_Jan2021.pdf>.

91 There is a disconnect between Western countries and for example, China's standards of what is considered 'green'. For example, in 2015, China formed its own green bond standard which permits the use of green bonds to fund clean coal projects. However, coal projects are wholly rejected from being 'green' under the Climate Bonds Standards. See Climate Bonds Initiative, *Climate Bonds Standards Version 3.0* (n 64) 5–6; Wang (n 35) 483.

92 Climate Bonds Initiative, *Climate Bonds Taxonomy* (n 90). See also 'Sector Criteria', *Climate Bonds Initiative* (Web Page, 2020) <https://www.climatebonds.net/standard/sector-criteria>. The specific selection criteria are: solar; wind; marine; geothermal; bioenergy; forestry; buildings; water; waste; and transport. Sector criteria currently being developed are hydropower, water transport, and agriculture.

93 Climate Bonds Initiative, *Climate Bonds Taxonomy* (n 90).

provide a post-issuance verifier's report, which will then be submitted to the CBI for approval in order for the issuer to obtain post-issuance certification. Finally, the issuer must prepare a report each year for the term of the bond and provide this to bondholders and the CBI. This final reporting step is mandatory for the certification of the bond, and the issuer needs to provide two types of reporting: allocation reporting[94] and eligibility reporting.[95] Impact reporting is also recommended but is not mandatory.[96]

In comparison to the GBP, the CBS is a more prescriptive yet inclusive, investor-oriented governance scheme,[97] involving a much broader range of stakeholder groups.[98] Its prescriptiveness is due to its distinguishing certification character, which involves the 'establishment of standards, assessment for compliance with standards, accreditation of the certifier, and continual compliance monitoring by a certified third party'.[99] The CBS provides a useful remedy for the issues stemming from the vagueness of the GB Principles. However, it must be remembered that the CBS remains a voluntary standard and involves another layer of burdensome costs upon the issuer. Indeed, it is not uncommon for issuers to simply avoid the CBS regime altogether.[100] Moreover, to add further complexity to the governance of the green bond market, issuers like the World Bank, Fannie Mae, and Berlin Hyp have developed their own criteria for green bond eligibility in lieu of certification under the CBS.[101]

C *Sustainability Linked Loan Principles*

A sustainability linked loan ('SLL') allows the borrower to use the proceeds for general corporate purposes, but with incentives to improve their sustainability performance

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94 Climate Bonds Initiative, *Climate Bonds Standards Version 3.0* (n 64) 5. Allocation reporting is confirming the allocation of bond proceeds to eligible projects and assets, and is mandatory for all certified debt instruments.

95 Ibid. Eligibility reporting is confirming the characteristics or performance of projects and assets to demonstrate their eligibility under the Taxonomy and relevant Sector Eligibility Criteria. It is mandatory for all certified debt instruments.

96 Ibid. Impact reporting is disclosure of metrics or indicators that reflect the expected or actual impact of eligible projects and assets, and is encouraged for all certified debt instruments, but is not mandatory.

97 Park (n 10) 25.

98 Members of the board and advisory panel include socially responsible investors, academics, and NGOs. For a comprehensive list, see 'Climate Bonds Standard Board', *Climate Bonds Initiative* (Web Page, 2021) <https://www.climatebonds.net/standard/governance/board>; 'Advisory Panel', *Climate Bonds Initiative* (Web Page, 2020) <https://www.climatebonds.net/about/advisory-panel>.

99 Park (n 10) 25; Martijn W Scheltema, 'Assessing Effectiveness of International Private Regulation in the CSR Arena' (2014) 13(2) *Richmond Journal of Global Law and Business* 263, 323.

100 Trompeter (n 39) 7.

101 Gilbert and Tobin (n 69).

over time. This sustainability performance is measured using sustainability performance targets ('SPTs'), which may include key performance indicators, external ratings, and various metrics that measure the borrower's sustainability profile. As a result, a typically distinguishing feature of an SLL is that the margin of the loan will change depending upon the borrower's sustainability performance. In comparison to the green bond, there is no need for borrowers of an SLL to earmark funds for eligible green projects or demonstrate sustainable expenditure.

The governing regime lies in the Sustainability Linked Loans Principles ('SLL Principles'). Similar to the GB Principles, they are market derived voluntary guidelines with the purpose of providing a level of identifiability, consistency, and transparency for SLLs. The SLL Principles comprise four main components. First, there must be a relationship between the funds lent and the borrower's overall corporate social responsibility ('CSR') strategy. Second, target setting in the form of SPTs should be created in order to measure the sustainability profile of the borrower. Third, borrowers are recommended to publish information relevant to their SPTs. Finally, there should exist either an external or internal review of the borrower's performance against the SPTs.

The first two components, which are unique compared to the GB Principles, require that the borrower demonstrates to its lenders what its sustainability objectives are as stipulated in their CSR strategy, and how these objectives translate into reaching their SPTs.[102] Borrowers should be comprehensive in the disclosure of any objectives, strategies, policies, and processes relating to sustainability. To that end, they should also disclose any sustainability standards or certifications to which they are seeking to conform.[103] These SPTs should be 'ambitious and meaningful' to the borrower's general business operations, relevant throughout the life of the loan, and be measured against either internal or external benchmarks.[104] It is vital that SPTs negotiated between the contracting parties are well formulated as they normally serve as the reference point for the margin of the facility.[105] Indeed, the SLL Principles encourage borrowers to seek independent review in determining the appropriateness of the SPTs. In applying SLL Principles practically, borrowers and lenders alike need to analyse the robustness of the CSR strategy in place and the borrower's prioritisation of sustainability practice in their core business operations. The SLL Principles provide an example list of SPTs falling under primarily environmental sustainability categories. However, innovative measures may include those that consider social outcomes such as employee diversity or lower crime rates.

The SLL Principles recommend reporting — on an annual basis — all information relating to their SPTs, such as the borrower's performance and the methodology

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102 LMA, LSTA, APLMA (n 44).

103 Ibid.

104 Ibid. External benchmarks could include an ESG rating based upon recent performance and assessed against an external third-party rating criterion.

105 Ibid.

used in assessing such performance.[106] However, the SLL Principles note that certain companies such as sub-investment grade borrowers do not need to publicly disclose this information, and only need to share it with their relevant lenders. This exception exists to lower reporting costs and thereby remove a barrier to entry for certain companies, typically unlisted mid-market corporations, who want to participate in sustainable activities but do not have large number of assets or projects dedicated towards thematically green investments. A notable difference is that the SLL Principles remain silent on impact reporting, whereas the GB Principles provide substantial detail on this in the form of impact reporting frameworks.[107] It has been suggested that the reason for this is that it is much harder to identify social and environmental impact in relation to the borrower's sustainability performance compared to funds directed at a specific green project.[108]

The independent review component of the SLL Principles recommends for this to be a negotiation point between borrowers and lenders. However, in some circumstances they permit internal reviews — a noticeably less exacting requirement compared to the GB Principles — which provide substantial detail on pre-issuance and post-issuance review processes, such as second-party opinions, verification, certification, and green bond ratings. As a final step, the SLL Principles recommend that the lenders themselves conduct an evaluation of the borrower's compliance against the SPTs based on the reported information.[109]

The relaxed standards of reporting and reviewing in the SLL Principles compared with GB Principles bring to the forefront concerns over harmonisation and product integrity, especially given that the SLL market attracts borrowers from wide-ranging industries, locations, scales, and financial and sustainability profiles. As such, it is suggested that the SLL Principles establish an online repository similar to ICMA's Resource Centre. This repository could contain reporting templates, along with other relevant documents such as SPT formulation and assessment methodologies, and suitable impact reporting metrics, in order to facilitate standardisation and information sharing across the marketplace.[110]

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106 LMA, LSTA, APLMA (n 44) 3.

107 See ICMA, 'Resource Centre' (n 86).

108 Tallat Hussain and Jeffrey Rubinoff, 'Sustainability Linked Loan Principles Extend Green Finance', *White and Case* (Web Page, 21 March 2019) <https://www.whitecase.com/publications/alert/sustainability-linked-loan-principles-extend-green-finance>.

109 This seems to mirror current lending practices in risk management, where the lender reviews its borrowers using audited documents and reports received from the borrower, for the purpose of affirming their risk profile: Australian Prudential Regulation Authority, *Prudential Standard CPS 220: Risk Management* (Prudential Standard, 2019) 11.

110 Similar 'knowledge hubs' have been created by the Task Force on Climate Related Financial Disclosures ('TCFD') and Altiorem, providing resources for those involved in sustainable investing. See 'TCFD Knowledge Hub', *TCFD* (Web Page, 2020) <https://www.tcfdhub.org/>; 'Library', *Altiorem* (Web Page, 2021) <https://altiorem.org/library/case/>.

The SLL Principles were created by the Loan Market Association, the Loan Syndicate and Trading Association, and the Asia Pacific Loan Market Association, all of whom were advised by lenders and borrowers of financial institutions, as well as the ICMA in relation to their work with the GB Principles.[111] As expected, the governance structure is identical to the GB Principles, in that it is a market-participant, permissive-rules based framework and shares the strengths and limitations of the GB Principles as discussed above. The SLL Principles are even less demanding than the GB Principles, given the notable absence of suggested pre-issuance and post-issuance review processes. The SLL market is still in its infancy. As the marketplace expands overtime, it should require greater levels of reporting and review processes to ensure the instruments are achieving their intended environmental and social impacts.

D *Australian Securities and Investments Commission's Regulatory Guidance 228*

In 2015, the Group of 20 ('G20') Finance Ministers requested that the Financial Stability Board ('FSB') 'convene public- and private-sector participants to review how the financial sector can take account of climate-related issues'.[112] The FSB, which includes representatives from Australia's Reserve Bank and Treasury, quickly established the Task Force on Climate-Related Financial Disclosures ('TCFD') to develop recommendations for voluntary climate-related financial disclosures for use by corporations to support investors, lenders, and insurance underwriters in understanding material climate risks.[113] The TCFD released its final report in June 2017, and in it addressed four core elements of climate-related financial disclosures:

> 1. Governance — Disclos[ing] the organization's governance around climate-related risks and opportunities.
>
> 2. Strategy — Disclos[ing] the actual and potential impacts of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning where such information is available.
>
> 3. Risk Management — Disclos[ing] how the organization identifies, assesses, and manages climate-related risks.
>
> 4. Metrics and Targets — Disclos[ing] the metrics and targets used to assess and manage relevant climate-related risks and opportunities where such information is material.[114]

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111 Loan Syndications and Trading Association, 'The LMA, LSTA and the APLMA Launch the Sustainability Linked Loan Principles' (Media Release, 19 March 2019) <https://www.lsta.org/news-resources/the-lma-lsta-and-the-aplma-launched-the-sustainability-linked-loan-principles-sllp/>.

112 Colin Myers, 'Financing Our Future's Health: Why the United States Must Establish Mandatory Climate-Related Financial Disclosure Requirements Aligned with the TCFD Recommendations' (2020) 37(2) *Pace Environmental Law Review* 415, 433.

113 Task Force on Climate-Related Financial Disclosures, *Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures* (Report, June 2017) ('TCFD'); Australian Sustainable Finance Initiative, *Developing an Australian Sustainable Finance Roadmap: Progress Report* (Report, December 2019) 14.

114 TCFD (n 113) 14.

Climate-related risk is delineated into transition risks, such as risks tied to changes in law, technology, and market forces; and physical risks, such as risks directly stemming from rising temperatures, sea levels, and extreme weather events.[115] Finally, the disclosure of climate-related risks in financial filings should be underpinned by six principles, in which disclosures should be: representative of relevant information; specific and complete; clear, balanced, and understandable; consistent over time; comparable among companies within a sector industry or portfolio; reliable, verifiable, and objective; and provided on a timely basis.[116]

The TCFD report was greatly influential in Australia, with many regulators and governing bodies signalling their commitment towards monitoring entities' management of climate change risk, and also endorsing the report's recommendations as a preferred disclosure framework.[117] Most relevant for bond issuers and investors was the Australian Securities and Investments Commission's ('ASIC') update to *Regulatory Guide 228 Prospectuses: Effective Disclosure for Retail Investors* ('RG228').[118] The update incorporated the types of climate change risks as identified by the TCFD Report into the list of examples of common risks that may need to be disclosed in a prospectus.[119] As such, bond issuers will likely need to provide disclosures in their prospectuses about impacts of climate change on the issuer's business model, and also transition and physical climate risks associated with the security

115 Ibid 27.

116 Ibid 18.

117 Governance Institute of Australia, *Climate Change Risk Disclosure: A Practical Guide to Reporting against ASX Corporate Governance Council's Corporate Governance Principles and Recommendations* (Report, February 2020) 5. Recommendation 7.4 of the ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (Report, February 2019) provides that a listed entity should disclose whether it has any material exposure to environmental or social risks, and if it does, how it intends to manage it: at 27. This applies to annual reports for the first full financial year after 1 January 2020. See Australian Accounting Standards Board and Auditing and Assurance Standards Board, *Climate-Related and Other Emerging Risks Disclosures: Assessing Financial Statement Materiality Using AASB/IASB Practice Statement 2* (Report, April 2019). This joint guidance paper reinforces that report preparers, assurers, and auditors should take into consideration climate-related issues in financial statement accounting. See also Australian Prudential Regulation Authority, *Climate Change: Awareness to Action* (Information Paper, 20 March 2019) 25.

118 ASIC, *19-208MR ASIC Updates Guidance on Climate Change Related Disclosure* (Regulatory Guide Update, August 2019) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-208mr-asic-updates-guidance-on-climate-change-related-disclosure/>; ASIC, *Regulatory Guide 228 Prospectuses: Effective Disclosure for Retail Investors* (Regulatory Guide, 12 August 2019) ('RG228'). See also ASIC, *Regulatory Guide 247 Effective Disclosure in an Operating and Financial Review* (Regulatory Guide, 12 August 2019); ASIC, *REP 593 Climate Risk Disclosure by Australia's Listed Companies* (Report, 20 September 2018).

119 See Table 7 of ASIC, 'RG228' (n 118).

and the offer.[120] While the RG228 only applies to offers to retail investors, issuers should not rely on the purported sophistication of wholesale investors as justification for failures in considering and disclosing relevant climate-related risks in offering documents.[121]

Very recently, the duty to disclose climate-related risks in bond offering documents has been cast into the limelight by the Federal Court claim, *O'Donnell v Commonwealth* ('*O'Donnell*').[122] Kathleen O'Donnell, representing herself, retail investors and holders of Australian Government Bonds ('AGBs'), alleges that physical and transitional climate-related risks capable of influencing an investor's investment decision should have been disclosed in the bonds' term sheets and information memoranda issued by the government. In failing to disclose these risks, it is alleged that the Commonwealth, as promoter of the information statements, engaged in misleading or deceptive conduct and breached its duty of utmost candour and honesty to investors.[123] The claim further alleges that the officials of the Commonwealth, specifically the Secretary to the Department of Treasury and the Chief Executive Officer of the Australian Office of Financial Management, failed to discharge their statutory obligation to exercise due care and diligence in approving the release of these documents to the public.[124] The applicant does not seek damages, but rather a declaration of breaches and an injunction preventing the Commonwealth from promoting exchange traded government bonds that do not disclose climate-related financial risks.

There exist some challenges to this claim. For example, the applicant will need to establish a reasonable expectation in all circumstances that climate-related risks would have been disclosed to potential investors in AGBs.[125] Moreover, the applicant will need to articulate what information ought to have been disclosed. Given the complexity of climate-related risks, it will be difficult to navigate 'which facts are material enough to warrant disclosure, and to what extent future possibilities are sufficiently certain to warrant disclosure'.[126] It is important to distinguish that *O'Donnell* and the RG228 do not concern greenwashing per se (unlike the governance regimes above), but rather the broader notion that climate change will cause material, financial risks, and must be considered and disclosed to the same

120 Ibid 31.

121 Sarah Barker, 'Misleading Climate-Related Disclosure: Are Your Verification and Disclosure Processes Defensible?', *MinterEllison* (Web Page, 23 July 2020) <https://www.minterellison.com/articles/misleading-climate-related-disclosure>.

122 Federal Court, VID482/2020, commenced 22 July 2020 ('*O'Donnell*').

123 *Australian Investments and Securities Commission Act 2001* (Cth) s 12DA(1).

124 *Public Governance, Performance and Accountability Act 2013* (Cth) s 25(1).

125 Kim Reid et al, 'A Growing Tide? Climate Change Class Action Proceedings Issued against the Federal Treasury', *Allens Linklaters* (Web Page, 12 August 2020) <https://www.allens.com.au/insights-news/insights/2020/08/a-growing-tide-climate-change-proceedings-against-Federal-Treasury/>.

126 Ibid.

extent as conventional financial risks relevant to a financial product issuance.[127] Nonetheless, the implications of this claim will be of importance to sovereign and corporate issuers of green debt instruments and their advisors. Several issues to consider include:

1. Fundraising structure — do we (and our key advisors) understand the range of climate-related financial risks that may be material to the issue, its size and structure, intended use of proceeds, credit rating, issue timing, covenants, pricing and subscription demand? What are the risk metrics and variables that will need to be considered?

2. Information gathering and verification — how do we, and our advisors, remain across dynamic climate-related financial risk issues, regulatory expectations and investor preferences, and integrate appropriate due diligence procedures into our information gathering and verification frameworks?

3. Disclosure documents — what disclosures should be made in our disclosure documents — both narrative and quantitative? What is the materiality threshold we should apply? What disclosure of forward-looking stress-testing and scenario analysis against the plausible range of climate futures should be included?

4. Roadshows, investor presentations and market questions — what are the key climate change-related questions that we may expect from potential subscribers?[128]

IV Contracts and Impacts

The governance regimes of green bonds and SLLs provide investors with an increased level of confidence that the funds raised will be used towards environmental or social causes. But as the sustainable finance market matures, investors expect more than a perceived integration of socially responsible approaches to financing. Rather, they are beginning to demand measurable insight into impact performance by way of performance-based mechanisms contracted into the debt instrument's legal documentation.[129]

A *Provisions in SLLs*

In understanding and developing appropriate performance-based contractual provisions for SLLs, it may be useful to first highlight the historical developments of loan agreements in microfinance impact investments. In contrast with traditional

127 Barker (n 121).

128 Ibid.

129 Bass et al (n 6) 13–14.

loan agreements where lenders are focused on protecting expected financial returns and institutional reputation, impact lenders are additionally wary of protecting, and even enhancing expected impact returns. Indeed, it has been commented that reputational stakes are higher for impact investors due to the ever-present risk of greenwashing.[130] In the past, impact provisions in loan agreements, if addressed at all, stipulated the impact intentions of the contracting parties and the causes to which the loan's proceeds could be put.[131] However, over time, impact investors have become more concerned with the manifestation of those intentions, resulting in the broadening of impact provisions to include covenants related to meaningful impact reporting.[132] More experimental impact lenders have gone further by incorporating key performance requirements or targets to be reached by borrowers. Such clauses are often connected to financial events, thereby rewarding or sanctioning borrowers according to their performance in reaching specified impact goals.[133] This carrot-and-stick mechanism is to some extent already mirrored by SLLs as seen through the requirement of SPTs. However, a current criticism is that SPTs are often drafted in general and vague terms, making it difficult to specifically measure and understand what the borrower intends to accomplish. As such, it is contended that SPTs as well as other impact provisions in SLLs should be tailored to the contracting parties and drafted in very specific language in order to provide greater assurance to lenders that positive social and environmental externalities will be achieved.

1 *Common Contractual Provisions*

Traditional commercial loan agreements contain many provisions that require little modification to accommodate for impact investments.[134] This should serve as a starting point for those seeking to create an SLL facility, or incorporating an SLL into an existing facility agreement.[135]

Introductory provisions, such as 'definitions' and 'recitals', will need to be adapted to address the impact goals of the loan. These may include additional definitions directed towards SPTs, the external reporting requirements, assessment methodologies, and the purpose of the loan itself. Financial terms of the loan, such as conditions precedent, lending disbursements, and repayment structures, may be revised so that they are contingent upon an impact related event, for example reaching an impact milestone or achieving a certain level of quality and frequency of impact

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130 Deborah Burand, 'Contracting for Impact: Embedding Social and Environmental Impact Goals into Loan Agreements' (2017) 13(3) *New York University Journal of Law and Business* 775, 784.

131 Ibid 783.

132 Keith Allman and Ximena Escobar de Nogales, *A Practical Guide to Investment Process and Social Impact Analysis* (Wiley Finance, 2015) 163.

133 Burand (n 130) 785.

134 Ibid.

135 Allman and Escobar de Nogales (n 132) 163.

reporting.[136] Similarly, performance commitment provisions, such as representations and warranties, may be altered so that any misrepresentations in an impact report may result in an event of default.

In the typical fashion of SLLs, the margin clause would also be modified in order to connect the borrower's sustainability performance with the margin of the loan facility.[137] It is contended that contracting parties should strive towards specified SPTs outlining precise milestones to be achieved within certain time periods. How stringently these SPTs are to be measured, and how significant the financial incentives or sanctions are in relation to the borrower's performance, will need to be determined on a case-by-case basis, especially given the varying industries, geographic regions, and financial capabilities of participants in the SLL market. The current market practice is that SLLs will exhibit a one-way pricing structure, meaning that if the borrower satisfies its sustainability criteria, the margin on the loan will be reduced; but, if the borrower fails to meet its targets, there will be no resulting margin penalty.[138] The size of the reduction varies depending on the loan and the market, but typically within the range of 0.02% to 0.04% on general corporate financing.[139] More recently, two-way pricing has been introduced to better incentivise performance, meaning that pricing increases are applied if the borrower's performance declines.[140]

Covenants that protect the lender's financial standing and returns, such as by regulating the borrower's handling of funds and business operations, may be similarly adjusted to protect the lender's impact returns.[141] For instance, a covenant which limits a borrower's discretion in making substantial changes in its business may be utilised by impact lenders for the purpose of preventing the borrower from deviating from its stated sustainable mission.[142] These may specifically include mitigating

136 An example of a term sheet provision combining impact reporting with financial reporting requirements:

> The [borrower] company will deliver to the [lender]: quarterly (within [number] days), and annual (within [number] days) financial statements; and (ii) quarterly reports summarising the status and results, pursuant to the agreed upon metrics, of the implementations of the [X] project (including, without limitation, a report detailing the number of [X] contracts sold and details of its sale, the number of [X] clients enrolled in the [X] program and the outcomes for all such clients).

137 'Cleaning Up: How Green Loans Are Evolving', *Ashurst* (Web Page, 16 July 2018) <https://www.ashurst.com/en/news-and-insights/legal-updates/cleaning-up-how-green-loans-are-evolving/>.

138 Linklaters, *Sustainable Finance: The Rise of Green Loans and Sustainability Linked Lending* (Report, 2019) 15 <https://www.linklaters.com/en/insights/thought-leadership/sustainable-finance/the-rise-of-green-loans-and-sustainability-linked-lending-where-are-we-now>.

139 Ibid. However, in some markets, discounts might be higher — as much as 0.1% to 0.2%.

140 Ibid.

141 Burand (n 130) 786.

142 Allman and Escobar de Nogales (n 132) 167.

departure risks of key individuals in the borrower's central management team,[143] requiring the borrower to retain and protect intellectual property that is essential to the borrower's environmental or social mission,[144] or even limiting certain expenditures by borrowers that may be deemed inconsistent with the impacts being sought.[145] In protecting from reputational risks, 'do no harm' covenants may also be present, discouraging borrowers from behaviour that may result in harmful impacts. Such covenants will be especially important when impact investment projects involve disadvantaged people.[146] A more general example of this is the International Finance Corporation's 'exclusion list', which prohibits direct or indirect financing to certain organisations that have previously engaged in socially or environmentally harmful corporate behaviour.[147]

2 *Impact Performance Provisions*

Impact performance provisions in loan agreements have existed for many years within the microfinance sector, and their experience provides useful guidance on how the SLL's SPTs may be formulated and implemented.[148] According to microfinance

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143 Ibid 183.

144 Ibid 176.

145 An example of a term sheet provision used by an impact investor in limiting significant remuneration package increases to the borrower's senior management team:

> The borrower shall not (without the prior written consent of the lender) make any material amendments to senior management remuneration packages, including but not limited to, increases in total compensation of greater than [x]%.

146 Consultative Group to Assist the Poor ('CGAP'), *Implementing the Client Protection Principles: A Technical Guide for Investors* (World Bank Publications, 2010) 16 <https://openknowledge.worldbank.org/bitstream/handle/10986/21977/Implementing0t00guide0for0investors.pdf?sequence=1&isAllowed=y>. In the microfinance sector, investors have implemented provisions that ameliorate the risk of microfinance institutions engaging in predatory behaviour when offering microcredit products. For example, KfW, the German government's development bank implemented the following provision:

> The borrower shall in particular provide its customers with clear and comprehensive information on the main characteristics of the financial services the customers seek. The borrower shall, for example, have thoroughly informed its customers in good time before the signing of a loan agreement on the terms and conditions of the loan in a way easily understandable for the customer. These loan agreements shall further contain such information and shall be drafted in a manner the customers are able to understand. Furthermore, the borrower shall critically review the customer's repayment capacities before signing a loan agreement and shall refrain from any form of unfair or even harmful debt collection practices.

147 See, eg, 'IFC Exclusion List', *International Finance Corporation* (Web Page, 2007) <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/company-resources/ifcexclusionlist#2007>.

148 See, eg, CGAP, *Microfinance Poverty Assessment Tool* (World Bank Publications, September 2003) 1 <https://www.cgap.org/sites/default/files/CGAP-Technical-Guide-Microfinance-Poverty-Assessment-Tool-Sep-2003.pdf>.

commentators, performance-based provisions are marked by two attributes: first, they are 'as clear and specific as possible about the expected results and how they will be measured'.[149] Second, they incentivise 'good performance [by borrowers] by defining sanctions or benefits that are tied to the achievement of the expected results'.[150] As a starting point, the following basic three-step approach[151] may be taken for contracting parties in SLLs: identification of appropriate SPTs; establishing performance level expectations for these SPTs; and aligning incentives by creating compliance rewards and noncompliance sanctions that are linked to SPTs.

In negotiating these steps, lenders and borrowers should remember that the agreement will only be as effective as the measurement and monitoring mechanisms of the borrower's performance that are in place. In the likely event that the borrower bears the cost in impact measuring and reporting, contracting parties should be cognisant of how exacting and onerous these terms may be when negotiating them.[152]

Moreover, selecting or designing appropriate SPTs will require a tailored mindset. Borrowers such as start-ups, who have fewer resources and limited capacity to acquire the data necessary to measure their performance, would not be held to the same standard as a mature, larger corporation with well-established reporting systems. Similarly, loans or loan facilities of a shorter duration will boast different SPTs to those that are used in longer term financing.[153] The context of the project is also a critical consideration as different sectors will require different measurements, particularly in the case of large corporations, which are engaged in various

149 CGAP, *Performance-Based Agreements: Incorporating Performance-Based Elements into Standard Loan and Grant Agreements* (World Bank Publications, May 2010) 1 <https://www.cgap.org/sites/default/files/CGAP-Technical-Guide-Performance-Based-Agreements-Incorporating-Performance-Based-Elements-into-Standard-Loan-and-Grant-Agreements-May-2010.pdf>.

150 Ibid.

151 Burand (n 132) 791.

152 See, eg, Linklaters (n 138) 16. An example of a term sheet provision for reporting on impact goals for self-reporting by the borrower can be found at Impact Terms, 'Measuring Impact' (Web Page, 2016) <https://www.impactterms.org/measuring-impact/>:

> The Company and the Investors have defined a set of metrics to assess the Company's performance in [describe impact goals], which metrics are described in [Exhibit X]. [During the term of the Loan], the Company shall deliver to the Investors, within X days following the end of each [reporting period], a report setting forth [the metrics] OR [the Company's progress toward each impact milestone] described in Exhibit X ('Impact Report'). [During the term of the Loan], each Impact Report described in the preceding paragraph shall be audited by a third-party organization with relevant expertise, [selected by the Investors and reasonably acceptable to the Company] OR [agreed upon by the Investors and the Company]. Costs of the audit shall be borne by the Company. If mutually agreed, the findings of the audit may be publicized by the Investors and the Company.

153 Burand (n 130) 791.

industries.[154] The spectrum of available SPTs is vast and contracting parties will need to consider using standardised or customised metrics,[155] and whether the SPTs are to focus on impact outputs or impact outcomes.[156]

In establishing performance level expectations, contracting parties should not be overzealous, as undue pressure on a borrower may lead to a deterioration in impact results.[157] Borrowers should avoid agreeing to performance hurdles that easily trigger events of default or mandatory prepayment requirements as poor financial viability of the borrower can result in enduring reputational damage.[158] Similarly, lenders will want to avoid a reputation of enforcing drastic consequences over impact targets as this may damage their relations with borrowers, prospective borrowers, and potential co-lenders.[159] To balance these interests, lenders should set achievable targets so that only events of serious underperformance by borrowers would trigger penalties or zero financial benefits. Impact performance provisions can also be utilised throughout the life of the loan agreement, from 'cradle to grave'.[160] Indeed, it has been reported that investors commonly use impact data in their pre-screening or due diligence stage, as well as in their decision to exit investments.[161]

Financial incentives or sanctions could be connected to the timing and amount of loan disbursements to the borrower,[162] the interest rate applied to disbursed

154 Allman and Escobar de Nogales (n 132) 208: 'One company's social mission, even in the same industry, might justify different metrics than another'.

155 It has been reported that most impact investors use a standard impact measurement system, with IRIS+ being the most popular: Dean Hand et al, *2020 Annual Impact Investor Survey* (Report, Global Impact Investing Network, 2020) 48.

156 A greater discussion on impact outputs, impact outcomes, and the impact value chain can be found in Part V of this article. It has been reported by impact investors that current impact measuring systems are still insufficient in measuring outcomes: Hand et al (n 155) 8.

157 Mayada El-Zoghbi, Jasmina Glisovic-Mezieres and Alexia Latortue, *Performance-Based Agreements: Incorporating Performance-Based Elements into Standard Loan and Grant Agreements: A Technical Guide* (Technical Guide, 2010) 5–6.

158 Burand (n 130) 802.

159 Ibid. Many lenders post-Global Financial Crisis in 2008 refrained from accelerating loan payments against their borrowers, instead focusing on the frequency of financial reporting and other actions that enhanced informational flows: International Association of Microfinance Investors, *Charting the Course: Best Practices and Tools for Voluntary Debt Restructurings in Microfinance* (Report, 2011) 6.

160 Burand (n 130) 813.

161 Bass et al (n 6) 13–14: In a survey of numerous impact investors, it was found that 77% and 88% of respondents used impact investment data in the due diligence and investment screening stage of the investment respectively, and 36% and 21% in the exit and post-exit stage of the investment respectively.

162 A term sheet's 'use of proceeds' provision is capable of reflecting the impact goals of the transaction. Moreover, an event of default may be triggered by social performance failures by the borrower.

amounts,[163] variable repayment schedules of disbursed amounts, and mandatory prepayment requirements.[164] To date, the market practice for SLLs is that the pricing is set by reference to the borrower's overall Environmental, Social, and Governance ('ESG') rating. The rating is usually expressed by a numerical range, such as zero to 100, and measures a variety of factors, depending on the rating agency.[165] If a transaction uses specific ESG criteria rather than an overall rating, different discounts may be applied for each specific target that is met. Alternatively, contracting parties may agree to an all or nothing approach where all targets must be met to trigger pricing changes.[166]

There are two competing challenges with the proposition of protecting impact returns. On one hand, financial success may be inseparable from impact success and there should not be a strict delineation of financial returns versus social and environmental returns.[167] Conversely, lenders and investors alike are wary of the greenwashing risk and do not want to rely solely on superficial integrations of sustainable impact goals in business models.[168] Rather, they want to see actual results which may be achieved through performance-based impact provisions. Contracting parties must balance these two concerns based on the circumstances before them. Performance-based impact provisions should not be unduly onerous on the borrower's investment capacity, but they must also provide lenders with an acceptable level of certainty that the raised funds are resulting in positive social or environmental impacts. The mere presence of these provisions also performs a valuable screening function, in that borrowers and lenders can quickly identify those parties that are not sufficiently mission-aligned and thereby inappropriate for sustainable financing.[169]

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163 An example provision connecting increased interest rate to poor social performance can be found at Impact Terms, 'Impact Terms Guide' (Web Page, 2021) <https://www.impactterms.org/impact-terms-guide/#iii_Interest_Rate_Decrease_for_Debt_Transactions>:

> If during the term of the Loan the Company fails to cure the violation of [specify penalty trigger] within X days, the interest rate shall be increased by [x] percent, provided that the interest rate shall not be increased above the Initial Rate plus [x] percent. Impact Terms.

164 Ibid. An example of a term sheet's provision of a mandatory prepayment requirement that is connected to the borrower's failure in achieving its impact objectives:

> In the event that as of [date], the borrower does not have a minimum of AUD[x] of the loan invested to support the [project], at the option of the lender, exercised in its sole discretion, the difference between the loan outstanding and the amount of the loan invested to support the [project], shall be due and payable as a mandatory prepayment on the loan.

165 Linklaters (n 138) 17. See, eg, Sustainalytics, *The ESG Risk Ratings Methodology* (Report, 2021) 4 <https://connect.sustainalytics.com/hubfs/INV/Methodology/Sustainalytics_ESG%20Ratings_Methodology%20Abstract.pdf>, which measures the magnitude of a company's unmanaged ESG risks.

166 Linklaters (n 138) 17.

167 Burand (n 130) 794.

168 Ibid 795.

169 Ibid 803.

B *Provisions in Green Bonds*

A characteristic feature of the modern debt market is the differing standards of documentary protections between loans and bonds, despite the fact that they serve more or less the same purpose — the investor or lender provides funds, and the borrower or issuer pays them back with interest.[170] With loans, there is generally one main document — the loan agreement, which outlines the entire transaction and the protections and expectations for both the borrower and the lender. However, bonds are fractured into several documents: the subscription agreement; the bond term sheet which sets out financial terms, covenants, and events of default; a paying agency agreement; a trust deed; and a bond indenture sheet. Despite the additional documents in bonds, bond lenders are afforded, or perhaps require, fewer protections than bank lenders do.[171]

In the context of impact investing, this difference in protections is an important distinction to make, given that investors, regardless of the debt instrument they pursue, are conscious of the actual environmental or social change that their funds are creating. As demonstrated above, there are many types of performance-based provisions that can be implemented into an SLL agreement. However, such specificity or direction is hardly found in the GB Principles. Furthermore, from analysing various green bond frameworks, prospectuses, and terms and conditions issued,[172] the issuance of green bonds has been observed to mostly mirror conventional bonds in the sense that there are no or very few modified provisions to accommodate the fact that they are thematically green. After stipulating that the funds are to be invested into a specified green project, the green thematic stops there. The price and interest rates of the bond tranches, and the instalments of this interest to be paid are not connected to the issuer's sustainable impact performance. The events of default clauses and covenant clauses are typically confined to details of payment performance and are silent on the issuer's obligations of reporting and external review requirements or achieving impact targets. Indeed, a major legal challenge facing green bonds today is that they rarely trigger an event of default if the use of proceeds is not complied with.[173] As long as the interest and principal are paid, the bondholder often has no recourse.

Bond issuers can very easily advertise to the public and external verifiers that the instrument complies with the four components of the GB Principles, but the generality

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170 Philip R Wood, 'Bondholders and Banks: Why the Difference in Protections' (2011) 6(2) *Capital Markets Law Journal* 188, 189.

171 Ibid.

172 See, eg, Apple, *Green Bond Prospectus* (2019); Acorn Holdings Limited, *Green Bond Framework* (2019); Green Storm, *Securitised Green Bond Prospectus* (2019). See also 'Labelled Green Bonds Data: Latest 3 Months', *Climate Bonds Initiative* (Web Page, 2021) <https://www.climatebonds.net/cbi/pub/data/bonds>; 'Green, Social and Sustainability Bonds Database', *International Capital Market Association* (Web Page, 2021) <https://www.icmagroup.org/green-social-and-sustainability-bonds/green-social-and-sustainability-bonds-database>.

173 Doran and Tanner (n 10) 23.

of the bond's actual terms and conditions of issuance may reveal a completely different picture. For example, in 2015 the East Bay Municipal Utility District issued USD74 million tranches labelled as green bonds.[174] The official statements provided very clear descriptions of the criteria used in order to ensure that the proposed green projects complied with the GB Principles. However, a further document went on to say:

> The terms 'Green Bonds' and 'green project' are *neither defined in nor related to provisions* in the Indenture. The use of such terms herein is for identification purposes only and is not intended to provide or imply that an owner of the Series 2015B Bonds is entitled to any additional security other than as provided in the Indenture. The purpose of labeling the Series [2015B] Bonds as 'Green Bonds' is, as noted, to allow owners of the Series 2015B Bonds to invest directly in bonds that will finance environmentally beneficial projects. *The District assumes no obligation to ensure that these projects comply with the principles of green projects as such principles may hereafter evolve*.[175]

Although the bond was advertised as compliant within a major regulatory framework, the issuer's ability to carve out any reference to it in the bond's term sheet is a concern for environmental non-performance.[176] There is generally little recourse to this.[177] Disgruntled investors will usually act with their feet, selling their investment in the bond on the secondary market. Alternatively, they may group together to negotiate with the issuer to provide greater reporting on impact performance, although this is rare due to practical difficulties.[178] While such actions may be effective in causing reputational damage to the issuer, they are not particularly helpful in aligning financial

[174] Phillip Ludvigsen, 'Advanced Topics in Green Bonds: Risks', *Environmental Finance* (Web Page, 24 November 2015) <https://www.environmental-finance.com/content/analysis/advanced-topics-in-green-bonds-risks.html>.

[175] East Bay Municipal Utility District, *Water System Revenue Bonds, Series 2015B Green Bonds and Series 2015C* (Report, 2015) 7 (emphasis added).

[176] Wang (n 35) 485. See also Antonio Vives, 'What's the True Impact of Green Bonds?', *GreenBiz* (Web Page, 11 May 2018) <https://www.greenbiz.com/article/whats-true-impact-green-bonds>: Gaps in the bond framework or prospectus greatly inhibit the bond's ability to be green.

> These documents state how the [bond] issue intends to comply with the GBP, but the vast majority include generalities, the minimum necessary to comply. The priority seems to be to maintain operational flexibility, to avoid having to disclose more information than necessary, to avoid potential reputational and, especially, to avoid legal risks. Many just state the general types of projects or activities to be undertaken without specifying details. With very few exceptions, they do not state how the projects or activities will contribute to the greening of the environment and society.

[177] Ibid; Doran and Tanner (n 10) 23.

[178] 'It is usually impossible to have informal discussions with a multitude of anonymous bondholders. If changes are required, then bondholder meetings have to be called and usually something must be offered to the bondholders as a sweetener to persuade them to vote, even if there are voting clauses in the bonds or by statute': Wood (n 170) 194.

and social interests of the transaction *ex ante*.[179] Impact investors should not be left to rely solely on a perceived integration of impact goals into the business model, but rather on performance-based provisions stipulated within the bond documents.

There exist several possible explanations as to why we see such a stark difference in bond provisions compared with loan provisions, despite the similarity in their function. One reason may be due to the stubbornness and indelibility of market practice.[180] Dating back to the late 1960s when the 'eurobond' market was still in its infancy, most issuers were blue-chip creditors who, as investors, were not willing to purchase bonds of weaker issuers. These issuers were able to resist over-exacting covenants and events of default, which hence informed the market norm.[181] Another explanation is that bond negotiation is not as tailored or personal compared to a loan instrument. The 'real' lender, being the investors in the bond, are not at the negotiating table when the terms of the bond are negotiated. Rather, the terms of the documents are being negotiated by the bank, who do not intend on holding the bonds but rather selling them on to investors on issue. Following this vein, the bank's primary interest is working towards minimum protections necessary to sell the bond. There is no reason for them to go further by, for example, arranging impact performance-based provisions as such a process can be temporally and financially burdensome. Perhaps the most cynical view of all is that investors simply do not have the time or resources to critically analyse the detailed terms of each bond, and therefore, do not care. Bondholders do not have the resources to initiate and process a bond restructuring by way of a bondholder meeting and would rather exit by a sale of the bonds. Given the oversubscription of green bonds in the market, it is very easy for investors to 'vote with their feet'.

It is likely there is a level of truth to all these reasons provided. That being said, it is difficult to argue that bond market stubbornness alone explains the prevailing conservative practices. Indeed, we have seen substantial changes in the bond market by way of securitisation bonds, derivatives, and various thematic bonds.[182] Moreover, although investors in green bonds are not seated at the negotiation table, it would be dismissive to believe that the arranging banks do not have a significant interest in the investors that they are selling to. Certain bond investors *do* have an interest in the environmental or social performance of their funds being used, despite the fact that they may not be willing to porously scrutinise various bond term sheets. So, while investors qua lenders may be either satisfied or forced to accept the earmarking process of green bonds as the primary means of corporate monitoring, this practice only serves to be detrimental to the legitimacy of the green bond market. It is necessary that both the banks representing prospective investors, as well as the investors themselves, negotiate for performance-based impact provisions in bond documentation to ensure stronger accountability of issuing entities in achieving positive environmental and social returns.

179 Burand (n 130) 795.

180 Wood (n 170) 192–3.

181 Ibid.

182 Ibid 193.

V The Concept of 'Impact'

As the sustainable finance market grows, so too does the demand for insight into impact performance.[183] Impact investors and borrowers alike have recognised that while there exist costs with impact measurement and management, the data collected is capable of generating business value and financial benefits.[184] Greater understanding in efficient uses of proceeds, assessing risk factors, revising impact goals, and refining business strategy are all reported benefits stemming from increased impact measurement and management.[185] However, simply repeating the mantra of measuring impact is not at all meaningful. If we are to contend that impact provisions should have a place in SLLs and green bonds, then it is important to dissect the concept of 'impact' and the measurement of social and environmental performance. Investors have cited a lack of transparency on impact performance, inability to compare impact results with market performance, difficulty in collecting quality data, and aggregating, analysing or interpreting data, as key challenges in measuring meaningful impact data.[186]

The 'impact value chain' has been acknowledged as a starting conceptual framework in analysing social and environmental impact.[187] It provides that the 'outputs' resulting from impact investing activities achieve certain 'outcomes' that then enable the assessment of 'impact' as the 'net effect or change in outcomes attributable to activities funded by an investment among individuals, communities, or in a defined geographical area'.[188] Some may believe that measuring these immediate outputs is sufficient, whereas others believe measuring outcomes is more rigorous. By way of example, a venture philanthropy fund, Acumen Fund, invested in companies for the purpose of improving the health and environment of target areas. If one of these companies manufactured anti-malaria bed nets, Acumen would count the number of these nets manufactured and distributed. Similarly, for an enterprise that built toilets and shower facilities in lower socio-economic districts, Acumen would track the number of times these facilities were used.[189] Through consultation with experts

183 Bass et al (n 6) 14.

184 Ibid; Laura Budzyna et al, *Measuring Social Impact in Microfinance: New Insights from Client Monitoring Databases* (Report, EA Consultants and Triple Jump, 12 March 2014).

185 Bass et al (n 6) 14.

186 Ibid.

187 Lisa Hehenberger, Anna-Marie Harling and Peter Scholten, *A Practical Guide to Measuring and Managing Impact* (Report, European Venture Philanthropy Association, April 2013).

188 Neil Reeder et al, 'Measuring Impact in Impact Investing: An Analysis of the Predominant Strength That Is also Its Greatest Weakness' (2015) 5(3) *Journal of Sustainable Finance and Investment* 136, 139.

189 Alnoor Ebrahim, 'Let's Be Realistic about Measuring Impact', *Harvard Business Review* (Web Page, 2013) <https://hbr.org/2013/03/lets-be-realistic-about-measur.html?>. This is also in alignment with the 'theory of change', which is a popular methodology used by impact investors. This theory can be defined as identifying and

and literature review, Acumen believes that there is a sufficient link between a specific output and desired outcome. In this instance, they believe that the number of anti-malaria bed nets distributed will lead to a reduction in malaria. This can be distinguished from measuring actual short or long term 'outcomes', such as the rate of malaria contraction, in which the process of acquiring such data can be complicated, expensive, and impractical for new enterprises.[190]

This is not to say outcome measures do not have a key role in assessing impact. However, progress on readily accepted, standardised outcome measures is often sector-specific. For example, the Investor Group on Climate Change's work in examining greenhouse gas emissions has been made possible through strong government and commercial resources.[191] For more nascent sectors, however, there remain issues with the lack of consensus on performance criteria, resulting in a chorus of commentators positing for a slow and careful approach, along with public policy action, before standardised outcome measures can be adopted.[192] One of the most difficult tasks in accurately and rigorously measuring outcomes is understanding what factors are responsible for these outcomes taking place. Common obstacles in attribution include multiple causes of effects, lack of longitudinal studies, changing efficacy over time, and possibilities of displacement in which benefits to the target group are offset by losses to others.[193] For instance, an impact investor who provided funding to farmers in Kenya to purchase dairy cattle sought to measure the impact it would have on their livelihood. While in the short-term farmers had access to capital to finance their business immediately, whether these farmers would ultimately thrive later on

achieving linkages or 'missing middles' between what a program does and how it leads to desired outcomes: Edward T Jackson, 'Interrogating the Theory of Change: Evaluating Impact Investing Where It Matters Most' (2013) 3(2) *Journal of Sustainable Finance and Investment* 95, 100.

190 Ebrahim (n 189). See also Reeder (n 188) 142–3. 'Available resources can be tight', meaning rigorous measurement is not always possible: John Gargani, 'Three Market Forces That Drive the Quality of Impact Measurement', *Social Value International* (Web Page, 2015) <https://socialvalueint.org/three-market-forces-that-drive-the-quality-of-impact-measurement/>.

191 Reeder et al (n 188) 139; Investor Group on Climate Change, *Transparency in Transition: A Guide to Investor Disclosure on Climate Change* (Report, April 2017) 34.

192 Lack of consensus on performance criteria has been reported as a major challenge to assessing impact, and that a slower and more careful approach is necessary to permit the necessary knowledge mobilisation: Alex Nicholls and Cathy Pharoah, *The Landscape of Social Investment: A Holistic Topology of Opportunities and Challenges* (Report, March 2008); Marguerite Mendell and Erica Barbosa, 'Impact Investing: A Preliminary Analysis of Emergent Primary and Secondary Exchange Platforms' (2013) 3(2) *Journal of Sustainable Finance and Investment* 111; David Wood, Ben Thornley and Katie Grace, 'Institutional Impact Investing: Practice and Policy' (2013) 3(2) *Journal of Sustainable Finance and Investment* 75.

193 Budzyna et al (n 184); Hehenberger, Harling and Scholten (n 187); Frank Vanclay, 'International Principles of Social Impact Assessment' (2003) 21(1) *Impact Assessment and Project Appraisal* 5, 7.

depended on volatile and uncontrollable variables such as weather conditions, crime rates, and the level of government corruption in their area.[194]

Another important hurdle is the nature of the outcomes the impact investor should be concerned with. While these outcomes will generally be connected to the objectives of the impact investor, as well as the relevant outputs, there is debate over whether short-term, long-term, individual-centric or society-based outcomes are the most appropriate.[195] Root Capital's investment in the agricultural sector in developing countries assessed the number of producers reached, their revenue, and the number of sustainable hectares under management.[196] In comparison, common metrics in the Canadian impact investor sphere of sustainable agriculture include the volume of organic produce; area of land farmed sustainably; reductions in the use of fertiliser; and availability of farmer's markets.[197] General market practice has demonstrated that the easiest outcomes to measure are the most preferable: 'where outcome metrics are resource-intensive or not essential to a venture's success, investors expressed a preference to work with output data that is easier to obtain'.[198] Market practice has also demonstrated that standardised impact frameworks or systems, normally more than one, are used in impact management and measurement by investors. The most commonly used impact frameworks are the SDG and Impact Reporting and Investment Standards ('IRIS') metrics.[199]

The difficulty in deciding which metrics to measure is in part due to the varying opinions of relevant stakeholders. There are many parties that may have influence over this decision, including the impact investors themselves, the beneficiaries, the parties supplying the funds, and third-party technical experts.[200] The impact investor and technical experts typically play fundamental roles in formulating impact measurement strategies due to their expertise in which metric is best aligned to the impact investor's goals and can be readily tracked.[201] Investing firms should ensure that there is close collaboration with the professionals dedicated to measuring impact due to raised concerns of stark knowledge disconnects between

194 Reeder et al (n 188) 147–8.

195 Ibid 141–2; Ebrahim (n 189).

196 Reeder et al (n 188) 141–2.

197 Hilary Best and Karim Harji, *Social Impact Measurement Use among Canadian Impact Investors* (Report, February 2013) 5.

198 Ibid 9.

199 Bass et al (n 6) 37; Natasha Watts and Ivan R Scales, 'Social Impact Investing, Agriculture, and the Financialisation of Development: Insights from Sub-Saharan Africa' (2020) 130(1) *World Development* 1, 6.

200 Reeder et al (n 188) 142–3.

201 Emma Disley et al, *Lessons Learned from the Planning and Early Implementation of the Social Impact Bond at HMP Peterborough* (Report, 2011); Peter Shergold, Cheryl Kernot and Les Hems, *Report on the New South Wales Social Impact Bond Pilot* (Report, Centre for Social Impact, February 2011).

the two sectors in market practice.[202] However, this collaborative approach has been criticised as being overly confined, resulting in poorly informed impact measuring methodologies, and consequently a bias towards those metrics most convenient to the impact investor.[203] In response, consultations with wider stakeholders such as the ultimate beneficiaries of impact investments may be a helpful redress in this imbalance of assessment.[204]

These experiences demonstrate that impact measurement is still a nascent domain, and formulation of appropriate assessment methodology is a far from straight-forward process. In the long term, frontline organisations and contracting parties will need to research and collaborate on their practices amongst the whole impact investing marketplace. The Global Impact Investment Network ('GIIN') recently released IRIS+, a system that provides users with comparable impact data contributed from hundreds of impact investors in various industries.[205] Key features of IRIS+ include core metrics sets backed by evidence and best practices across the industry, thematic taxonomies, and interoperability with third party data platforms that use IRIS metrics. While this is a significant step in impact measurement, IRIS+ was launched only in 2019, and will require continued contribution before rigorous market practices are realised. In the interim, investors and borrowers will need to identify when it is best to measure outputs as opposed to outcomes, especially when causality remains poorly understood, and engage in robust collaboration between impact beneficiaries, investment managers and technical experts dedicated to the assessment of impact.[206]

VI Conclusion

The continued growth of the sustainable debt market relies heavily on the regulatory and contractual measures available in combatting the risk of greenwashing and providing systemic legitimacy in green and social investments. Borrowers and issuers require sustained market demand for their green bonds and SLLs, while investors and lenders expect not only financial returns, but also measurable, positive social and environmental returns. To date, the governance structures in place, such as the GB Principles, CBS, and SLL Principles, have provided the much needed regulation to these markets by implementing a level of transparency and standardisation that has not been so burdensome as to inhibit its growth. However, almost in lockstep,

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202 Budzyna et al (n 184) 8.

203 Melinda T Tuan, *Measuring and/or Estimating Social Value Creation: Insights into Eight Integrated Cost Approaches* (Report, Bill and Melinda Gates Foundation: Impact Planning and Improvement, 15 December 2008); Jim Clifford, Kate Markey and Natasha Maplani, *Measuring Social Impact in Social Enterprise: The State of Thought and Practice in the UK* (Report, 27 February 2013); Reeder et al (n 188) 148.

204 Reeder et al (n 188) 151.

205 'IRIS+ System: About', *Global Impact Investment Network* (Web Page, 2021) <https://iris.thegiin.org/about/>.

206 Ebrahim (n 189).

as the market continues to develop, so too does the expectation that the raised funds are resulting in measurable impacts. While regulation will be continually tweaked and modified to reflect this sentiment, contracting parties also have a role to play in their negotiations over performance-based clauses. By extension, a robust and rigorous understanding in measuring 'impact' is required if these clauses are to have their intended effect.

Given the infancy of the SLL market, it is important to allow the market to grow by avoiding onerous and expensive regulatory requirements. However, future iterations of the SLL Principles could include more comprehensive detail around SPTs and reporting. Compared to the GB Principles, there is considerable information on what may be eligible green projects for green bond issuance. In a similar manner, the SLL Principles could provide further guidance on what are appropriate SPTs, fostering a more informed understanding of how an SLL borrower could improve their sustainability profile. Relatedly, the recommendation of reporting information relevant to SPTs, such as assessment methodologies and impact reporting, could be implemented effectively through a resource centre akin to the one provided in the GB Principles. Templates demonstrating to market-participants how to structure SPTs, measure compliance against SPTs, and the content involved in reporting for both internal and external reviews would promote consistency amongst the breadth of borrowers hailing from various industries and geographies and of different financial sizes.

An innovative proposition for green bonds would be to incorporate performance-based provisions into green bond documentation, similar to specified SPTs in their SLL counterparts. While there are notable differences in required documentation and market norms between these two debt instruments, there is no reason why green bondholders should not be afforded a greater level of certainty in the advertised impact of their investments. The onus lies on the underwriters as well as the investors they represent to negotiate for terms in the bond agreement that stipulate specific environmental and social targets, along with more stringent impact reporting requirements. These could be tied to financial incentives of a similar nature to SLLs by rewarding issuers with lower interest rates paid out to bondholders. ICMA's Resource Centre already provides a wealth of information regarding suitable impact measuring metrics and impact reporting frameworks that would serve as, at the very least, a baseline for such negotiations.

While such contractual provisions would be one way of ameliorating the risk of greenwashing, the stubbornness of the green bond market may require another avenue in the form of increased regulation. The difficulty with the current regulatory regimes as discussed above is that they are voluntary and do not provide an official definition of what is 'green'. A conclusive definition by a federal regulator, such as ASIC would be helpful *ex ante* in reassuring investors that issuers are committed to a credible, green investment, and that the funds raised will be used appropriately. ASIC, the Reserve Bank of Australia, and the recently created Australian Sustainable Finance Initiative, which comprises of leaders from Australian and international financial institutions, regulators, think tanks, and regulators, should collaborate to create a pioneering official definition of green bonds that is clear and reasonable to comply with.[207] A mandatory verification and certification step by either the government or a government-endorsed third party would also vest greater legitimacy in the invested green bond. In a similar vein, it would also be beneficial for Australian regulators to stipulate due diligence and reporting standards for impact reporting and financial reporting. These stipulated reports would discuss the allocation and progress of funds being used, and the outcomes and performance of invested environmental and social projects. Such frequent and comprehensive reporting would not only achieve greater transparency of the green bond proceeds, but also provide investors with sufficient information to raise complaints against the issuing corporation to a federal regulator, such as ASIC, in instances of suspected greenwashing.

Governmental involvement has already been seen in China and India, which have been identified as very active participants in the green bond market. Between 2015–17, several Chinese government institutions produced green bond issuance guidelines and opinions, advocating for quarterly financial and impact reporting, as well as external review.[208] At around the same time, the Securities and Exchange Board of India ('SEBI') released their official green bond requirements, providing a categorical list of eligible green bond project types, as well as discretion by the SEBI to approve other categories on a case-by-case basis. Disclosure requirements were also a critical component, with issuers needing to provide regular statements and reports on the environmental objectives of the green bond project, tracking of raised funds, and qualitative and quantitative performance measures on its achieved social and environmental impact.[209] As such, it is contended that Australian regulators should take a more proactive approach in regulating the green bond market by providing

207 See 'Australian Sustainable Finance Roadmap', *Australian Sustainable Finance Initiative* (Web Page, 2020) <https://www.sustainablefinance.org.au/>; James Fernyhough, 'Big Four Banks Form Climate Investment Initiative', *Australian Financial Review* (online, 27 May 2019) <https://www.afr.com/companies/financial-services/big-four-banks-form-climate-investment-initiative-20190324-p5172j>. An interesting analogy can be seen with the United States Food and Drug Administration ('FDA') deciding upon a definition for 'organic' food labelling. Here, the FDA worked in conjunction with the Department of Agriculture ('USDA') in conducting studies and requesting comments from industry participants. This was done to create a criterion for a suitable 'organic' definition that was well informed and cost effective. To be considered 'organic', the food must meet several requirements in its production, as well as mandatory certification by the USDA National Organic Program. It is illegal to label products as organic with the USDA organic seal without certification: Trompeter (n 39) 7.

208 See Weihui Dai, Sean Kidney and Beate Sonerud, *Roadmap for China: Green Bond Guidelines for the Next Stage of Market Growth* (Report, Climate Bonds Initiative, 2016); Hao Zhang, *Regulating Green Bonds in the People's Republic of China: Definitional Divergence and Implications for Policy Making* (Working Paper No 1072, Asian Development Bank Institute, January 2020).

209 Securities and Exchange Board of India, *Disclosure Requirements for Issuance and Listing Green Bonds* (Memorandum, 2015) 7 <https://www.sebi.gov.in/sebi_data/meetingfiles/1453349548574-a.pdf>.

official definitions of what should be considered green, and requiring certification accreditation and more frequent financial and impact reporting.

The understanding of 'impact' and the corresponding requirements for measuring and reporting impact is an area that will require many years of refinement and collaboration. Methodologies, templates, and general practices will need to be provided by impact investors from all types of industries, geographies, and financial sizes. The creation of IRIS+, along with other knowledge banks and resource centres, will hopefully facilitate these developments over the long term. However, for now, there are several matters that participants in SLLs and green bonds should consider that may aid in the formulation of rigorous and appropriate impact assessment. Depending on the impact investor's industry and financial capabilities, measuring 'outputs' instead of 'outcomes' may be more appropriate. Indeed, outcomes have been identified as difficult to accurately and rigorously measure as they may not only require monitoring over many years, but can be affected by variables out of control by the investor. However, outcomes do provide meaningful data, and are perhaps the best indication of whether the end goal of the investment has been realised. It is also critical that there is strong coordination between those responsible for formulating the impact assessment methodology. Not only will this require a decision on who should be involved to begin with, but also precision about how those that are involved are working together throughout the entirety of the investment. Indeed, a reported issue in the industry is a knowledge disconnect between investment managers and professionals dedicated to the assessment of impact, resulting in the two sides often working separately in their day-to-day operations.

This article has identified some of the difficulties in ensuring measurable impact within the sustainable debt market, specifically in relation to SLLs and green bonds. Moreover, it has analysed the primary regulatory regimes governing these two debt instruments as well as emerging contractual mechanisms in the impact investing domain, both of which attempt to ameliorate the risk of greenwashing and provide a level of systemic legitimacy across the market. Contracting parties need to place greater emphasis upon the inclusion of impact provisions into the documentation of debt agreements, in conjunction with a rigorous and collaborative consideration of what 'impact' they are attempting to measure and achieve. It is conceded that this refined regulation will likely discourage certain market participants of sustainable finance from issuing bonds in the short term due to the additional costs incurred. However, it is a necessary step in tempering and restraining corporations from misleading the public and investors by taking advantage of their intentions to achieve positive social and environmental returns. By promoting the goals of transparency and legal accountability, market participants can trust in the legitimacy of the sustainable debt instruments, and more importantly, ensure the survival of the sustainable finance revolution.