ISSUE ONE
DECEMBER
2022

THE CLIMATE ISSUE

GILBERT + TOBIN × BWD PRESENTS

QUARTERLY ESG UPDATE

A strategic review of the latest in sustainability.

GILBERT + TOBIN

BWD

GILBERT+TOBIN & BWD PRESENT A STRATEGIC REVIEW OF THE LATEST IN SUSTAINABILITY.

OUR CONTRIBUTORS

Karen Evans-Cullen
Partner
Gilbert + Tobin

Luke Heilbuth
CEO
BWD Strategic

Tom Brett
Partner
Gilbert + Tobin

Ben Ziser
Head of Strategy
BWD Strategic

Ilona Millar
Partner
Gilbert + Tobin

Matt van Someren
Senior Climate Strategist
BWD Strategic

GILBERT +TOBIN

Gilbert + Tobin are recognised as a leading transactions, regulatory and disputes law firm. We handle some of the most complex transactions in Australia, advising acquirers, targets and financiers. We are trusted by clients on sensitive regulatory investigations and approvals, litigation and Royal Commissions.

Visit www.gtlaw.com.au

BWD

BWD is an advisory firm that specialises in sustainable business strategy. By combining best practice sustainability strategy with original design and data visualisation, we cut through the complexity of sustainability to create a lasting competitive advantage for our clients.

Visit bwdstrategic.com

INSIDE / QUARTERLY ESG UPDATE

THE CLIMATE ISSUE

Climate policy developments in Australia and overseas are providing clear signals for private sector action to decarbonise the global economy in line with the Paris Agreement. Companies need to set credible science-based net zero targets and transition plans to address growing social, legal, and regulatory risks.

DECARBONISATION DEVELOPMENTS

Developments in Australia

Emission Reduction Targets

Since the Labor party came into power in May 2022, the Federal Government has proposed significant changes to Australia's laws and policies whilst pursing its aim to increase decarbonisation in Australia. The Federal Government will use a sectoral approach to address decarbonisation in Australia, and it is expected that all sectors of the Australian economy will do their part to reduce emissions.

In June 2022, the Federal Government made its climate priorities known on the international stage, communicating **Australia's updated Nationally Determined Contribution** (**NDC**) under the Paris Agreement to the United Nations Framework Convention on Climate Change (**UNFCCC**). The Federal Government committed to reducing emissions by at least 43% from its 2005 levels by 2030 in its updated NDC, and reaffirmed its target to achieve net zero emissions by 2050.[1]

On 14 September 2022, the ***Climate Change Act 2022*** (**Climate Act**) came into force.[2] The Climate Act sets in legislation Australia's emission reduction target. It also requires the Minister for Climate Change to deliver an annual statement to Parliament describing Australia's progress towards achieving its emissions reduction targets, relevant international developments, climate change policy and the effectiveness of Commonwealth climate change policies in contributing to achieving the targets. The Climate Change Authority (**CCA**) has been tasked with providing advice to the government on the setting of future targets and on the effectiveness of policy approaches undertaken to achieve those targets. These reports, along with the government's response, will be made publicly available, with reasons to be provided should the government depart from recommendations of the CCA. The operation of the legislation will undergo periodic reviews.

Whilst the Climate Act sets emissions targets, the means of implementation will occur through separate regulations and policies. For example, the ***Climate Change (Consequential Amendments) Act 2022***, which was introduced alongside the Climate Act, embeds Australia's 2030 and 2050 emissions targets into the objects and functions of a range of relevant Commonwealth entities, including the Australian Renewable Energy Agency, the Clean Energy Finance Corporation, the Clean Energy Regulator and the Climate Change Authority. It also embeds these targets in relevant Federal schemes, including the National Greenhouse and Energy Reporting scheme. This legislation will help to focus the objectives and support the functions of relevant Federal entities in meeting the legislated targets, further consolidating a broad, whole-of-Government approach to tackling climate change.

Electricity sector

There have been a number of recent decarbonisation developments in the electricity sector. Under the **Rewiring the Nation plan**[3], the Federal Government has committed to investing $20 billion to rebuild and modernise Australia's electricity grid. The Federal Government will also establish the Rewiring the Nation Corporation (**RNC**) to rebuild the electricity grid.

In August 2022, the Federal Government announced that it is considering introducing **new vehicle fuel efficiency standards** to help increase the supply of electric vehicles (**EVs**) and in turn reduce emissions.[4] In September 2022, the Federal Government released a consultation paper on the National Electric Vehicle Strategy, which sought views on implementing vehicle fuel efficiency standards in Australia. The consultation paper's consultation period ended in October 2022. In the consultation paper, it was stated that vehicle fuel efficiency standards need to be: "(a) effective in reducing transport emissions; (b) equitable so all Australians can access the vehicles they need for work and leisure; (c) transparent and well explained to avoid unintended consequences; (d) credible and robust by drawing on expert analysis and experience; and (e) enable vehicles with the best emissions and safety technology to be available to Australians."[5]. If passed, such standards may increase the uptake of EVs in Australia. In response to this development, businesses may need to roll out EVs into any fleet of vehicles. The proposed new fuel efficiency standards fall short on specific targets for a certain number of EVs. At this stage, there are discussions regarding the use of targets and concessions in terms of tax breaks to incentivise people to purchase EVs.

On 10 November 2022, the Australian Department of Climate Change, Energy, the Environment and Water opened for public consultation the National Energy Performance Strategy (the **Strategy**). According to the consultation paper, the Strategy will focus on prioritising and harmonising the efforts of government, industry and households to improve energy efficiency whilst also lowering energy prices, reducing pressure on Australia's energy system and reducing Australia's greenhouse gas emissions. Consultation on the Strategy closes on 3 February 2023.[6]

1 The Australian Government, Australia's Nationally Determined Contribution – communication 2022 (2022), accessed at https://unfccc.int/sites/default/files/NDC/2022-06/Australias NDC June 2022 Update %283%29.pdf.

2 Prime Minister of Australia, Albanese Government passes Climate Change Bill in the House of Representatives (2022), accessed https://www.pm.gov.au/media/albanese-government-passes-climate-change-bill-house-representatives.

3 Australian Labor Party, Rewiring the nation (2022), accessed https://www.aph.gov.au/-/media/0E6625101815437D8D883CB3DC6C515F.ashx .

4 CNBC, Australia's plans fuel efficiency standards to boost electric car supply (2022), accessed https://www.cnbc.com/2022/08/19/australia-plans-fuel-efficiency-standards-to-boost-electric-car-supply.html.

5 The Australian Government, *National Electric Vehicle Strategy: consultation paper* (2022), accessed https://consult.dcceew.gov.au/national-electric-vehicle-strategy.

6 The Australian Government, *National Energy Performance Strategy: consultation paper* (2022), accessed https://consult.dcceew.gov.au/neps-consultation-paper.

Decarbonisation developments in Australia (continued)

Safeguard Mechanism Amendments

The Safeguard Mechanism is Australia's primary instrument for controlling carbon emissions from large emitters by setting emissions limits (or 'baselines'), which covered facilities must either emit below or purchase carbon credits to offset any exceedance of that limit. The scheme currently covers 215 of Australia's biggest emitters.[7]

A key proposal flagged by the Labor party in its election campaign was to bring these entities under declining baselines to align the mechanism with Australia reaching net zero greenhouse gas emissions by 2050. In August 2022, the Federal Government released its **Safeguard Mechanism Reforms: Consultation Paper (Consultation Paper)**, setting out its proposed reforms to the Safeguard Mechanism. The Consultation Paper includes proposed reforms which would:

- change facility baselines to align the Safeguard Mechanism with Australia's updated 2030 and 2050 targets. While final baseline decline rates will not be settled until other policy settings are finalised, indicative decline rates are expected to be between 3.5 and 6 percent each year to 2030;
- introduce a new form of carbon credits called Safeguard Mechanism Credits **(SMCs)** which would be issued to Safeguard facilities when their emissions fall below their baseline and then be available for trading with other covered facilities; and
- potentially provide assistance (either through baseline setting, allocation of SMCs or access to financial assistance) to emissions-intensive, trade-exposed entities **(EITEs)**.[8]

How baselines are set will be critical to determining the baseline decline trajectory, with important implications for Safeguard Mechanism facilities' operations. Businesses should consider how the proposed reforms will impact their supply chain operations (either directly or with possible carbon cost pass through), and how they can respond to those impacts.[9]

Review of the integrity of Australian Carbon Credit Units

On 1 July 2022, Minister Bowen announced an independent review into the integrity of ACCUs and Australia's carbon crediting framework. Under the terms of reference, the review will focus on:

- governance structures and legislative requirements;
- the integrity of ACCUs and methods for generating ACCUs; and
- whether carbon crediting projects are providing social, economic, environmental, indigenous and other non-carbon co-benefits.[10]

The Integrity of the ACCU scheme has faced particular scrutiny since early this year, when the former head of the Federal Government's Emissions Reduction Assurance Committee, released a series of academic papers scrutinising the integrity of particular methods used in generating ACCUs. This scrutiny, along with concerns about the decision of the Clean Energy Regulator to facilitate the exit by project proponents of their fixed delivery carbon abatement contracts with the Commonwealth, has led to much market uncertainty.

The ACCU review report is expected by the end of 2022. Depending on the report's findings, we may expect to see further reform to the *Carbon Credit (Carbon Farming Initiative) Act 2011* and the rules and methods which sit beneath it throughout 2023, with flow on effects for the volumes of ACCUs which particular projects are eligible to generate, and potentially the way in which co-benefits are recognised. It is hoped that the review into the integrity of ACCUs will provide a basis for restoring confidence in the Australian carbon market.

Decarbonisation developments overseas

EU Fit-for-55 package

The EU's **Fit for 55 package**, is a set of proposals that have been developed to revise EU legislation and to put in place new initiatives that aim to ensure that EU policies are in line with the climate goals agreed by the Council and the European Parliament, which are a part of the Green Deal and set out in the European Climate Law.[11] 'Fit for 55' refers to the EU's target of reducing net greenhouse gas emissions by at least 55% by 2030.

On 29 June 2022, the Environment Council adopted the 'general approach' negotiating position on the majority of the proposals that form the EU Fit-for-55 package. The proposals are yet to be formally adopted. Significantly, as a part of the EU Fit-for-55 package, the European Commission has **proposed changes to the EU's Emissions Trading System (EU ETS)** which should result in an emission reduction, in the sectors concerned, of 61% by 2030 compared with 2005 levels.

These more ambitious targets for industry will potentially lead to increased investment in low emission technologies, particularly as prices of allowances in the ETS continue to rise. Adoption of more stringent standards in Europe will drive the adoption of new technologies, change approaches to construction and set best practice which will become a benchmark for investors in Europe and overseas.

7 Gilbert + Tobin, *Australia's proposed Safeguard Crediting Mechanism: An incentive for emissions reduction* (2021), accessed https://www.gtlaw.com.au/knowledge/australias-proposed-safeguard-crediting-mechanism-incentive-emissions-reduction.

8 Gilbert + Tobin, *Australia's proposed Safeguard Crediting Mechanism: An incentive for emissions reduction* (2021), accessed https://www.gtlaw.com.au/knowledge/australias-proposed-safeguard-crediting-mechanism-incentive-emissions-reduction.

9 Gilbert + Tobin, *Australia's proposed Safeguard Crediting Mechanism: An incentive for emissions reduction* (2021), accessed https://www.gtlaw.com.au/knowledge/australias-proposed-safeguard-crediting-mechanism-incentive-emissions-reduction.

10 Chris Bowen, *Independent Review of ACCUs* (2022), accessed https://minister.dcceew.gov.au/bowen/media-releases/independent-review-accus.

11 European Council, *Fit for 55 – The EU's plan for a green transition* (2022), accessed https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/.

PRESIDENT JOE BIDEN SIGNS THE DEMOCRATS' LANDMARK CLIMATE CHANGE AND HEALTH CARE BILL IN THE STATE DINING ROOM OF THE WHITE HOUSE IN WASHINGTON, TUESDAY, AUG. 16, 2022.
(IMAGE: AP PHOTO/SUSAN WALSH)

Decarbonisation developments overseas (continued)

It is also proposed that a **carbon border adjustment mechanism (CBAM)** be created, which will aim to prevent emissions reduction efforts of the EU being offset by increasing emissions outside EU borders through, for example, the relocation of production to non-EU countries. CBAM is designed to function in parallel with the EU ETS. The CBAM would require EU importers, as of 2026, to purchase certificates that are an equivalent to the weekly EU carbon price. The CBAM would initially apply to imports in five sectors that are deemed to be at a relatively high risk of carbon leakage: cement, iron and electricity, steel, fertilisers, and aluminium. The CBAM charge would cover imports of these goods from all third countries, except those participating in the ETS or a linked mechanism.[12] This could impact Australian companies that import from the EU, as costs could increase due to EU companies needing to purchase certificates that are an equivalent to the weekly EU carbon price.

On 8 November 2022, the European Council and European Parliament reached a provisional agreement to implement an EU wide target to reduce GHG levels by 40% by 2030 on 2005 levels for sectors not covered by the EU ETS, being road and domestic maritime transport, agriculture, buildings, small industries and waste. The provisional agreement provides member states flexibility to reach their targets. This includes allowing member states to 'bank and borrow' emissions allocations. For example, if a member state's annual emissions are lower than their allocation for that year, they can 'bank' up to 25% of their annual allocations to then use in later years up to 2030.[13]

On 27 October 2022, the European Council and European Parliament reached a provisional agreement to introduce more stringent CO2 emissions performance standards for new vans and cars. According to the EC's press release, this includes targets:

— to reduce CO2 emissions by 55% for new cars and by 50% for new vans by 2030 on 2021 levels; and

— to reduce CO2 emissions by 100% for both new cars and vans by 2035.[14] On 11 November 2022, the European Council and European Parliament reached a provisional agreement to strengthen the contribution of the land use, land use change and forestry (LULUCF) sector to the EU's target to reduce greenhouse gas emissions by at least 55% by 2030.[15] If adopted, this will set an overall EU-level objective of 310 Mt CO2 equivalent of net removals in the LULUCF sector in 2030.

On 25 October 2022, the European Council and European Parliament agreed to review the Energy Performance of Buildings Directive. The agreement establishes an objective for new buildings to be zero-emissions by 2030 and for existing buildings to transition to zero-emissions by 2050.[16] Other proposals target the decarbonisation of the aviation and maritime sectors and increasing the use of renewable energy.

Inflation Reduction Act

On 16 August 2022, US President Biden signed into law the ***Inflation Reduction Act*** (IRA). The IRA includes transformative energy and climate provisions, including hundreds of billions of dollars in federal funding, which is expected to bring the US closer to achieving its emissions reduction targets. Key takeaways from the IRA include:

— methane emissions will be subject to a new fee beginning in 2024;

— funding and statutory amendments will facilitate offshore wind development;

— changes to natural resources laws will make fossil energy extraction more expensive;

— more funding will be available to boost low- and zero-emissions vehicles;

— increased allocation of funds will promote more energy-efficient buildings; and

— there will be new investments in nuclear energy.[17]

The US government will use a mix of carbon pricing tax credits and revisions to royalty arrangements to incentivise low carbon development. Investment will drive rapid technological change in the US. There is a risk that investments will flow to US as a result of the IRA, rather than Australia, if Australia's policy settings are not aligned with those of the IRA. Some Australian companies may benefit from engagement with US-linked opportunities.

Ilona Millar
Partner
Gilbert + Tobin

12 European Parliament, *EU carbon border adjustment mechanism – implications for climate and competitiveness* (2022), accessed https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698889/EPRS_BRI(2022)698889_EN.pdf.

13 European Council, *'Fit for 55': EU Strengthens Emission Reduction Targets for Member States* (2022), accessed https://www.consilium.europa.eu/en/press/press-releases/2022/11/08/fit-for-55-eu-strengthens-emission-reduction-targets-for-member-states/.

14 European Council, *'Fit for 55' proposal agreed: the EU strengthens targets for CO2 emissions for new cars and vans* (2022), accessed https://www.consilium.europa.eu/en/press/press-releases/2022/10/27/first-fit-for-55-proposal-agreed-the-eu-strengthens-targets-for-co2-emissions-for-new-cars-and-vans/.

15 European Council, *'Fit for 55': provisional agreement sets ambitious carbon removal targets in the land use, land use change and forestry sector* (2022), accessed https://www.consilium.europa.eu/en/press/press-releases/2022/11/11/fit-for-55-provisional-agreement-sets-ambitious-carbon-removal-targets-in-the-land-use-land-use-change-and-forestry-sector/.

16 European Council, *'Fit for 55:' Council agrees on stricter rules for energy performance of buildings* (2022), accessed https://www.consilium.europa.eu/en/press/press-releases/2022/10/25/fit-for-55-council-agrees-on-stricter-rules-for-energy-performance-of-buildings/.

17 Sidley, *Inflation Reduction Act: Top 10 takeaways from the energy and environmental titles* (2022), accessed https://www.sidley.com/en/insights/newsupdates/2022/08/inflation-reduction-act-top-10-takeaways-from-the-energy-and-environmental-titles.

FOUR WAYS TO ENSURE CREDIBLE CORPORATE NET ZERO TARGETS

Net zero commitments have now been made by 137 countries[1] and over one third of the world's largest companies by revenue. Eighty-three percent of global emissions and 91 percent of GDP is now covered under some form of net zero target.

Spurred into action by tighter regulation, investor pressure and customer expectations, many businesses are, however, rushing into commitments that amount to little more than lip service and leave them exposed to accusations of greenwashing.

What's wrong with net zero?

It's poorly defined and easily misunderstood

Many companies are unclear about how they should go about "operationalising" a broad net zero target, so they make their own decisions[2] on a range of key issues including timeframes, emissions coverage and offsetting.

The absence of a clear definition[3] and agreed principles for how businesses should apply the science of net zero has led to differences in the scope of their targets and mitigation strategies.

Opaqueness provides fertile ground for greenwashing and confusion

Many companies have been setting their own parameters[4] for what a net zero target should entail. They often omit key details from their net zero pledges such as coverage of greenhouse gases, the role of offsets and whether targets include all emissions across their value chain. This variability presents several problems.

Foremost, variability in the scope of net zero targets combined with a lack of transparency makes it difficult for investors, shareholders, and customers to assess the quality of a company's commitment.

There's also the problem of offsetting. Many companies with net zero targets are making no specific commitment[5] to reduce their emissions, instead substituting the heavy lifting of emissions reduction with carbon offsets.

Relying too heavily on the "net" in net zero is risky for a number of reasons, most notably, because of widespread concerns around the environmental and social integrity of offsets being bought and sold in global carbon markets.

Initiatives such as the Science Based Targets Net Zero Standard[6] and the UN-backed Race to Zero[7] campaign have given businesses guidance on how to set credible targets that seek to resolve many of these issues.

Investor expectations and regulatory scrutiny are increasing

Increasingly, stakeholders are pressuring companies to disclose the details of any commitment, along with concrete implementation plans. And a new global baseline for investor-focused climate risk reporting (the IFRS S2 Climate-related Disclosures Standard)[8] will require companies to be far more detailed[9] in communicating their climate plans.

Regulators are also becoming more diligent. Bodies including the ACCC[10] in Australia, SEC[11] in the United States and the European Union markets watchdog[12] are stepping up their scrutiny of market behaviour and business claims. Deutsche Bank's DWS[13] was one of the first high-profile scalps. Wall Street giant Goldman Sachs[14] is currently being investigated over the alleged ESG credentials of some funds. Clearly, litigation is now a risk for companies making questionable net zero claims.

1 *Net Zero Tracker*, accessed at https://zerotracker.net/
2 Joeri Rogelj, Oliver Geden, Annette Cowie & Andy, *Net-zero emissions targets are vague: three ways to fix*, accessed at https://www.nature.com/articles/d41586-021-00662-3
3 P. Boyd and C. Pickett, *Defining Net Zero (2020)*, accessed at https://cbey.yale.edu/sites/default/files/2020-07/CBEY_NET-ZERO_July_17_2020.pdf
4 The Energy & Climate Intelligence Unit and Oxford Net Zero, *Taking Stock: A global assessment of net zero targets (2021)*, accessed at https://ca1-eci.edcdn.com/reports/ECIU-Oxford_Taking_Stock.pdf?v=1616461369
5 *Corporate Climate Responsibility Monitor (2022)*, accessed at https://newclimate.org/resources/publications/corporate-climate-responsibility-monitor-2022
6 Science Based Targets, *The Net Zero Standard (2022)*, accessed at https://sciencebasedtargets.org/net-zero
7 UNFCC, *Race to Zero (2021)*, accessed at https://racetozero.unfccc.int/wp-content/uploads/2021/04/Race-to-Zero-Criteria-2.0.pdf
8 IFRS, *ISSB Exposure Draft: Climate-Related Dislcosures (2022)*, accessed at https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf
9 BWD, *Your ESG reporting will need to change in the next year (2021)*, accessed at https://bwdstrategic.com/insight/your-esg-reporting-will-need-to-change-in-the-next-year/
10 AFR, *ACCC says it's ready to pursue greenwashers (2022)*, accessed at https://www.afr.com/companies/financial-services/accc-says-it-s-ready-to-pursue-greenwashers-20220615-p5atv7
11 Bloomberg, *The SEC War on Greenwashing Has Begun (2022)*, accessed at https://www.bloomberg.com/news/articles/2022-06-15/the-sec-s-war-against-greenwashing-and-esg-misuse-has-begun
12 Reuters, *EU watchdog to define 'greenwashing' as sustainable funds rocket (2022)*, accessed at https://www.reuters.com/business/sustainable-business/eu-watchdog-define-greenwashing-sustainable-funds-rocket-2022-02-11/
13 FT, *DWS chief resigns after police raid over greenwashing claims (2022)*, accessed at https://www.ft.com/content/50f5c4a1-5ebe-40cc-a89f-2952f58ba324
14 Bloomberg, *The SEC War on Greenwashing Has Begun (2022)*, accessed at https://www.bloomberg.com/news/articles/2022-06-15/the-sec-s-war-against-greenwashing-and-esg-misuse-has-begun

1. EMISSIONS REDUCTION AS A FIRST PRINCIPLE

2. SET SCIENCE BASED SHORT- AND LONG-TERM EMISSIONS REDUCTION TARGETS

3. NET ZERO TARGETS SHOULD BE COMPREHENSIVE AND TRANSPARENTLY COMMUNICATED

4. BUSINESSES SHOULD BE GUIDED BY PRINCIPLES OF EQUITY AND FAIRNESS

How can businesses set a credible net zero target?

Emissions reduction as a first principle

To minimise the risks associated with the "net" in net zero, deep and rapid emissions reductions should be at the centre[15] of net zero targets and strategies, obviously because the rate at which emissions are reduced matters. To avoid making climate change worse, companies need to stop adding to the problem.

Set science based short- and long-term emissions reduction targets

Emissions must be reduced to limit warming to a specified target and by a specified time. So net zero targets should consist of both short- and long-term emissions reduction targets[16] aligned to limiting global warming to 1.5C.

Long-term emissions reduction targets set a specific timeframe for the achievement of net zero, allow for planning and investment to reduce emissions and signal a multi-decade commitment. Short-term targets serve as milestones to measure progress along the path to net zero, and show investors, customers, and other stakeholders that an organisation is genuinely taking action to meet the overall target.

Net zero targets should be comprehensive and transparently communicated

Corporate net zero targets should cover all sources of a company's emissions[17], including scope 3 emissions created up and down the value chain. While scope 3 emissions are more difficult to measure and mitigate than scopes 1 and 2, it is an area of increasing focus[18] for consumers and investors alike.

Companies are better served taking action on scope 3 now, rather than delaying until regulation or stakeholder pressure makes action mandatory. Transparent communication[19] of each element of a company's net zero target is also essential so stakeholders can assess its credibility and likely impact. Questions to ask include:

— What sources of emissions are covered?

— Have both short- and long-term reduction targets been set?

— What proportion of the target is to be met by emissions reduction vs offsets?

— What methods of offsetting are being used?

— Investors and others increasingly expect this level of detail.

Businesses should be guided by principles of equity and fairness

Any company claiming their net zero target to be "Paris-aligned" or "contributing to the goals of the Paris Agreement" should understand that they are assenting to Paris Agreement obligations around historical emissions, capability to act and a commitment to the principles of sustainable development.

Companies must ensure rigour and clarity in their net zero targets – only then can investors and consumers make informed assessments on the validity of their claims.

Matt van Someren
Senior Climate Strategist
BWD Strategic

15 Nature, *The meaning of net zero and how to get it right (2021)*, accessed at https://www.nature.com/articles/s41558-021-01245-w
16 Science Based Targets, *The Net Zero Standard (2022)*, accessed at https://sciencebasedtargets.org/resources/files/Net-Zero-Standard.pdf
17 Science Based Targets, *The Net Zero Standard (2022)*, accessed at https://sciencebasedtargets.org/resources/files/Net-Zero-Standard.pdf
18 State Street, *Expect more scrutiny on Scope 3 emissions*, accessed at https://www.statestreet.com/ideas/articles/scrutiny-on-scope3-emissions.html
19 WRI, *Designing and communicating net zero targets (2020)*, accessed at https://files.wri.org/d8/s3fs-public/designing-communicating-net-zero-targets.pdf

CLIMATE RISK DISCLOSURE DEVELOPMENTS IN AUSTRALIA & OVERSEAS

Climate risk disclosure requirements are expanding, both in Australia and overseas. The draft disclosures produced by the International Sustainability Standards Board (ISSB), itself a consolidation of leading frameworks and standards, will be formalised in 2023. They provide companies with a uniform global baseline for reporting on climate and other sustainability-related information designed to meet the information needs of investors.

Developments in Australia

Federal Government proposals

Although Australian regulators have recognised that climate change is a financial risk and have provided guidance on climate-related financial risk disclosures, and many Australian companies are voluntarily disclosing in accordance with the recommendations of the Taskforce for Climate-related Financial Disclosure (TCFD), reporting and disclosure is not yet mandatory (as is the case in other jurisdictions).The new Federal government has been considering a policy that would require companies to reveal more of the financial risks they face due to climate change, in an attempt to provide more certainty to investors.[1] The Federal Government has also stated that it will 'take a whole of government approach to climate risk disclosure in the public sector, as well as working with regulatory agencies, businesses, unions and investor groups to ensure climate risk disclosure and management are at the centre of the modernisation of the economy.'[2]

In October 2022, the Federal Government published its budget, which includes $30 million in funding for climate modelling and approximately $6 million in funding for the development of climate reporting standards, which when developed, may align Australian corporations' obligations in respect of climate risk disclosure with those seen internationally.

Background and existing framework

On 4 August 2022, APRA published the findings of the latest voluntary climate risk self-assessment survey, which was conducted across the insurance, banking and superannuation industries. The survey was issued in March 2022, and was designed to provide insights into how APRA-regulated entities are aligning their practices with the expectations set out in its Prudential Practice Guide CPG 229 Climate Change Financial Risks (CPG 229). The survey results suggest that APRA-regulated entities are generally well-aligned to CPG 229, especially in the areas of disclosure and governance. However, only a small portion of survey participants indicated that they have fully embedded climate risk across their risk management framework.

On 3 September 2022, APRA released an Information Paper on the Climate Vulnerability Assessment (CVA)[3] that is being undertaken by Australia's 5 largest banks. The objectives of the CVA are: to assess potential financial exposure to climate risk within portfolios; to understand how banks may adjust business models and implement management actions in response to different scenarios; and to foster improvement in climate risk management capabilities. Banks have been progressing their CVA against two agreed scenarios, tailored to the Australian context, and looking at how these integrate with existing stress-testing programs. APRA is due to release aggregated results on banks' analysis in 2022. The CVA has been designed to have wider application to the insurance and superannuation sectors, which could see similar reviews undertaken in future.

On 3 August 2022, Australia's Financial Services Council (FSC) published FSC Guidance Note No 44: Climate Risk Disclosure in Investment Management (FSC Guidance Note).[4] The FSC Guidance Note seeks to provide practical steps, based on leading practice, to guide investment managers on how to communicate with investors regarding the relevant green or sustainable attributes of relevant products and services. The FSC Guidance Note develops a set of common considerations for the investment management industry with respect to (i) approach to assessment of emissions in portfolios, setting net-zero targets and aligning portfolios to net zero targets; (ii) appropriate product labelling and avoidance of greenwashing; and (iii) application of TCFD reporting to asset managers.

The release of guidance is timely, given ASIC's review into ESG fund labelling and claims and the release of INFO 271 'How to avoid greenwashing when offering or promoting sustainability related products', which provides guidance on avoiding misleading and deceptive conduct and fulfilling disclosure obligations. exposes funds to liability.

1 Jim Chalmers, *A stronger and cleaner economy, powered by super* (2021), accessed at https://jimchalmers.org/latest-news/speeches/a-stronger-and-cleaner-economy-powered-by-super/.
2 Australian Labor Party, *ALP National Platform* (2021), accessed https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf.
3 https://www.apra.gov.au/climate-vulnerability-assessment
4 Financial Services Council, *FSC Guidance Note No 44: Climate Risk Disclosure in Investment Management* (2022), accessed https://www.fsc.org.au/resources/fsc-standards-and-guidance-notes/guidance-notes.

ALTHOUGH AUSTRALIAN REGULATORS HAVE RECOGNISED THAT CLIMATE CHANGE IS A FINANCIAL RISK AND HAVE PROVIDED GUIDANCE ON CLIMATE-RELATED FINANCIAL RISK DISCLOSURES, AND MANY AUSTRALIAN COMPANIES ARE VOLUNTARILY DISCLOSING ACCORDING TO THE TCFD

Developments in Australia (continued)

The **Corporate Emissions Reduction Transparency (CERT) report** is a new voluntary initiative for companies reporting over 50 kilotonnes of carbon dioxide equivalent (CO2-e) emissions a year under the National Greenhouse and Energy Reporting scheme to present their climate-related commitments and their progress to achieve them, including through the use of Australian and international offsets. The Clean Energy Regulator published its first CERT report in July 2022 and sought seeking public feedback on the 2023 CERT report.

On 26 November 2021, **APRA released the final Prudential Practice Guide: CPG 229 Climate Change Financial Risks (CPG 229)**.[5] CPG 229 outlines prudent practices in relation to climate change financial risk management. CPG 229 does not impose new requirements on APRA-regulated institutions. Instead, it provides guidance, sets out examples of better practice and aims to assist institutions in managing climate-related risks and opportunities. The guide reflects the Financial Stability Board's TCFD framework and good practice that APRA has observed in the market. APRA has used a principles-based approach to the guidance.[6] In light of CPG 229, companies should take steps to identify climate related risks that may impact its business operations and review existing governance and risk management to determine whether they are in line with the guidance provided in CPG 229. Companies should conduct a gap analysis comparing their current capabilities to APRA's view of good practice.

From 1 January 2020, **the fourth edition of the ASX Corporate Governance Principles and Recommendations (ASX CGPR)** has applied to ASX listed entities, providing a framework for appropriate corporate governance standards. Specifically in respect to disclosures of ESG related matters, Recommendation 7.4 of the ASX CGPR states that a 'listed entity should disclose whether it has any material exposure to environmental or social risks and, if it does, how it manages or intends to manage those risks'. The ASX CGPR also encourages entities to benchmark their disclosures against their peers and 'to consider whether they have a material exposure to climate change risk by reference to the recommendations of the TCFD and, if they do, to consider making the disclosures recommended by the TCFD'.

In 2019 **ASIC published updates to the *Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors (RG 228)***,[7] and the ***Regulatory Guide 247 Effective disclosure in an operating and financial review (RG 247)***.[8] Specifically, the updated guidance, amongst other things:

- incorporated physical and transitional climate-related risks as identified by the TCFD into the list of examples of common risks that may need to be disclosed in a prospectus; and
- highlighted climate change as a systemic risk that could impact an entity's financial prospects for future years and that may need to be disclosed in an operating and financial review.

5 Australian Prudential Regulation Authority, *CPG 229 Climate Change Financial Risks* (2021), accessed https://www.apra.gov.au/sites/default/files/2021-11/Final Prudential Practice Guide CPG 229 Climate Change Financial Risks.pdf.

6 Ashurst, *APRA releases its finalised prudential guidance on the management of climate change financial risks* (2021), accessed https://www.ashurst.com/en/news-and-insights/legal-updates/apra-releases-its-finalised-prudential-guidance-on-the-management-of-climate-change-financial-risks/.

7 Australian Securities and Investments Commission, *Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors* (RG 228) (2019), accessed https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-228-prospectuses-effective-disclosure-for-retail-investors/.

8 Australian Securities and Investments Commission, *Regulatory Guide 247 Effective disclosure in an operating and financial review* (RG 247) (2019), accessed https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-247-effective-disclosure-in-an-operating-and-financial-review/.

Developments overseas

Mandatory climate-risk disclosure requirements are being set across the world, for example in:

— New Zealand, through the *Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021*;

— European Union, through the Corporate Sustainability Reporting Directive;

— Switzerland , through the Ordinance on Climate Disclosures 2022; and

— United Kingdom, through the *Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022*.

Other countries are set to follow suit. For example, there have been developments in Hong Kong regarding climate-related risk disclosure obligations. In December 2020, it was announced that climate-related disclosures will be mandatory in Hong Kong across relevant sectors no later than 2025.[9] The climate-related disclosures will need to be in line with standards set by the TCFD,[10] and it is expected that there will be general alignment with the ISSB Standards.

ISSB exposure drafts of the Sustainability Standard and the Climate Standard

At COP26 the International Financial Reporting Standards Foundation (**IFRS**) announced a new International Sustainability Standards Board (**ISSB**) which has been charged with developing a 'comprehensive global baseline of high-quality sustainability disclosure standards to meet investors' information needs'.[11]

On 31 March 2022, the ISSB released the following exposure drafts:

— Exposure Draft IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information (**Sustainability Standard**); and

— (b) Exposure Draft IFRS S2 Climate-related Disclosures (**Climate Standard**) (**Standards**).[12]

The Standards were open for public consultation until 29 July 2022. The Standards are designed to be applied together and alongside future industry-specific standards.[13] draw heavily from the framework and recommendations of the Task Force on Climate-Related Financial Disclosures (**TCFD**) and also the Sustainability Accounting Standards Board Standards (**SASB**), but also provide more granularity around reporting requirements.

Standards

The Sustainability Standard sets out the proposed overall requirements for reporting under the Standards, providing core content for reporting, the presentation of reports and other practical requirements. Specifically, the Sustainability Standard will require companies to:

— consider relevant disclosure topics;

— identify any significant sustainability-related opportunities and risks; and

— disclose all material information, which is information that if omitted, misstated or obscured, could reasonably be expected to influence decisions of the primary users of general purpose financial reporting.[14]

The Climate Standard replicates the core requirements set out in the Sustainability Standard, and adds climate-specific reporting requirements. For example, a specific disclosure required under the Climate Standard is how a company plans to achieve any climate-related targets.

Under the Standards, companies will use metrics and targets to monitor their sustainability-related risks, opportunities and targets. Climate-related metrics set out in the Climate Standard include:

— scope 1, 2 and 3 greenhouse gas emissions;

— the percentage and amount of business activities or assets vulnerable to the risks of transitioning to a low-carbon economy; and

— the percentage and amount of business activities or assets vulnerable to the risks relating to the physical impacts of climate change.

The Standards could potentially apply to all companies globally, and there is no threshold for which companies it would be applicable to (such as for example, in New Zealand where mandatory climate-risk disclosures must only be made by 200 large financial institutions covered by the *Financial Markets Conduct Act 2013*).

The impact of the Standards is that companies will be required to disclose far more information regarding many sustainability topics, rather than just climate-related risks. Reporting will be linked to financial statements, therefore companies will need to ensure that by the time that the Standards are released, they are able to include sustainability information in their financial reports.[15]

9 Hong Kong Exchanges and Clearing Limited, Reporting on TCFD recommendations: Guidance on climate disclosures (2021), accessed https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Environmental-Social-and-Governance/Exchanges-guidance-materials-on-ESG/guidance_climate_disclosures.pdf.

10 Thomson Reuters, *Hong Kong sets new climate disclosure rules, aligns with global standard* (2020), accessed https://www.reuters.com/article/us-hong-kong-regulator-climate-change-idUSKBN28R0Y5.

11 IFRS, *IFRS foundation announces International Sustainability Standards Board, consolidation with CDSB and VRF, and publication of prototype disclosure requirements* (2021), accessed https://www.ifrs.org/news-and-events/news/2021/11/ifrs-foundation-announces-issb-consolidation-with-cdsb-vrf-publication-of-prototypes/.

12 International Sustainability Standards Board, *Exposure draft of the Sustainability Standard* (2022), accessed https://www.ifrs.org/projects/work-plan/general-sustainability-related-disclosures/exposure-draft-and-comment-letters/#consultation.

13 KPMG, *Sustainability reporting – proposals for general and climate-related requirements* (2022), accessed https://assets.kpmg/content/dam/kpmg/xx/pdf/2022/04/sustainability-reporting-proposals-noth.pdf.

14 KPMG, *Sustainability reporting – proposals for general and climate-related requirements* (2022), accessed https://assets.kpmg/content/dam/kpmg/xx/pdf/2022/04/sustainability-reporting-proposals-noth.pdf.

15 KPMG, *Get ready for ISSB sustainability disclosures* (2022), accessed https://assets.kpmg/content/dam/kpmg/au/pdf/2022/issb-sustainability-disclosures-au-talkbook-april-2022.pdf.

Developments overseas (continued)

It is worth noting that individual jurisdictions will decide whether or not to adopt the Standards. However companies should prepare for the Standards being adopted in their jurisdiction. There may also be pressure from investors to do so. Directors should consider their internal capability to comply with the Standards.[16]

Companies that report under the TCFD will need to transition to align with the proposed Climate Standard. Further, those that report using the Sustainability Accounting Standards Board Standards **(SASB)** will need to transition to align with the proposed Sustainability Standard. Also of note, those reporting under the Global Reporting Initiative **(GRI)** will need to ensure that their reports align with GRI's Universal Standards update.[17]

Australian Submissions

Australian bodies that made submissions to ISSB in relation to the Standards include the Australian Accounting Standards Board **(AASB)**, the Business Council for Sustainable Development Australia **(BCSD)**, Australia's Council of Financial Regulators **(CFR)**, and the Australian Institute of Company Directors **(AICD)**.[18] Australian bodies that made submissions in relation to the Standards broadly endorsed the Standards. However, there was general agreement that the fact that the Standards do not include 'safe harbour' provisions for some of the forward-looking disclosures is an issue.

For example, the AICD noted that compliance with the standards may expose Australian companies and Directors to heightened legal risks, as there are generally no "safe harbour" provisions for some of the forward-looking disclosures required under the standards, including in circumstances which may fall short of the "reasonable basis" implicitly required under section 769C of the *Corporations Act 2001*.

US Proposed Rule

On 21 March 2022, the **SEC issued a proposed rule (Proposed Rule**) to enhance and standardise the climate-related disclosures provided by public companies in the United States of America **(US)**, including both domestic and foreign private issuers. The Proposed Rule seeks to amend the *Securities Act of 1933* and the *Securities Exchange Act of 1934* to require public companies (which includes foreign private issuers) to provide disclosures regarding their annual greenhouse gas emissions and the climate-related risks their businesses face. The Proposed Rule draws on the recommendations of the TCFD, but notably also extends disclosure to scope 3 emissions (over time).[19] The significance of the proposed adoption of mandatory reporting standards aligned with the TCFD framework in what is still the deepest and most important capital market in the world, cannot be overstated. One way or another, these requirements will likely "filter down" into any jurisdiction, including Australia, which enjoys meaningful capital flows with the US. If adopted, the Proposed Rule would apply to Australian companies that issue debt or have securities listed in the US as it will apply to foreign private issuers, as well as US domestic companies.

Ilona Millar
Partner
Gilbert + Tobin

COMPANIES THAT CURRENTLY REPORT AGAINST THE TCFD WILL NEED TO ALIGN THEIR STRATEGY AND REPORTING WITH THE IFRS'S PROPOSED CLIMATE STANDARD FROM 2023.

16 Gilbert + Tobin, *Boardroom brief: week commencing 8 August 2022* (2022), accessed https://www.gtlaw.com.au/knowledge/boardroom-brief-week-commencing-8-august-2022.
17 BWD, *Your ESG reporting will need to change in the next year* (2022), accessed https://bwdstrategic.com/insight/your-esg-reporting-will-need-to-change-in-the-next-year/.
18 IFRS, *Exposure draft and comment letters: Climate-related disclosures* (2022), accessed https://www.ifrs.org/projects/work-plan/climate-related-disclosures/exposure-draft-and-comment-letters/#view-the-comment-letters.
19 See also: Gilbert + Tobin, *The effect of the SEC's proposed climate-related disclosures on Australian companies* (2022), accessed https://www.gtlaw.com.au/knowledge/effect-secs-proposed-climate-related-disclosures-australian-companies, and Securities and Exchange Commission, *Statement on proposed mandatory climate risk disclosures* (2022), accessed https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321.

NEED TO DO MORE ON CLIMATE RISK? HERE'S WHERE TO START.

Chances are that investors, employees and customers are increasingly calling for you to do more about climate change. These demands are here to stay, and stakeholders are sophisticated enough to tell when a company's efforts lack authenticity.

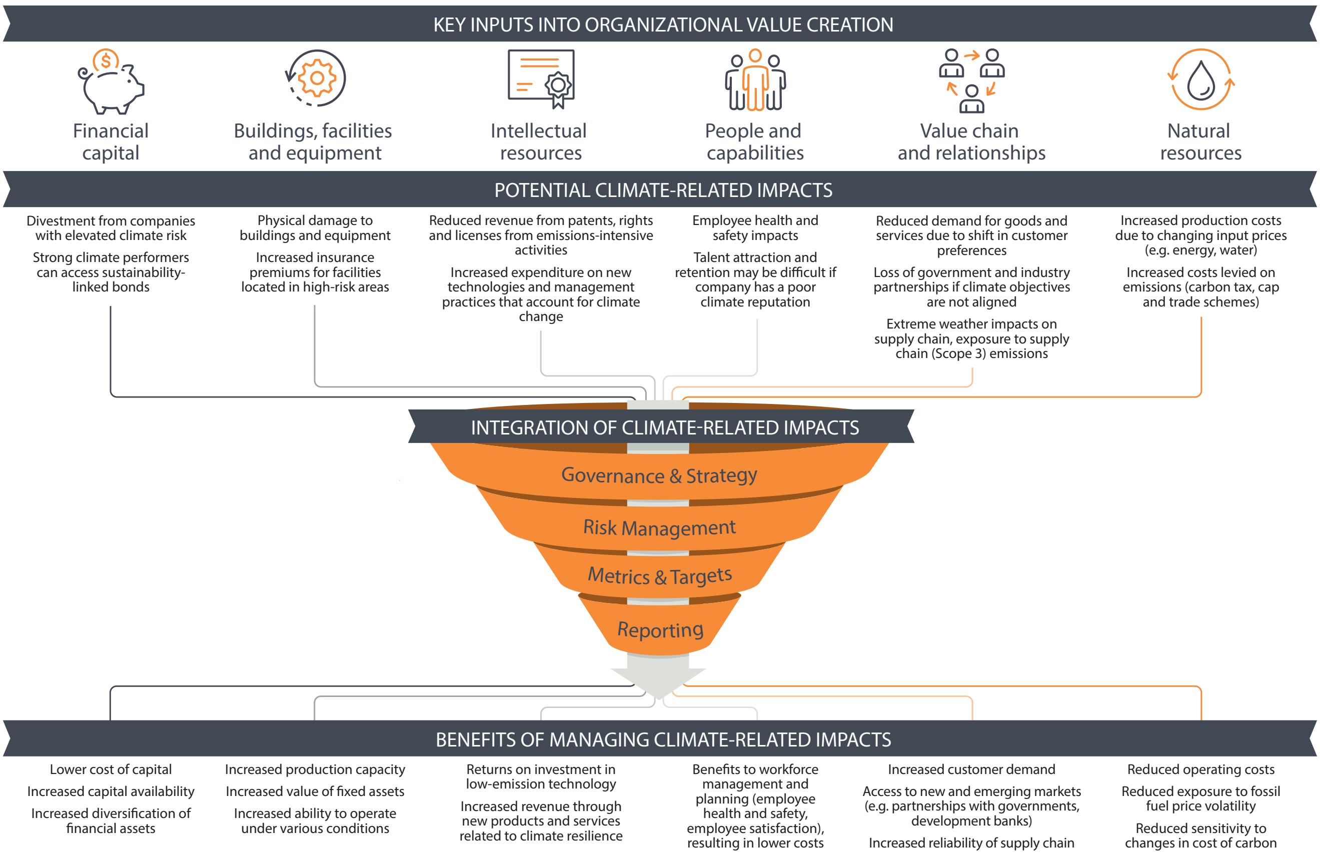
One sign of inauthenticity is when a company's reporting doesn't directly address the issues that its stakeholders deem to be important. If you're only just starting to consider how climate change will impact your organization and want to ensure an authentic response, it pays to understand what investors and other stakeholders want to know.

As climate-related corporate reporting matures, we are gaining new insights into exactly what information is most important when considering an organisation's approach to climate change. In its 2020 Status Report, the Task Force on Climate-related Financial Disclosures (TCFD) reported that expert users were nearly unanimous in rating a company's description of how climate-related issues have affected its business and strategy as extremely useful, making it the 'most useful' piece of information for financial decision-making.

According to the TCFD, therefore, the most useful thing to do is to arrive at a description of how climate-related issues affect your business and strategy. This is an encouraging finding, because understanding and describing potential climate-related impacts on your business does not require expensive quantitative modelling or bespoke scenario analysis.

Instead, it requires understanding the resources that your company relies on to create value, and then articulating the impacts that climate change has on these resources, both positive and negative. This can be done through the inclusion of a tailored climate narrative, tables and infographics in your standard reporting documents.

The below infographic provides a starting point. Leveraging the work of the TCFD, the infographic identifies how climate change may impact your organization's key inputs (such as equipment, employees, water, and financial capital). It also outlines benefits (illustrated in the diagram with respect to organizational inputs) that companies may expect in the long term when they incorporate climate change into their corporate governance, strategy, risk management, and reporting.



(Image: BWD Strategic)

Three ways companies can incorporate IPCC findings into their reporting and strategy

The Intergovernmental Panel on Climate Change (IPCC) recently the second in a series of three major reports. This report contains a comprehensive examination of the impacts of climate change, particularly for resource-poor countries and marginalised communities.

The report also details which climate adaptation approaches are most effective and feasible, as well as which groups of people and ecosystems are most vulnerable.

Underneath the detailed technical analysis, one thing is clear – the effects of a changing climate are already here. For instance, this report shows Australian agriculture is already suffering from the impacts of climate change.

The report holds three key implications for climate and broader ESG reporting:

Orient your climate ambition around 1.5C

The 1.5C target has taken on a life of its own. "Keep 1.5C alive" was the refrain of COP26 in Glasgow. In response, there was a wave of net zero pledges made by governments and the private sector.

Even if all Glasgow pledges are fulfilled, we are still facing a temperature overshoot[1] – global warming rising to approximately 2C. In the more likely scenario of not all pledges being fulfilled, warming could be more like 3C.[2]

From July 2022, the Science Based Targets initiative (SBTi) is increasing the minimum ambition in corporate target setting from 'well below 2C' to '1.5C' above pre-industrial levels.[3]

Uplift your reporting with better data and integrated thinking

The IPCC report underscores the need for two additions to your corporate reporting efforts: better data and integrated thinking. First, collect holistic data – you can only adapt to what you know. Sophisticated companies like Solvay are adopting an integrated dashboard to measure and share progress.[4]

Second, learn more about the concept of integrated thinking. In the Value Reporting Foundation's latest report 'Integrated Thinking: A Virtuous Loop',[5] companies are pushed to set themselves on a continuous journey. In other words, use your report to evaluate how you delivered against your business strategy. Where did you perform well? Where did you fall short? Being able to answer these questions will enable you to make continuous enhancements.

Map climate-related risks to your existing risk categories

The IPCC projects that climate risks will worsen with every 0.1C of additional warming. What's more, these risks will compound one another as multiple hazards occur at the same time and in the same regions.

The Task Force on Climate-related Financial Disclosures believes that, in most situations, climate-related risks are drivers of existing risks.[6] Therefore, all companies stand to benefit from mapping climate-related risks to their existing risk categories.

Luke Heilbuth
CEO
BWD Strategic

Ben Ziser
Head of Strategy
BWD Strategic

1 *Climate Action Tracker (2021)*, accessed at https://climateactiontracker.org/publications/glasgows-2030-credibility-gap-net-zeros-lip-service-to-climate-action/
2 FP, *The climate conversation no-one wants (2022)*, accessed at https://foreignpolicy.com/2022/01/17/climate-change-solar-geoengineering-radiation-modification-governance/
3 Science Based Targets, *Climate ambition: SBTi raises the bar to 1.5 degrees C (2021)*, accessed at https://sciencebasedtargets.org/news/sbti-raises-the-bar-to-1-5-c
4 IR, *Integrated thinking in action (2020)*, accessed at https://www.integratedreporting.org/wp-content/uploads/2020/12/IIRC_Case_Solvay-1.pdf
5 IR, *Integrated thinking virtuous loop (2021)*, accessed at https://www.integratedreporting.org/wp-content/uploads/2021/06/Integrated-thinking-virtuous-loop.pdf
6 *Task Force on Climate-related Financial Disclosures (2020)*, accessed at https://assets.bbhub.io/company/sites/60/2020/09/2020-TCFD_Guidance-Risk-Management-Integration-and-Disclosure.pdf

NATURE-RELATED DISCLOSURE

The Taskforce on Nature-Related Financial Disclosures (TNFD) will provide a risk management and disclosure framework to help companies report and act on their nature-related risks and opportunities (scheduled for finalisation in September 2023). Companies should consider developing their strategy now, to avoid reacting to external pressures later. Initial steps include screening for biodiversity risks, incorporating nature into strategy, reporting and financial planning, and publishing a biodiversity strategy.

NATURE-RELATED DISCLOSURE DEVELOPMENTS IN AUSTRALIA & OVERSEAS

Taskforce on Nature-Related Financial Disclosures (TNFD) developments

In 2021, the Taskforce on Nature-Related Financial Disclosures **(TNFD)** was established. The TNFD is a market-led, global initiative that aims to develop and deliver a risk management and disclosure framework for organisations to report and act on evolving nature-related risks and opportunities **(Framework)**. The framework will provide guidance and recommendations on the disclosure of nature-related risks and opportunities. The aim of the TNFD is to support a shift in global financial flows away from nature-negative outcomes and toward nature-positive outcomes.[1] This will in turn minimise impacts on biodiversity.

The TNFD has started developing the Framework. On 28 June 2022, **the TNFD released the second version of its beta Nature-Related Risk and Opportunity Management and Disclosure** Framework (Beta Framework) for market and other stakeholder consultation.[2] A further two iterations of the Beta Framework are planned to be released in November 2022 and February 2023, before the release of the final Nature-Related Risk and Opportunity Management and Disclosure Framework in September 2023.[3] The deadline for feedback on the Beta Framework is 23 September 2022.

It is anticipated that the TNFD will align itself with the goals of no net-loss of biodiversity by 2030; and net gains by 2050, which are expected to be set in the Post-2020 Global Biodiversity Framework being negotiated at by parties to the UN Convention on Biological Diversity (due for adoption at COP-15 in October 2022).

The Framework will build upon the approach taken by the Task Force on Climate-Related Financial Disclosures **(TCFD)** and will also align with the standards that are being developed by the International Sustainability Standards Board **(ISSB)** for climate-related disclosures and sustainability-related financial information disclosures. This follows market feedback that the Framework should be consistent with the emerging sustainability reporting global baseline.[4] By aligning the TNFD's recommended disclosures closely to those of the TCFD, the TNFD intends to facilitate and encourage a move towards integrated disclosures, which capture information regarding the value of natural capital to business and society, quantify and track ecosystem services, and potentially apportion nature loss (and gain) at a corporate/industry level.

Some key aspects of the Beta Framework include:

- draft disclosure recommendations, which build on those already recommended by the TCFD. They follow the TCFD's four pillars of disclosure: risk management, governance, metrics and targets and strategy; and
- the LEAP approach for financial institutions, which is guidance intended to support nature-related risk and opportunity assessments within businesses, which should in turn inform disclosure decisions aligned with the TNFD's draft disclosure recommendations. The guidance involves four core phases:
  1. Locating interfaces with nature;
  2. Evaluating any dependencies and impacts;
  3. Assessing nature-related risks and opportunities; and
  4. Preparing to respond to those risks and opportunities, and reporting to investors.[5]

The Australian Government has joined the TFND as a funding partner and is a member of the TNFD Forum, alongside other governments including the Canadian, French, UK and Japanese governments. As a strategic funding partner, the Australian Government sits on the TNFD Stewardship Council alongside Switzerland, the Netherlands and the UK.[6]

The Australian Government wants to ensure that Australian businesses are ready to adopt the Framework, and that the Framework is compatible with Australian circumstances. In order to do so, two projects are currently underway: the TNFD Consultation and Education Series run by KPMG that aims to identify the perspectives and experiences of Australian businesses to provide feedback to TNFD, and the Natural Capital Data and System Mapping which is being run by Deloitte, and will identify what is required to enable financial institutions to integrate natural capital data into their systems. This is important, as additional disclosure requirements could not fit Australian circumstances if key bodies in Australia do not provide feedback.

1 Taskforce on Nature-related Financial Disclosures, *The TNFD nature-related risk and opportunity management and disclosure framework Beta v0.2* (2022), accessed https://framework.tnfd.global/wp-content/uploads/2022/06/TNFD-Framework-Summary-Executive-Summary-Beta-v0-2.pdf.

2 Taskforce on Nature-related Financial Disclosures, *The TNFD nature-related risk and opportunity management and disclosure framework Beta v0.2* (2022), accessed https://framework.tnfd.global/wp-content/uploads/2022/06/TNFD-Framework-Summary-Executive-Summary-Beta-v0-2.pdf.

3 Taskforce on Nature-related Financial Disclosures, *About* (2022), accessed https://tnfd.global/about/.

4 Taskforce on Nature-related Financial Disclosures, *The TNFD nature-related risk and opportunity management and disclosure framework Beta v0.1* (2022), accessed https://framework.tnfd.global/wp-content/uploads/2022/06/TNFD-Framework-Executive-Summary-Beta-v0-1-EN.pdf.

5 Taskforce on Nature-related Financial Disclosures, *Understanding the Taskforce on Nature-related Financial Disclosures* (TNFD) (2022), accessed https://static1.squarespace.com/static/6182172c8c1fdb1d7425fd0d/t/62d0e183abd4773039ea932a/1657856432697/TNFD+Educational+Workshop+3+-+LEAP+approach+%28ASFI%29.pdf.

6 Taskforce on Nature-related Financial Disclosures, *Understanding the Taskforce on Nature-related Financial Disclosures* (TNFD) (2022), accessed https://static1.squarespace.com/static/6182172c8c1fdb1d7425fd0d/t/62d0e183abd4773039ea932a/1657856432697/TNFD+Educational+Workshop+3+-+LEAP+approach+%28ASFI%29.pdf.

OVER HALF OF THE WORLD'S ECONOMIC OUTPUT – US $44 TRILLION IN VALUE – IS MODERATELY OR HIGHLY DEPENDENT ON NATURE

Taskforce on Nature-Related Financial Disclosures (TNFD) developments (continued)

Other Australian bodies participating in the TFND consultation process are the:

— Australian Sustainable Finance Institute, the Australian Council of Superannuation Investors, and the Responsible Investment Association Australasia, which together ran workshops for those interested in the Beta Framework and the TNFD generally;[7]

— National Farmer's Federation;

— Minerals Council of Australia;

— Australian Banking Association; and

— Business Council of Australia.[8]

Whilst there is strong interest and momentum in developing best practice tools to better account for and value assets on the basis of nature-related risks and how they are managed, these risks are in many ways more difficult to quantify and account for than climate change risks. Some of the key issues emerging from the consultation process, which may influence the development of the framework and the speed with which its recommendations will be able to be implemented by organisations include the data requirements to inform natural capital accounting across a complex array of natural and geographic factors; and the existence and standardisation of environmental accounting frameworks that can be used to baseline, measure and report on risk and outcomes.

The TNFD is intended to deliver greater protection of biodiversity and restoration of ecosystem. The proposal for a new **Biodiversity Certificates Scheme** in Australia could also present an opportunity for businesses to undertake or invest in landscape management and restoration[9] to deliver biodiversity outcomes, whilst also generating another revenue stream. On 26 August 2022, the Australian government committed to establishing a new Biodiversity Certificates Scheme (Scheme), to be managed by the Clean Energy Regulator. The Scheme is proposed to operate in a similar way to Australia's current ACCU market, and will run alongside that market. On 31 August 2022, the Federal Government invited views on the proposed Scheme during September from a range of stakeholders, including farmers and people interested in conservation and Indigenous land managers.

Ilona Millar
Partner
Gilbert + Tobin

7 Australian Financial Sustainable Finance Institute, *Taskforce on Nature-related Financial Disclosures (TNFD)* (2022), accessed https://www.asfi.org.au/tnfd.

8 Taskforce on Nature-related Financial Disclosures, *Understanding the Taskforce on Nature-related Financial Disclosures* (TNFD) (2022), accessed https://static1.squarespace.com/static/6182172c8c1fdb1d7425fd0d/t/62d0e183abd4773039ea932a/1657856432697/TNFD+Educational+Workshop+3+-+LEAP+approach+%28ASFI%29.pdf.

9 Department of Climate Change, *Energy, the Environment and Water, A market for biodiversity* (2022), accessed https://ehq-production-australia.s3.ap-southeast-2.amazonaws.com/3dc665510fe453ced1bdd34cf350408ac021c00a/original/1662085461/6b4d1953bbc3d28235941233c613d71e_biodiversity-market-fact-sheet.pdf.

HOW TO BECOME A BIODIVERSITY LEADER

In this article, we explain the latest thinking on how business interacts with nature, why it matters to your business, and what you can do about it.

Understanding the current business-nature relationship

As you may know, the demands humans place on nature today are equivalent to the sustainable output of 1.6 earths.[1] As a result, biodiversity and ecosystem health[2] are declining across the globe at rates unprecedented in human history.[3]

At the corporate level, nature-related risks and opportunities are best understood through the lens of impacts and dependencies. These concepts are defined by the OECD as follows:

Dependencies: How nature positively or negatively impacts an organisation's immediate financial performance from the 'outside-in.' For example, extreme heat, zoonotic disease (-); mineral deposits, fertile soil (+).

Impacts: How an organisation's activities positively or negatively impact nature from the 'inside-out.' For example, chemical pollution (-); reforestation and afforestation (+).

Why does this matter for your business?

According to the World Economic Forum (WEF), over half of the world's economic output – US $44 trillion in value[4] – is moderately or highly dependent on nature. Unsurprisingly then, the 2022 Global Risks Report[5] ranks biodiversity loss as the third most severe risk facing the planet over the next decade.

The decline in ecosystem services (e.g., climate regulation, soil fertility) and natural capital stocks[6] pose a significant financial risk to banks, insurers, and institutional investors. Recent investigations found that more than one-third of all investments held by French[7] and Dutch[8] financial institutions are 'highly' or 'very highly' dependent on nature.

In response, providers of financial capital are expanding their focus from climate risk to broader, nature-related risks.[9] Global institutions are also pushing companies to measure and report on their nature-related risks and opportunities in a consistent way.

Climate change has recently become a predominant focus for the corporate sector. At BWD, we are convinced biodiversity will be next. The Taskforce on Nature-related Financial Disclosures (TNFD), for example, has set a deadline of 2023[10] for the creation of a new reporting framework to address risks connected to the natural world.

If you are still grappling with the challenges posed by climate change, there's some good news. Actions that address biodiversity loss and climate change are often complementary.[11] For example, reducing value chain emissions tends to create positive value for nature along the way (e.g., afforestation accelerates carbon sequestration).

1 The Economist, *How should economists think about biodiversity? (2021)*, accessed at https://www.economist.com/finance-and-economics/2021/02/06/how-should-economists-think-about-biodiversity
2 Dasgupta, P. (2021), *The Economics of Biodiversity: The Dasgupta Review. Abridged Version*, accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957292/Dasgupta_Review_-_Abridged_Version.pdf
3 UN Sustainable Development Goals, *UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating' (2019)*, accessed at https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/
4 WEF, *Nature risk rising: Why the crisis engulfing nature matters for business and the economy (2020)*, accessed at https://www.weforum.org/reports/nature-risk-rising-why-the-crisis-engulfing-nature-matters-for-business-and-the-economy
5 WEF, *The Global Risks Report (2022), 17th Edition*, accessed at https://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2022.pdf
6 The Economist, *How should economists think about biodiversity? (2021)*, accessed at https://www.economist.com/finance-and-economics/2021/02/06/how-should-economists-think-about-biodiversity
7 Banque de France, *A silent spring for the financial system (2021)*, accessed at https://publications.banque-france.fr/en/silent-spring-financial-system-exploring-biodiversity-related-financial-risks-france
8 PBL, Indebted to nature. Exploring biodiversity risks for the Dutch financial sector (2020), accessed at https://www.pbl.nl/en/publications/indebted-to-nature
9 Swiss Re Institute, *Biodiversity and ecosystem services (2020)*, accessed at https://www.swissre.com/dam/jcr:a7fe3dca-c4d6-403b-961c-9fab1b2f0455/swiss-re-institute-expertise-publication-biodiversity-and-ecosystem-services.pdf
10 IR Magazine, *TNFD sets 2023 deadline for new reporting framework on nature-related risks (2021)*, accessed at https://www.irmagazine.com/esg/tnfd-sets-2023-deadline-new-reporting-framework-nature-related-risks
11 Torsten Kurth, Gerd Wübbels, Adrien Portafaix, Alexander Meyer zum Felde, and Sophie Zielcke, *The Biodiversity Crisis Is a Business Crisis (2021)*, accessed at https://web-assets.bcg.com/fb/5e/74af5531468e9c1d4dd5c9fc0bd7/bcg-the-biodiversity-crisis-is-a-business-crisis-mar-2021-rr.pdf

ACT NOW AND YOU'LL BE AN EARLY-MOVER IN WHAT WILL BECOME A CRITICAL BUSINESS ISSUE.

What can you do about biodiversity? Here are four simple tips.

Complete a readiness review.

Screen your organisation for biodiversity risks at the corporate level.[12] Consider operations, investments, value chains and communities. From there, prioritise your material (i.e. most important) nature-related impacts and dependencies, and set strategic objectives

Familiarise yourself with key frameworks and tools.

Engage with the initial guidance from the TNFD and the Science-based Targets for Nature (SBTN). This Business Benefits document is a useful resource for raising awareness with internal stakeholders. It will help you lay a foundation for nature-related reporting now, rather than being caught out later. You can also begin gathering and/or supplementing existing data to estimate your value chain-wide impacts and dependencies on nature, with guidance from the Natural Capital Protocol (NCP) and other leading tools (e.g., ENCORE, Swiss Re's BEC Index, and STAR metric). From here, build a list of potential issue areas and locations for target setting.

Incorporate nature-related risks and opportunities into existing strategy, reporting and financial planning.

Once complete, your readiness review will tell you which nature-related issues matter most to your business. While being familiar with the emerging tools and data sets will help you know what's possible to measure and manage at this early stage. If you commit to steps one and two above, you can begin introducing nature-related risks and opportunities into your existing strategy, reporting and financial planning.

Signal your intent to become a biodiversity leader.

Act now and you'll be an early-mover in what will become a critical business issue. To signal your leadership to investors, employees, governments, local communities and others, consider publishing your first 'biodiversity strategy'[13], which should outline your priority areas, your existing work, and long-term ambitions.

Luke Heilbuth
CEO
BWD Strategic

12 Wiley, *Bringing sustainability to life: A framework to guide biodiversity indicator development for business performance management (2020)*, accessed at https://onlinelibrary.wiley.com/doi/epdf/10.1002/bse.2573

13 Kering, *Biodiversity strategy (2022)*, accessed at https://www.kering.com/en/sustainability/safeguarding-the-planet/biodiversity-strategy/

GREENWASHING

Regulators around the world, including ACCC, ASIC and the SEC, have identified greenwashing as a top enforcement priority for 2022 and beyond. Common signs of greenwashing include evidence-free ESG reporting, wokewashing (corporate virtue signalling), competence washing (embellishing in-house sustainability expertise), and dubious net zero targets.

GREENWASHING DEVELOPMENTS IN AUSTRALIA & OVERSEAS

Developments in Australia

With focus on the clean energy transition increasing, companies are eager to promote their operations and products as clean and green. Environmentally friendly products are more attractive to customers and investors and making green claims can improve a company's market position relative to competitors that are making weaker or no comparable environmental claims. In this environment, regulators are alive to the risk of parties engaging in "greenwashing", which is the practice of providing misleading information about a product or an entity's ESG credentials, which may influence the market and thereby impact upon an investor's ability to make informed investment decisions. Greenwashing can result in decreased investor confidence and undermine the financial system working fairly and efficiently.[1]

Entities are subject to certain requirements when promoting or offering sustainability-related products, such as prohibitions against misleading and / or deceptive conduct under the *Corporations Act 2001* and *Australian Securities and Investments Commission Act 2001*, as well as disclosure obligations under the *Corporations Act 2001*, ASIC Regulatory Guide 65 and the *Corporations Regulations 2001*.[2]

In relation specifically to climate change and clean energy, ASIC expressly recognises the recommendations by the Financial Stability Board's Task Force on Climate-related Financial Disclosures **(TCFD)** in relation to climate-related disclosures. However, compliance is, for the time being, voluntary. ASIC suggests that entities who report voluntarily under the TCFD framework will be well-placed to transition to any future standards which may be imposed.[3]

The Australian Competition and Consumer Commission (ACCC) announced earlier this year that potentially misleading claims relating to environmental claims and sustainability are its top consumer protection priority for 2022/23. The ACCC has emphasised that it will look to take a pro-active approach in enforcing consumer laws relating to greenwashing. Outgoing Chairman of ACCC, Mr Rod Sims, noted in a speech delivered to the Committee for Economic Development of Australia that the ACCC's focus would go beyond consumer goods, taking a closer look at claims made in the manufacturing and energy sectors relating to the carbon neutrality of production processes.[4]

ASIC has also identified greenwashing as an area of priority for 2022 and will be conducting its own investigations into corporate statements. [5] The Chair of ASIC, Mr Longo, has encouraged boards to *'look out for any greenwashing – and to ask whether their company's disclosure around environmental risks and opportunities, or their promotion of ESG-focused products, accurately reflects their practices in this area'*. [6] ASIC is currently conducting at least two investigations into greenwashing.[7]

On 27 October 2022, ASIC announced that it had taken its first formal enforcement action for greenwashing and issued penalties against ASX listed company, Tlou Energy Limited (Tlou). Tlou included reports and presentations about its business operations in ASX announcements which claimed that:

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

ASIC issued four infringement notices in relation to the above statements, as ASIC was concerned that Tlou either did not have a reasonable basis to make the representations, or that the representations were factually incorrect. ASIC also issued Tlou with a penalty of $53,280 which Tlou paid but did not admit to any contravention.[8]

1 Gilbert + Tobin, *Summary of ASIC Guidance on 'How to avoid greenwashing when offering pr promoting sustainability-related products'* (2022), accessed https://www.gtlaw.com.au/knowledge/summary-asic-guidance-how-avoid-greenwashing-when-offering-or-promoting-sustainability.

2 Gilbert + Tobin, *Summary of ASIC Guidance on 'How to avoid greenwashing when offering pr promoting sustainability-related products'* (2022), accessed https://www.gtlaw.com.au/knowledge/summary-asic-guidance-how-avoid-greenwashing-when-offering-or-promoting-sustainability.

3 Gilbert + Tobin, *Summary of ASIC Guidance on 'How to avoid greenwashing when offering pr promoting sustainability-related products'* (2022), accessed https://www.gtlaw.com.au/knowledge/summary-asic-guidance-how-avoid-greenwashing-when-offering-or-promoting-sustainability.

4 Gilbert + Tobin, *The market struggles to find direction with 'green' initiatives* (2022), accessed https://www.gtlaw.com.au/knowledge/market-struggles-find-direction-green-initiatives; Australian Competition and Consumer Commission, *ACCC's enforcement and compliance policy update 2022-23* (2022), accessed https://www.accc.gov.au/speech/acccs-enforcement-and-compliance-policy-update-2022-23.

5 Australian Competition and Consumer Commission, Compliance and enforcement priorities 2022/23 (2022), accessed https://www.accc.gov.au/media-release/compliance-and-enforcement-priorities-for-2022-23.

6 Australian Securities and Investments Commission, ASIC's corporate governance priorities and the year ahead (2022), accessed https://asic.gov.au/about-asic/news-centre/speeches/asic-s-corporate-governance-priorities-and-the-year-ahead/.

7 Australian Financial Review, ASX-listed company investigated by ASIC for greenwashing (2022), accessed https://www.afr.com/companies/financial-services/asx-listed-company-investigated-by-asic-for-greenwashing-20220822-p5bbrd.

8 Gilbert + Tobin, *And so it begins … ASIC takes its first enforcement action for 'greenwashing'* (2022), accessed https://www.gtlaw.com.au/knowledge/so-it-begins-asic-takes-its-first-enforcement-action-greenwashing#:~:text=On%2027%20October%202022%2C%20ASIC,environmentally%20friendly%2C%20sustainable%20or%20ethical.

Developments in Australia (continued)

In June 2022, **ASIC released Information Sheet 271** How to avoid greenwashing when offering or promoting sustainability-related products **(INFO 271)**, which provides guidance to superannuation and investment funds on:

— what greenwashing is and why it's a concern;

— the current regulatory setting for communications about sustainability-related products; and

— nine questions to consider when offering or promoting sustainability-related products, being:

1. Is your product true to label?
2. Have you used vague terminology?
3. 'Are your headline claims potentially misleading?
4. Have you explained how sustainability-related factors are incorporated into investment decisions and stewardship activities?
5. Have you explained your investment screening criteria? Are any of the screening criteria subject to any exceptions or qualifications?
6. Do you have any influence over the benchmark index for your sustainability-related product? If you do, is your level of influence accurately described?
7. Have you explained how you use metrics related to sustainability?
8. Do you have reasonable grounds for a stated sustainability target? Have you explained how this target will be measured and achieved?
9. Is it easy for investors to locate and access relevant information?

INFO 271 highlights the importance for directors to ensure, when making disclosures, including in product disclosure standards, that: disclosures are clear; headline statements about green credentials are not misleading; sustainability targets are backed by clear, time based action plans with information about how progress will be measured and what assumptions underpin the targets and measurement. In anticipation of the transition to future ISSB sustainability-related disclosure standards, ASIC also recommend adopting the TCFD recommendations.

The Australian market is experiencing increased demand for sustainability-related financial products, which gives rise to an enhanced risk of greenwashing. In the current regulatory environment, it is more important than ever that all companies ensure that claims relating to the green characteristics of their investment or other products are well backed up. Whilst INFO 271 is directed towards superannuation and investment funds, the guidance is widely applicable to any companies offering products with sustainability claims.

Developments overseas

There is no doubt that regulators in multiple domains consider investor and consumer risks arising from greenwashing to be very serious.

In March 2022, The European Council and European Parliament proposed an EU Directive that would amend the Unfair Commercial Practices Directive and the Consumer Rights Directive so that companies will be prohibited from greenwashing.[9]

In the UK, the Financial Conduct Authority has proposed new rules that target greenwashing. A consultation paper regarding the proposed rules was published on 25 October 2022, and it is open to public consultation until 25 January 2023. It is expected that the rules will be published in the first 6 months of 2023. It is proposed in the consultation paper that greenwashing be tackled by including in the rules investment product sustainability labels, as well as restrictions on the use of terms such as "green", "sustainable" and "ESG".[10]

In late May 2022, 50 German police officers raided the Frankfurt offices of Deutsche Bank's asset management arm, DWS Group (DWS) in response to allegations made by a former executive at DWS that the funds arm was engaging in greenwashing. In 2020, DWS claimed that half of the US$900 billion worth of assets it managed were invested under ESG criteria. The former executive claimed that this was false and misleading. The police raid marked the first **major milestone in the investigation** into DWS and made global news. The CEO of DWS resigned in response to the allegations and public pressure.

Meanwhile, in the US, the Securities Exchange Commission **(SEC)** has initiated an investigation into Goldman Sachs Group Inc's asset-management division, and particularly its funds which are claimed to meet particular ESG standards.

The prevention of greenwashing has been identified as a top priority by the SEC under the guidance of Chair Gary Gensler and similar investigations can be expected in the coming months. We can expect to see continued growth in the frequency and seriousness of actions taken by global regulators to prevent greenwashing, as the gains to be made by promoting 'clean' and 'green' products continues to increase. This represents a heightened risk to fund and asset managers, who must ensure they are not misrepresenting the importance of sustainability-related factors in decision-making relating to financial products. Notwithstanding the legal consequences that may arise should any negative finding result from such investigations, asset and fund managers should be aware of the reputational damage they may sustain if their name becomes headline news around the world on the basis of ESG and greenwashing concerns. Investors are demanding investments that are ethical, sustainable and environmentally friendly, and mere rumours of misleading and deceptive conduct can create a sceptical and cautious market.

Ilona Millar
Partner
Gilbert + Tobin

9 European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information* (2022), accessed chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://eur-lex.europa.eu/resource.html?uri=cellar:ccf4e0b8-b0cc-11ec-83e1-01aa75ed71a1.0012.02/DOC_1&format=PDF.

10 Mayer Brown, *UK Sustainability Disclosure Framework – New FCA Greenwashing Rules under consultation* (2022) accessed mayerbrown.com/en/perspectives-events/publications/2022/11/uk-sustainability-disclosure-framework-new-fca-greenwashing-rules-under-consultation

FOUR COMMON SIGNS OF GREENWASHING

How do we detect greenwashing when reviewing a company's ESG strategy and reporting? There are four common signs.

EVIDENCE-FREE ESG REPORTING

Businesses that routinely underinvest in their ESG reporting, using corporate spin as a proxy for a real strategy.

WOKEWASHING

Businesses that virtue signal (or wokewash) support for a cause while acting in ways which undermine the credibility of their commitment.

COMPETENCE WASHING

Businesses that fabricate in-house capability and hope stakeholders don't notice. Claiming to be sustainable in hopes of recruiting quality ESG professionals.

DUBIOUS NET ZERO TARGETS

Businesses that pledge underwhelming net zero plans. Only promising to reduce its scope 1 and 2 emissions.

How do we detect greenwashing when reviewing a company's ESG strategy and reporting? There are four common signs. (continued)

Evidence-free ESG reporting

Greenwashing businesses routinely underinvest in their ESG reporting, using corporate spin as a proxy for a real strategy and progress against it. You can identify a shoddy report by looking for:

Vague language: A SASB survey found that companies used generic language 53 percent of the time[1] when addressing an ESG topic.

Clichés: Even one damages credibility ("our people are our greatest strength"). Their inclusion is often a sign that the company does not have evidence-based targets and metrics to support its ESG claims.

Jargon verbs and marketing spin: Synergize, ideate, thrive, elevate, ignite, leverage. A report is a strategic document, not an advertising campaign.

Using the SDGs as a brand element: Slapping the coloured squares of the 17 Sustainable Development Goals is not an ESG strategy. Include SDG targets (not just goals), and an explanation of how they relate to company strategy.

Wokewashing

There is nothing wrong with business leaders taking a stance on social issues. In fact, consumers like it. Eight-six percent of us think CEOs should publicly speak[2] about problems in society. And 68 percent think CEOs should step in when the government fails to fix them.

But companies get into trouble when they virtue signal (or wokewash) support for a cause while acting in ways which undermine the credibility of their commitment. An example was the decision by several companies, including P&G, YouTube, and Mercedes, to proclaim their support for Gay Pride month in the West, while remaining silent to the abuse of LGBTIQ people in the Arabian Gulf and parts of Africa,[3] where hundreds of gay men remain in prison.

As the philosopher Judith Shklar[4] argued, cruelty is the worst of human vices, but people are least forgiving of hypocrisy. Corporate PR teams take note.

1 SASB, *The state of disclosure (2016)*, accessed at https://www.sasb.org/wp-content/uploads/2019/08/StateofDisclosure-Report-113016v2-1.pdf
2 Edelman, *2021 Edelman Trust Barometer (2021)*, accessed at https://www.edelman.com/trust/2021-trust-barometer
3 Post Millennial, *Corporations change their logos to rainbows for Pride Month, but not in areas where LGBT is forbidden (2021)*, accessed at https://thepostmillennial.com/corporations-change-their-logos-to-rainbows-for-pride-month-but-not-inareas-where-lgbt-isnt-accepted
4 Talking Politics podcast, *Shklar on hypocrisy (2022)*, accessed at https://podcasts.apple.com/gb/podcast/shklar-on-hypocrisy/id1508992867?i=1000517869772

How do we detect greenwashing when reviewing a company's ESG strategy and reporting? There are four common signs. (continued)

Competence washing

Until recently, most boards and executives were disinterested in ESG, and as a result, limited their investment in the Sustainability function and its employees. This sent a signal to talented staff – if you want to advance in the organisation, look elsewhere.

Things have changed. Today, almost every business claims to be sustainable. But dig deeper and you might find there is no senior leader with experience in the field. This is known as competence washing. One form involves appending Sustainability to the end of an already long executive title, e.g. Head of Corporate Affairs, Communications and Sustainability. Another is to place an internal employee from an unrelated field into a newly created Head of Sustainability role.

In truth, there is a shortage of quality ESG professionals. The solution is not to fabricate in-house capability and hope stakeholders don't notice. Companies capture the benefits of ESG when they spend time and money hiring an expert, and then develop talent from within (or hire consultants) to support that person.

Dubious net zero targets

The concept of net zero is simple. By a certain date, the pledging company or government must absorb as much carbon as it emits. Everything else from this point is complicated. There is not even an agreed definition for what net zero means.

The most common form of underwhelming net zero pledging occurs when a company promises only to reduce its scope 1 and 2 emissions – pollution that comes directly from its day-to-day operations and energy use. This selective target-setting omits scope 3 – the carbon emissions created across a company's entire value chain.

Recent analysis of the climate pledges of 25 of the world's biggest companies[5] found just three – Maersk, Vodafone and Deutsche Telekom – demonstrated a clear commitment to reducing all emissions by more than 90 percent. If a company does not include scope 3 emissions, its net zero target is essentially useless.

Offsetting is another problematic feature of net zero commitments. The practice often allows companies to set a superficially ambitious target (set decades into the future) by paying third parties to offset their emissions.

The concept of offsetting – while necessary in the short-term for hard-to-abate industries – is riddled with flaws. Most fundamentally, it relies on the faulty assumption that environmental harm can be alleviated in one place by doing environmental good elsewhere. Ecosystem health cannot be horse-traded.

It's also hard to regulate. Business and governments routinely buy low-quality offsets from projects that would have been built anyway (such as government-mandated renewables projects in India[6] and China), and offsets are routinely double counted.[7]

So what does good look like? While imperfect, BWD recommends companies commit to the Science-Based Targets initiative.[8] Targets are considered 'science-based' if they align with what the latest climate science deems necessary to meet the goals of the Paris Agreement.

If you seek corporate inspiration, look to Microsoft. The company has an achievable plan to be carbon negative by 2030, grounded in science and mathematics.[9] No other globally significant company compares.

Luke Heilbuth
CEO
BWD Strategic

5 ABC (US) News, *'Net zero' promises from major corporations fall short, climate groups say (2022)*, accessed at https://www.nbcnews.com/science/environment/net-zero-promises-major-corporations-fall-short-climate-groups-say-rcna14460
6 BBC, *Paris Agreement: Will India lose millions of carbon credits? (2019)*, accessed at https://www.bbc.com/news/world-asia-india-50774901
7 Greenpeace, *Doubts over Shell's 'drive carbon neutral' claim (2021)*, accessed at https://unearthed.greenpeace.org/2021/10/25/shell-oil-carbon-neutral-offsetting/
8 Science Based Targets, *Lead the way to a low-carbon future (2021)*, accessed at https://sciencebasedtargets.org/how-it-works
9 Microsoft, *Microsoft will be carbon negative by 2030 (2020)*, accessed at https://blogs.microsoft.com/blog/2020/01/16/microsoft-will-be-carbon-negative-by-2030/

EMPLOYMENT

Expectations on employers have heightened over the past year, with legislation and changing corporate norms pushing for greater respect, equity and transparency in the workplace.

EMPLOYMENT & RELATED ISSUES

Issues in Australia

Job Summit

The Federal Government's Jobs and Skills Summit was held on 1-2 September 2022. Attendances were drawn from a wide cross section of business and employee representatives. The summit was seen as an opportunity to set the Government's agenda on key challenges and opportunities facing the Australian labour market and economy.

Key themes (amongst others) discussed at the summit from an ESG perspective were:

- boosting job security and wages, creating safe, fair and productive workplaces; and
- promoting equal opportunities and reducing barriers to employment.

At the Summit there was a clear focus on women and equality, job security and low-income workers. The focus on gender equality is evident from the introduction of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Secure Jobs Bill) which will address:

- Flexible work: the Secure Jobs Bill expands circumstances where an employee may request flexible work arrangements including in circumstances of family and domestic violence and allow employees to dispute the refusal with the Fair Work Commission (FWC);
- Sexual harassment/ discrimination: the Secure Jobs Bill expressly prohibits sexual harassment in workplaces and enables the FWC to resolve disputes relating to workplace sexual harassment. Protections against discrimination are also extended; and
- Equal remuneration / prohibiting pay secrecy: the Secure Jobs Bill introduces a positive right for employees to disclose or not disclose information about their own remuneration and otherwise prohibits salary secrecy clauses, with penalties for non-compliance. There is also an expanded scope for the FWC to make Equal Remuneration Orders, and new FWC expert panels handling pay equity and the care and community sector.

Equal pay

Businesses are taking their own steps to tackle pay equity concerns. In April 2022 Westpac Banking Corporation became the first Australian organisation to remove pay secrecy clauses in employment contracts across its workforce. Others have followed suit. The removal of these provisions will need to be balanced against the legitimacy of their use. In the UK, under the Equality Act 2010, recent amendments now make it illegal for an employer to enforce a pay secrecy clause if discussions were for gender equality reasons.

Parental Leave

There is no statutory entitlement under the *Fair Work Act 2009* to paid parental leave, as there is only unpaid leave available. Paid parental leave is derived from the Federal Government's Paid Parental Leave Scheme which is a tax funded program (payments are provided at the national minimum wage). Currently up to 18 weeks for primary carers and up to 2 weeks for partners is available.

The Federal Government intends to increase the length of the Paid Parental Leave Scheme as follows:

- from 1 July 2023, a single 20-week payment;
- from 1 July 2024, payments increased by 2 weeks each year; and
- by 1 July 2026 a 26 week payment.

The above changes are subject to legislation passing.

Respect@Work

In June 2018, the Sex Discrimination Commissioner, and the then Minister for Women, announced a National Inquiry into Sexual Harassment in Australian Workplaces to examine the prevalence, nature, drivers and reporting of sexual harassment, the current legal and regulatory framework, and the impact of sexual harassment on individuals and business, as well as ways to improve prevention and response. In 2020, the *Respect@Work: Sexual Harassment National Inquiry Report* (**Respect@Work Report**) was published.[1] The Respect@Work Report made 55 recommendations directed to all levels of government and the private sector for policy and legislative reforms to prevent and address workplace sexual harassment. There are 5 key areas of focus which underpin the recommendations:

- data and research;
- primary prevention;
- the legal and regulatory framework;
- workplace prevention and response; and
- support, advice and advocacy.

The new Federal Government has committed to adopting all 55 recommendations set out in the Respect@Work Report, including the imposition of a nation-wide 'positive' duty on employers to prevent sexual harassment. A positive duty imposes a higher threshold than that which currently exists for most of Australia, which is a duty to take "reasonable steps" to identify and prevent harm (i.e. sexual harassment).

The Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Respect at Work Bill) will create a positive duty to take reasonable and proportionate measures to eliminate unlawful sex discrimination, including sex discrimination, sexual and sex-based harassment, hostile work environments and victimisation.

1 https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020

Issues in Australia (continued)

Sexual harassment will be treated as a work health and safety issue, with the Respect at Work Bill seeking to implement a further 7 of the 55 recommendations of the Australian Human Rights Commission's Respect@Work Report.

Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021

The Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 was passed on 2 September 2021, and amends both the *Fair Work Act 2009* and the *Sex Discrimination Act 1984* to, among other things, insert a new provision expressly stating that it is unlawful , so as to codify the position at common law. It also establishes a new anti-sexual harassment jurisdiction in the Fair Work Commission. The amendments implement recommendations of the Australian Human Rights Commission national inquiry into sexual harassment in Australian workplaces in 2018 (the National Inquiry) and Respect@Work (the Sex Discrimination Commission's March 2020 report of the National Inquiry). Whilst the amendments do not specifically address company reporting requirements, sexual harassment in the mining industry has been in the spotlight (for example, the Report into Workplace Culture at Rio Tinto).

Victorian Taskforce on Workplace Sexual Harassment

Sexual harassment is seen as an occupational health and safety issue that requires employers to actively prevent and manage it. On 8 March 2021, the Victorian Government announced the establishment of the Ministerial Taskforce on Workplace Sexual harassment (the Taskforce) to develop reforms that will better prevent and respond to sexual harassment in workplaces. The taskforce provided 26 recommendations, the Victorian Government accepted in part or in principle 21 of the 26.

The reform pillars focus on (a) preventings this type of harassment from occurring, (b) supporting workers to report, (c) enforcing compliance measures when breaches occur and (d) raising awareness and promoting accountability in workplaces across Victoria. The proposed reforms also include the prohibition of non-disclosure agreements (NDAs) in workplace sexual harassment matters. The restrictions on the use of NDAs in workplace sexual harassment matters is already in place in Ireland, a province in Canada and California (US).

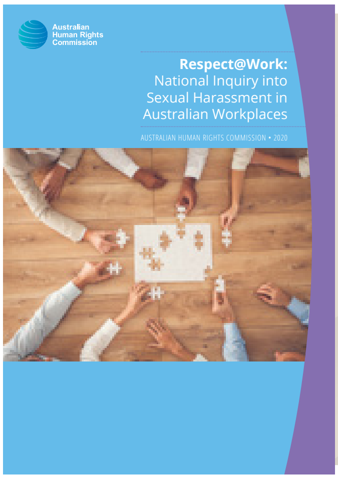
Occupational Health and Safety Amendment (Psychological Health) Regulations

Victoria has proposed the *Occupational Health and Safety Amendment (Psychological Health) Regulations* which contain strict obligations for employers in the management of risks to employees' mental health, including to identify and control psychosocial hazards and to implement "prevention plans". The proposed regulations are yet to take effect.

National system to address wage theft

It is estimated wage theft costs workers $1.35 billion each year. It happens across all industries and types of employers. Victoria and Queensland have criminalised wage theft. This means that it is offence for an employer, to among other things, deliberately and dishonestly underpay employees, withhold an employee's wage, superannuation or other entitlements. Instances of non-compliance can attract significant financial penalties and imprisonment for individuals. The Federal Government have signaled its intention to introduce a national system to address wage theft.

IT IS ESTIMATED WAGE THEFT COSTS WORKERS $1.35 BILLION EACH YEAR.



THE NEW FEDERAL GOVERNMENT HAS COMMITTED TO ADOPTING ALL 55 RECOMMENDATIONS SET OUT IN THE RESPECT@WORK REPORT, INCLUDING THE IMPOSITION OF A NATION-WIDE ‘POSITIVE’ DUTY ON EMPLOYERS TO PREVENT SEXUAL HARASSMENT

Issues in Australia (continued)

ASIC Whistleblower Policy and regulatory guidance

Since 1 January 2020, the Corporations Act has required public companies, large proprietary companies, and trustees of registrable superannuation entities to have a whistleblower policy that sets out particular matters, and to make that policy available to its officers and employees. To support the implementation of these requirements, in November 2019, ASIC released *Regulatory Guide 270 Whistleblower policies* (RG 270),[2] which contains guidance and good practice tips on establishing and implementing a whistleblower policy and program.

ASIC has reviewed the policies of a number of companies and published findings on how the policies reviewed address the legal requirements under the Corporations Act. ASIC was concerned the majority of those policies did not fully address the relevant requirements.

ASIC’s open letter to CEOs asking for a review of their whistleblower policies

Following findings that many entitles do not fully understand the enhanced whistleblower protection regime, ASIC has published an open letter to CEOs of public companies, large proprietary companies and trustees of registrable superannuation entities (RSEs) asking for a review of their whistleblower policies.[3]

ASIC’s open letter to CEOs reminds them of their obligation to have a whistleblower policy that is in line with the whistleblower protection and highlights what entities can do to improve their policies.

Future reform of the Public Interest Disclosure Act 2013

The Federal Government intends to undertake future reforms to the *Public Interest Disclosure Act 2013* to address whistle-blower laws in the public sector.

Issues overseas

Equal Pay Certification 2018 (Iceland)

Iceland has introduced a policy that requires businesses with more than 25 employees to show that they pay women and men equally for a job of equal value. This is implemented through a tool called the Equal Wage Management Standard.[4]

Equality Act (2010) (UK)

In the UK, the *Equality Act 2010* provides that an employer cannot enforce a pay secrecy clause if discussing was for ‘gender equality reasons’. The USA adopted similar position.

Human Rights Law (New York City, US)

On 1 November 2022, the New York City Human Rights Law required employers to include a good faith pay range in all job advertisements (known as the Salary Transparency Law). Any advertisement for a job, promotion, or transfer opportunity that would be performed in New York City is covered by this new law.

Pay Transparency Directive (European Union)

The European Union is currently negotiating a Pay Transparency Directive, which is likely to come into effect in 2024. The directive will require employers with at least 250 employees to report on their gender pay gap and perform a pay assessment if the gap exceeds 5%. The directive would also give jobseekers the right to information about the pay range and criteria of positions and pay data to show whether men and women are paid the same by the company in question.

Tom Brett
Partner
Gilbert + Tobin

2 ASIC, RG 270 Whistleblower policies (RG 270), accessed https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-270-whistleblower-policies/.
3 ASIC, 21-267MR ASIC calls on Australian CEOs to review whistleblower policies (13 October 2021), accessed https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-267mr-asic-calls-on-australian-ceos-to-review-whistleblower-policies/.
See also: https://download.asic.gov.au/media/pnkbtzpp/letter-to-ceos-on-whistleblower-policies-published-13-october-2021.pdf
4 https://hbr.org/2021/01/how-iceland-is-closing-the-gender-wage-gap#:~:text=In%202018%2C%20Iceland%20introduced%20the,%2C%20or%20simply%2C%20the%20system.

SUPPLY CHAIN DUE DILIGENCE

The Federal Government has commissioned a review to consider changes to modern slavery legislation. A number of jurisdictions overseas are refining their approach to human rights due diligence and human rights within supply chains.

HUMAN RIGHTS & SUPPLY CHAIN DUE DILIGENCE DEVELOPMENTS IN AUSTRALIA & OVERSEAS

Developments in Australia

When the *Modern Slavery Act 2018* **(Act)** was passed it established a national modern slavery reporting requirement which requires entities carrying on business in Australia with annual consolidated revenue of at least AU$100 million **(Reporting Entities)** to report on how they are addressing and preventing modern slavery risks in their operations and supply chains. Reporting Entities comply with the Act by preparing annual modern slavery statements, which are published by the Federal Government on the Modern Slavery Statements Register for transparency.

On 22 August 2022, the Federal Government released for public consultation the **Issues Paper for the statutory review of the Act (Review)**. This Issue Paper follows the Terms of Reference for the Review which was published by the Australian Border Force. The Review commenced on 31 March 2022 and is being led by Professor John McMillan, a Professor at the Australian National University, supported by the Australian Border Force and the Attorney-General's Department. The Review will consider the operation of the Act and whether any additional measures are necessary or desirable to improve the operation of the Act or compliance with the Act. The Issues Paper details specific issues that will be considered during the Review, including:

— **Whether the AU$100 million annual consolidated revenue threshold is appropriate.** There is not necessarily a direct correlation between the size of an entity and its exposure to modern slavery risks, although larger Reporting Entities are, generally speaking, better equipped to comply with the Act. If the threshold changes, different companies may become Reporting Entities, therefore Australian businesses should start preparing for this now, if they are not already doing so.

— **Whether the 'modern slavery' definition under the Act, which is used in the mandatory reporting criteria, is appropriate.** The current definition of 'modern slavery' is relatively technical. However it is unlikely Reporting Entities will change their operations if the definition of modern slavery is amended. Reporting Entitles do not rely upon technical definitional arguments to delineate their responsibilities under the Act, or more generally at law. Engaging in conduct that sits at the boundaries of what may or may not constitute "modern slavery" is inherently high risk. Reputational damage may still occur even where an entity is sitting on the right-side of that boundary, and the consequences for erring on the wrong-side of that boundary are potentially severe. In this sense, a more general, less technical, approach to defining modern slavery may make little difference to how Reporting Entities approach their reporting obligations.

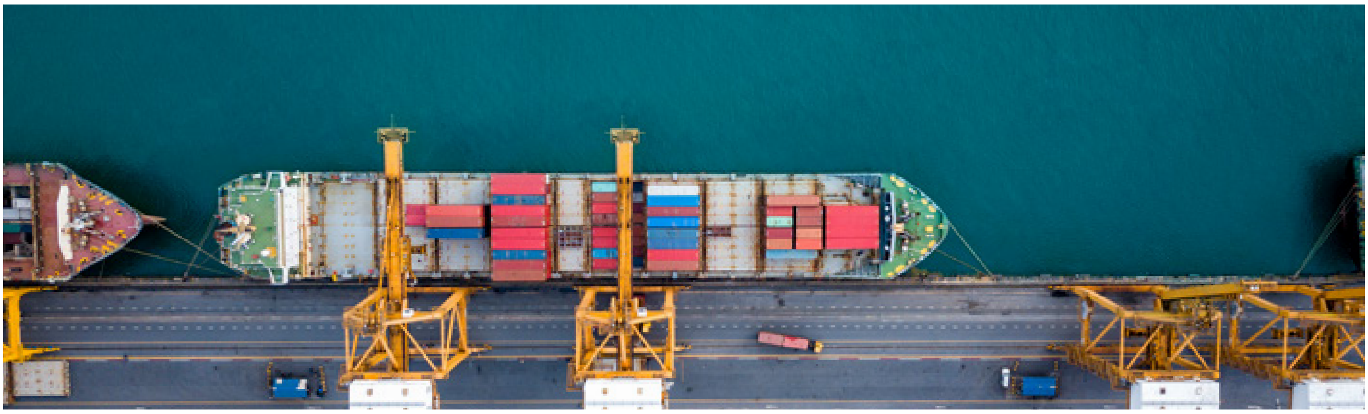
— **Whether it is desirable or necessary for an independent body, such as an Anti-Slavery Commissioner, to oversee the implementation and/or enforcement of the Act.** The Federal Government has already committed to establishing an independent Anti-Slavery Commissioner, with the intent that it will coordinate work across industry and government in the aim of eliminating modern slavery in Australia and global supply chains. However, whether it will oversee the implementation or enforcement of the Act is still to be determined.

The three-month consultation period for the Review closed on 22 November 2022. During the public consultation period, Professor McMillan will be conducting both in person and online consultation sessions regarding the Review. The Review will be completed within 12 months of the commencement of the Act, which will be in March 2023.

The Review could have significant implications for Australian businesses. There is the potential for additional companies to be covered by the reporting regime, and there will be an expectation for companies to increase the quality of their reporting under the regime. Additionally, there will be the potential for this law reform to expand into broader human rights due diligence in Australia.

The modern slavery legislation in NSW has recently been amended. The *Modern Slavery (Amendment) Act 2021*[1] of NSW (NSW Act) commenced on 1 January 2022. The amendments repealed previous modern slavery reporting obligations for NSW businesses in an effort to harmonise the supply chain transparency regime nationally under the Act. As a result of the change, NSW businesses with over $50 million annual revenue that had previously been required to prepare modern slavery statements and report on steps taken to assess and address risks of modern slavery in their supply chains and operation will no longer be required to do so. Businesses with consolidated revenue over $100 million will still be obliged to report under the Commonwealth regime. The NSW Act continues to provide a framework for voluntary reporting by those companies not obliged to do so under the Commonwealth Act, tracking modern slavery risks in NSW government supply chains, and providing education and oversight on issues through the NSW Anti-Slavery Commissioner.

1 *Modern Slavery (Amendment) Act 2021* (NSW), accessed https://legislation.nsw.gov.au/view/pdf/asmade/act-2021-39.



Developments overseas

EU Directive on corporate sustainability due diligence

On 23 February 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence,[2] which proposes to establish a corporate sustainability due diligence duty to address adverse environmental and human rights impacts,[3] including those stemming from value chains. The proposed Directive will aim to ensure that directors incorporate sustainability issues into the decision-making processes of their companies. The proposed Directive covers specific human rights that are relevant to business activities and some environmental rights, such as rights concerning biodiversity. Due to the broad application of the proposed Directive, it may apply to companies that are not in the EU.[4]

On 10 November 2022, the EU Parliament adopted the Corporate Sustainability Reporting Directive (CSRD). This Directive mandates many companies to regularly disclose information about the environmental and societal impact of their activities. It will also apply to all non-EU companies with substantial activity in the EU. This is understood to mean companies that have a turnover above €150 million in the EU.[5] Obligations imposed under the CSRD include the provision of more detail in reports concerning the environment, human rights and social standards.

The reporting results will be measured in line with EU climate goals and subject to independent audits and reporting standards, to be set by the European Financial Reporting Advisory Group. It is expected that the Council of the EU will adopt the CSRD in late 2022. The CSRD would then be published in the EU Official Journal, and would come into force 20 days after its publication. Positive reporting obligations would begin between 2024 and 2028, depending on the size of the company.[6]

Legislation mandating HRDD

A number of countries have been developing laws that mandate Human Rights Due Diligence **(HRDD)** in supply chains:

- **Norway** passed the *Norwegian Transparency Act 2022*.[7]
- **Germany** passed the *Corporate Due Diligence Obligations in Supply Chains 2021* (which will be effective from 1 January 2023).[8]
- **The Netherlands** is considering the *Responsible and Sustainable International Business Conduct Bill*.[9]
- **France** passed the *French Duty of Vigilance Law 2017*.[10]

With mandated HRDD becoming more prevalent, proactive implementation and corporate commitment in conducting HRDD will ensure and enhance the sustainability of businesses. To prepare for the new wave of HRDD trends, companies should start contemplating how HRDD can be implemented under the current supply chain structures. [11]

2 *Proposal for a Directive of The European Parliament And Of The Council on Corporate Sustainability Due Diligence and amending Directive* (EU) 2019/1937 (2022), accessed https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.

3 Clayton Utz, *European Commission takes huge step towards mandating corporate sustainability due diligence* (2022), accessed https://www.claytonutz.com/knowledge/2022/march/european-commission-takes-huge-step-towards-mandating-corporate-sustainability-due-diligence#:~:text=On 23 February 2022%2C the,behaviour throughout global value chains.

4 Clayton Utz, *European Commission takes huge step towards mandating corporate sustainability due diligence* (2022), accessed https://www.claytonutz.com/knowledge/2022/march/european-commission-takes-huge-step-towards-mandating-corporate-sustainability-due-diligence#:~:text=On 23 February 2022%2C the,behaviour throughout global value chains.

5 European Parliament, *New social and environmental reporting rules for large companies* (2022), accessed https://www.europarl.europa.eu/news/en/press-room/20220620IPR33413/new-social-and-environmental-reporting-rules-for-large-companies

6 Rahman Ravelli, *The EU Corporate Sustainability Due Diligence Directive – a step closer to ESG mandatory reporting* (2022), accessed https://www.lexology.com/library/detail.aspx?g=b7cccba7-546a-45b2-87d0-6005a18612b5

7 JD Supra, *The Norwegian Transparency Act comes into force: mandatory human rights due diligence for large companies doing business in Norway (an in practice, many of their foreign suppliers)* (2022), accessed here; Stortinget, *Adoption of the Act on Business Transparency and Work with Basic Human Rights and Decent Working Conditions* (Openness Act) (2021), accessed https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2020-2021/vedtak-202021-176/.

8 Global Compliance News, *International: human rights due diligence – recent global trends* (2022), accessed https://www.globalcompliancenews.com/2022/06/12/international-human-rights-due-diligence-recent-global-trends-02062022/#:~:text=Germany passed its Supply Chain,as well as reporting duties.

9 Global Compliance News, *International: human rights due diligence – recent global trends* (2022), accessed https://www.globalcompliancenews.com/2022/06/12/international-human-rights-due-diligence-recent-global-trends-02062022/#:~:text=Germany passed its Supply Chain,as well as reporting duties.

10 Business and Human Rights Resource Centre, *France's duty of vigilance law* (2022), accessed https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/frances-duty-of-vigilance-law/.

11 Global Compliance News, *Thailand: human rights due diligence* (2022), accessed https://www.globalcompliancenews.com/2022/06/23/thailand-human-rights-due-diligence-09062022/.

Developments overseas (continued)

Developments relating to human rights and supply chains

A number of other countries have been developing laws, regulations, policy documents and guidelines regarding human rights and supply chains:

- The **Canadian government** is currently considering the *Fighting Against Forced Labour and Child Labour in Supply Chains Bill*, which will allow the prohibition of the importation of goods manufactured by forced or child labor.[12]
- The **US government** signed into law the *Uyghur Forced Labor Prevention Act* in 2021, which provides that all goods manufactured in the Xinjiang Uyghur Autonomous Region are the product of forced labour and are therefore not allowed to be imported into the US.[13]
- The **Japanese government** is drafting HRDD guideline for Japanese companies. The guideline, scheduled to be issued sometime in the summer of this year, is expected to be based on the EU and US practices on HRDD and provides an assessment method, implementation system, and sanction measures in case of violations.[14]
- The **Thai government**, in cooperation with the United Nations Development Programme **(UNDP)**, has published its first National Action Plan on Business and Human Rights (2019-2022) **(NAP)** which primarily focuses on improving and addressing urgent and important human rights issues caused by business activities. [15]
- The **Swiss government** has adopted amendments to the Code of Obligations, which in part introduce new due diligence and reporting obligations with respect to conflict minerals and to prevent child labour throughout the supply chain.[16] Even though detailed HRDD is yet to be developed in many countries, the examples above show that there is a trend for countries to focus on HRDD issues and to start legislating in these areas. Companies should start preparing to respond to investor calls for human rights due diligence in supply chains now, if they have not already done so.

Right to a healthy environment

On 28 July 2022, the United Nations General Assembly declared the ability to live in a "clean, healthy and sustainable environment" a universal human right. Though the declaration is not legally binding, it has laid the foundation for more effective treaties and national laws. This is relevant to HRDD as there is now one more human right that can be addressed in HRDD. In Australia, the Environmental Defenders Office has issued a report that urges the Australian Government to recognise in legislation the right to a healthy environment.[17]

Ilona Millar
Partner
Gilbert + Tobin

12 Global Compliance News, *International: human rights due diligence – recent global trends* (2022), accessed https://www.globalcompliancenews.com/2022/06/12/international-human-rights-due-diligence-recent-global-trends-02062022/#:~:text=Germany passed its Supply Chain,as well as reporting duties.
13 Global Compliance News, *International: human rights due diligence – recent global trends* (2022), accessed https://www.globalcompliancenews.com/2022/06/12/international-human-rights-due-diligence-recent-global-trends-02062022/#:~:text=Germany passed its Supply Chain,as well as reporting duties.
14 Global Compliance News, *International: human rights due diligence – recent global trends* (2022), accessed https://www.globalcompliancenews.com/2022/06/12/international-human-rights-due-diligence-recent-global-trends-02062022/#:~:text=Germany passed its Supply Chain,as well as reporting duties.
15 Global Compliance News, *Thailand: human rights due diligence* (2022), accessed https://www.globalcompliancenews.com/2022/06/23/thailand-human-rights-due-diligence-09062022/.
16 Lenz & Staehelin, *New ESG regulations enter into force as of January 1, 2022* (2021), accessed https://www.lenzstaehelin.com/en/publications/newsletters/detail/new-esg-regulations-enter-into-force-as-of-january-1-2022.
17 Footprint News, *Albanese urged to enact UN environmental right into law* (2022), accessed here. See also: Environmental Defenders Office, *A healthy environment is a human right* (2022), accessed https://www.edo.org.au/publication/the-right-to-a-healthy-environment/.

DIRECTORS' DUTIES & GOVERNANCE

The AICD, complemented by commentary from leading barristers Bret Walker AO SC, Gerald Ng MAICD, Noel Hutley SC and Sebastian Hartford Davis, has provided updated guidance on the approach directors should take when considering the interests of a company.

DIRECTORS' DUTIES & GOVERNANCE DEVELOPMENTS IN AUSTRALIA & OVERSEAS

Developments in Australia

In July 2022, the **legal opinion of Bret Walker AO SC and Gerald Ng MAICD** regarding directors' "best interest" duty **(Walker and NG Opinion)**[1] was released, as well as the Australian Institute of Company Directors' **(AICD)** Practice Statement regarding the approach directors should take when considering the interests of the company.

The "best interest" duty is that, under Australian law, directors must exercise their powers and discharge their duties in good faith in the best interests of the company and for a proper purpose.[2] Bret Walker AO SC and Gerald Ng MAICD were commissioned by AICD to provide the Walker and NG Opinion.

The Walker and NG Opinion provides that directors have considerable discretion in identifying the best interests of a company and its shareholders. The "best interest" duty requires directors to consider what is in the best interests of shareholders. However, the law does not assume that shareholder interests are best served by having no regard to other stakeholders, such as employees, customers, suppliers, creditors, Traditional Owners, the environment and broader community, particularly over the longer-term. Though there is no duty owed specifically to stakeholders, their interests should be legitimate concerns of company directors. If stakeholder interests are not met, there could be long term risks for the company such as reputational harm.

The Walker and NG Opinion also provides that the law commonly imposes specific obligations on companies with respect to the interests of certain stakeholders, which may necessitate the prioritisation of those interests. Directors should not take steps to avoid such obligations when fulfilling the "best interest" duty. Directors may need to meet the obligations owed to the stakeholders even if it adversely impacts upon returns that might otherwise be enjoyed by shareholders.

In AICD's Practice Statement regarding the directors' "best interests" duty **(Practice Note)**[3] AICD provides that directors should take a long-term view of their company's interests and seek to maintain a respectful and transparent relationship with stakeholders. This compliments the commentary from leading barristers Bret Walker AO SC, Gerald Ng MAICD, Noel Hutley SC and Sebastian Hartford Davis.

On 23 April 2021, the Centre for Policy Development published the latest **legal opinion of Noel Hutley SC and Sebastian Hartford Davis** regarding climate change risks and the duty of "care and diligence" imposed upon Australian company directors by section 180(1) of the *Corporations Act 2001* (Corporations Act) and general law (Hutley and Davis Opinion).[4]

1 Bret Walker and Gerald Ng, *The content of directors' "best interest" duty* (2022), accessed https://www.aicd.com.au/content/dam/aicd/pdf/news-media/research/2022/AICD-walker-opinion-feb-2022.pdf.

2 At general law and also section 181(1)(a) of the *Corporations Act 2001*.

3 Australian Institute of Company Directors, *Directors' "best interests" duty in practice* (2022), accessed https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-tools/board/directors-best-interests-duty-in-practice-web2.pdf.

4 Noel Hutley SC and Sebastian Hartford-Davis, *Climate Change and Directors' Duties: Further Supplementary Memorandum* (2021), accessed https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf. See also: Noel Hutley SC and Sebastian Hartford-Davis, *Climate Change and Directors' Duties* (2016), accessed here; and Noel Hutley SC and Sebastian Hartford Davis, *Climate Change and Directors' Duties: Supplementary Memorandum* (2019), accessed https://cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016_pdf.pdf.

Developments in Australia (continued)

Previously, Noel Hutley SC and Sebastian Hartford Davis opined that there has been a profound shift in the way regulators and the public perceive climate change, and in turn, there has been a shift in what is expected of regulators and companies when they respond to and address climate change issues. In turn, the standard of care required to discharge a directors' duty of care and diligence in relation to climate-related governance under the Corporations Act has been elevated. In the Hutley and Davis Opinion, the authors have stated that the "standard of care to be exercised by directors with respect to climate change has risen and continues to rise." They have also perceived a "growing sense of regulatory, investor and community pressure for directors to understand, and to convey that they understand, that the financial risks of a changing climate are to be taken seriously as economic and operational risks." This pressure is reflected in the increasing levels of climate risk disclosure in the financial statements of companies, and the net zero targets committed to by numerous Australian companies.

Noel Hutley SC and Sebastian Hartford Davis also discussed the acute litigation risk of greenwashing claims in the context of net zero commitments. They opined that net zero emissions targets appear to be regarded by many directors as an "appropriate and necessary step" in the discharge of duties, and that there is increasing momentum towards companies making net zero commitments.

NET ZERO TARGETS MUST BE BASED ON A GENUINE INTENTION, FORMED ON REASONABLE GROUNDS, TO PURSUE STRATEGIES TO ACHIEVE THE COMMITMENT IN GOOD FAITH

However, net zero targets must be based on a genuine intention, formed on reasonable grounds, to pursue strategies to achieve the commitment in good faith. Otherwise, the company with the commitment would be at risk of greenwashing claims. This may lead to exposure to liability for a breach of the directors' duty of care.

To reduce the likelihood of liability arising from a net zero commitment, and to reduce the risk of future greenwashing claims, directors can take several practical steps. First, directors should develop a net zero strategy which is integrated with their company's operational strategy. Second, the net zero strategy should explain which emissions it encompasses (e.g. Scope 1, Scope 2 and Scope 3 emissions) and the relevant timeframe of the commitment. Third, if a company's net zero strategy is amended, not suitably fulfilled, affected by supervening circumstances, or otherwise untenable, this information should be disclosed promptly.

Developments overseas

In its Communication on the Green Deal dated 11 December 2019,[5] the European Commission highlighted that sustainability should be embedded further into the corporate governance framework.

On 23 February 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence,[6] which proposes to establish a corporate sustainability due diligence duty to address adverse environmental and human rights impacts. The proposed Directive will aim to ensure that directors incorporate sustainability issues into the decision-making processes of their companies. The proposed Directive covers specific human rights that are relevant to business activities and some environmental rights, such as rights concerning biodiversity. Due to the broad application of the proposed Directive, it may apply to companies that are not in the EU.

Karen Evans-Cullen
Partner
Gilbert + Tobin

5 Communication from the Commission to the European Parliament, *the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: the European Green Deal* (2021), accessed https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588580774040&uri=CELEX%3A52019DC0640.

6 *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* (EU) 2019/1937 (2022), accessed https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.

WANT TO KNOW MORE ABOUT SUSTAINABILITY IN YOUR INDUSTRY?

Get in touch:

GILBERT + TOBIN

Gilbert + Tobin are recognised as a leading transactions, regulatory and disputes law firm. We handle some of the most complex transactions in Australia, advising acquirers, targets and financiers. We are trusted by clients on sensitive regulatory investigations and approvals, litigation and Royal Commissions.

Visit www.gtlaw.com.au

BWD

BWD is an advisory firm that specialises in sustainable business strategy. By combining best practice sustainability strategy with original design and data visualisation, we cut through the complexity of sustainability to create a lasting competitive advantage for our clients.

Visit bwdstrategic.com

GILBERT
+TOBIN

GTLAW.COM.AU

Level 35, Tower Two,
International Towers Sydney
200 Barangaroo Ave,
Barangaroo NSW 2000

T +61 2 9263 4000

BWD

BWDSTRATEGIC.COM

Suite 2, Level 1,
234 George St,
Sydney NSW 2000

T +61 422 339 069