Directors' Duties Navigator: Climate Risk and Sustainability Disclosures*

Fourth edition, September 2024

**Previously titled 'Primer on Climate Change: Directors' Duties and Disclosure Obligations'*

Commonwealth Climate and Law Initiative

Climate Governance Initiative

Australia

1. Legal and Regulatory Landscape Regarding Climate Change

1.1. Government approach to climate change

1.1.1. Climate change legislation

In September 2022, Australia passed the *Climate Change Act 2022* (**CCA**) enshrining in law the goal of reducing Australia's net GHG emissions to 43% below 2005 levels by 2030 and achieving net zero by 2050.[1] Pursuant to the CCA, the Australian Government is required to prepare an *Annual Climate Change Statement*. The 2023 statement outlines the Government's policy commitment to mitigate effects of climate change.[2] The CCA also expanded the role of the Climate Change Authority (the **Authority**), an independent body established under the *Climate Change Authority Act 2011*, to provide expert advice to the Australian Government on climate change policy.[3] In November 2023, the Authority reported that whilst the Government is pursuing a broad and deep climate change policy agenda, this will not achieve the emission reductions required by the CCA.[4] The Authority has provided 42 recommendations focused on decarbonising each sector of the Australian economy.[5]

1.1.2. Transition plans and targets

The CCA codifies Australia's updated 2022 nationally determined contribution (**NDC**) under Article 4 of the Paris Agreement. The Authority is required under the CCA to advise the Minster for Climate Change at least every 5 years in relation to setting future emissions reduction targets to be included in new NDCs.[6] The Authority expects to submit its 2035 targets advice to the Minister for Climate Change in the fourth quarter of 2024,[7] and Australia will submit its second NDC to the UNFCCC in 2025.[8]

The Government is in the process of developing a *Net Zero Plan* to guide Australia's transition to its legislated target of net zero GHG emissions by 2050 (the **Transition Plan**).[9] 6 sectoral emission reduction plans have been developed by Government departments and the CCA to support the Transition Plan, covering electricity and energy, transport, agriculture and land, industry and waste, resources, and the built environment.[10]

With respect to adaption, in October 2021 a *National Climate Resilience and Adaptation Strategy 2021-2025* was published, with the National Adaptation Policy Office (**NAPO**) coordinating climate adaptation work across all governments.[11] The Department of Climate Change, Energy, the Environment and Water is now developing Australia's first National Climate Risk Assessment and National Adaptation Plan. In April 2024, a consultation closed on a *National Adaptation Plan Issues Paper*.[12] As at the time of writing, the results are yet to be

1 Section 10, Climate Change Act, 2022 (13 September 2022) <https://www.legislation.gov.au/Details/C2022A00037>.

2 Australian Government, Department of Climate Change, Energy, the Environment and Water (2023) <https://www.dcceew.gov.au/sites/default/files/documents/annual-climate-change-statement-2023.pdf>

3 Section 14(1), CCA

4 Climate Change Authority, Authority publishes its advice for the government's second Annual Climate Change Statement (November 2023) < https://www.climatechangeauthority.gov.au/authority-publishes-its-advice-governments-second-annual-climate-change-statement>

5 Climate Change Authority, 2023 Annual Progress Report Recommendations (October 2023) <https://www.climatechangeauthority.gov.au/sites/default/files/documents/2023-11/2023%20APR%20-%20Recommendations_0.pdf>

6 Section 15, CCA

7 Climate Change Authority, 2035 Emissions Reduction Targets (May 2024) <https://www.climatechangeauthority.gov.au/2035-emissions-reduction-targets>

8 Australian Government, Department of Climate Change, Energy, the Environment and Water, International climate action <https://www.dcceew.gov.au/climate-change/international-climate-action>

9 Australian Government, Department of Climate Change, Energy, the Environment and Water, Net Zero <https://www.dcceew.gov.au/climate-change/emissions-reduction/net-zero#:~:text=The%20Net%20Zero%20Plan%20will,Australia's%20transition%20to%20net%20zero>

10 Climate Change Authority, Sector Pathways Review (July 2024) <https://www.climatechangeauthority.gov.au/sector-pathways-review#:~:text=The%20Australian%20Government%20is%20currently,transition%20to%20net%20zero%20emissions>

11 Australian Government, Department of Climate Change, Energy, the Environment and Water, National Climate Resilience and Adaptation Strategy <https://www.dcceew.gov.au/climate-change/policy/adaptation/strategy>

12 Australian Government, Department of Climate Change, Energy, the Environment and Water, Assessing and adapting to Australia's climate risks <https://www.dcceew.gov.au/climate-change/policy/adaptation/ncra#:~:text=We%20are%20developing%20Australia's%20first,and%20impacts%20from%20climate%20change.>

released. All states and territories have progressed adaptation plans, either as standalone strategies or part of a broader climate plan.[13]

On 27 March 2024, the Australian Government introduced two bills to Parliament aimed at advancing the country's net zero transition: the *Net Zero Economy Authority Bill 2024 (***NZEA Bill***)* and the *Net Zero Economy Authority (Transitional Provisions) Bill 2024* (**Transitional Provisions Bill**). The NZEA Bill proposes the establishment of an independent statutory authority to guide economic transformation in line with global decarbonisation efforts. The Transitional Provisions Bill facilitates the transition of the interim Net Zero Economy Agency, currently part of the Department of the Prime Minister and Cabinet, into this new standalone authority.[14]

1.1.3. Wider government approach to climate change

Australia's 2023-24 national budget included AUD4.6 billion in new climate-related spending commitments through to 2030, adding to the AUD24.9 billion from the 2022-23 budget.[15] On 14 May 2024, the 2024-2025 national budget was published[16], which plans to invest AUD22.7 billion over the next decade to build 'Future Made' – a plan to maximising the economic and industrial benefits of the move to net zero and secure "*Australia's place in a changing global economic and strategic landscape*".[17]

Led by the Australian Sustainable Finance Institute (**ASFI**), the *Australian Taxonomy Development Project* commenced in July 2023.[18] The taxonomy will "*support mobilisation of private capital towards sustainable activities and provide a base for further measures to address greenwashing and help facilitate Australia's transition to net zero*."[19] The initial phase of the taxonomy comprised the development of climate change mitigation technical screening criteria for 6 priority sectors, and associated technical work on data requirements, ensuring minimum social safeguards are embedded and a 'Do No Significant Harm' framework. The first round of public consultation has finished, with the second round due to commence in November 2024.[20]

In 2016, a Safeguard Mechanism was introduced, and reformed in 2023, to reduce emissions at Australia's largest industrial facilities by setting legislated limits to help Australia achieve its emission reduction targets under the CCA.[21] The Safeguard Mechanism and carbon credit units are administered by the Clean Energy Regulator.[22]

In its 2023 Annual Progress Report, the Authority recommends that the Government develop and publish a *National Carbon Market Strategy*.[23] As of April 2024, the Clean Energy Regulator is developing an Australian Carbon Exchange "*to make it easier to trade Australia carbon credit units.*"[24]

1.2. Regulatory approaches to climate change

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[13] Australian Government, Department of Climate Change, Energy, the Environment and Water, Climate adaptation in Australia <https://www.dcceew.gov.au/climate-change/policy/adaptation>

[14] Australian Government Department of the Prime Minister and Cabinet, Net Zero Economy Authority Bill introduced (2024) <https://www.pmc.gov.au/news/net-zero-economy-authority-bill-introduced>

[15] Australian Office of Financial Management, Australian Government Climate Change Commitments, Policies and Programs (February 2024) <https://www.aofm.gov.au/sites/default/files/2024-02-02/Climate%20change%20slides%20updated%20February%202024.pdf>

[16] Government of Australian, Budget 2024-2025 <https://budget.gov.au>

[17] Government of Australia, A Future Made in Australia <https://budget.gov.au/content/factsheets/download/factsheet-fmia.pdf>

[18] ASFI, Taxonomy Project <https://www.asfi.org.au/taxonomy>

[19] The Treasury, Sustainable Finance Roadmap (June 2024) <https://treasury.gov.au/sites/default/files/2024-06/p2024-536290.pdf> 3

[20] ASFI Taxonomy Project < https://www.asfi.org.au/taxonomy-public-consultation/#nextsteps>

[21] Department of Climate Change, Energy, the Environment and Water, Safeguard Mechanism <https://www.dcceew.gov.au/climate-change/emissions-reporting/national-greenhouse-energy-reporting-scheme/safeguard-mechanism>

[22] Clean Energy Regulatory, Carbon Credits <https://cer.gov.au/markets/carbon-credits>

[23] CCA, 2023 Annual Progress Report (2023) <https://www.climatechangeauthority.gov.au/sites/default/files/documents/2023-11/2023%20AnnualProgressReport_0.pdf> 137

[24] Clean Energy Regulator, Australian Carbon Exchange *<https://cer.gov.au/markets/australian-carbon-exchange>*

1.2.1. Climate change as a systemic financial risk

Australian regulators recognise climate change as a systemic financial risk that must be considered, and if material to businesses, addressed by directors through governance, risk management and disclosure practices. In 2017, a *Council of Financial Regulators Climate Working Group* was established, bringing together the Australian Prudential Regulation Authority (**APRA**), Australian Securities & Investments Commission (**ASIC**), the Reserve Bank of Australia's (**RBA**) and Treasury, to consider and coordinate actions in relation to understanding and managing financial climate-related risks.

1.2.2. Financial regulation and guidance

Australian regulators have taken concrete steps to address climate-related financial risks and encourage companies to do likewise.

RBA: As early as 2019, the RBA Deputy Governor described the physical and transition risks associated with climate change as "*likely to have first-order economic effects*".[25] The RBA's Financial Stability Reviews throughout 2022, 2023, and the most recent in March 2024, identify climate change as a key risk to financial stability originating from outside the financial system.[26] A RBA review published in March 2023 recommended that the RBA "*continue its work to understand the implications of climate change for the economy and the financial system, taking further steps to incorporate physical and transition risks into RBA analysis and modelling*", although the transition to a low carbon economy not be an explicit objective of monetary policy, this being better suited to Government policies.[27]

APRA: APRA has emphasised that climate risks should be managed like any other risk, in line with existing prudential risk management standards[28] and its *Prudential Practice Guide CPG 229 Climate Change Financial Risks* (**CPG 229**), issued in November 2021.[29] APRA and the RBA have announced that they will increase the incorporation of climate-related issues into their supervisory roles, including increasing the scrutiny of institutions' climate risk management and factoring this into ongoing stress tests.[30] In 2022, APRA carried out a climate vulnerability assessment of the five largest Australian banks.[31] Key insights include that climate risk impacts are concentrated in specific regions or industries (e.g., mining, manufacturing and transport) and whilst climate-related data quality and accessibility was a challenge, this should not preclude financial institutions undertaking climate risk analysis.

In June 2023, the Australian Government updated its APRA Statement of Expectations, which now requires the regulator to promote prudent practices and transparency in relation to climate-related financial risks and adoption of climate reporting standards to entities under its

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25 Guy Debelle, 'Climate Change and the Economy,' Speech at the Public Forum hosted by the Centre for Policy Development, Sydney (March 2019) <https://www.rba.gov.au/speeches/2019/sp-dg-2019-03-12.html>.

26 RBA, Financial Stability Review <https://www.rba.gov.au/publications/fsr/2024/mar/contents.html>

27 RBA, Review of the Reserve Bank of Australia - An RBA fit for the future (March 2023) < https://rbareview.gov.au/sites/rbareview.gov.au/files/2023-06/rbareview-report-at_0.pdf> 6

28 Summerhayes G, 'Australia's new horizon: Climate change challenges and prudential risk', Speech at the Insurance Council of Australia Annual Forum, Sydney (17 February 2017) and Summerhayes G, 'Financial exposure: the role of disclosure in addressing the climate data deficit', Speech at ClimateWise and University of Cambridge Institute for Sustainable Leadership, London, (22 February 2019); APRA, 'APRA releases guidance on managing the financial risks of climate change' (22 April 2021) APRA Website <https://www.apra.gov.au/news-and-publications/apra-releases-guidance-on-managing-financial-risks-of-climate-change>.

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

30 APRA, 'Information Paper: APRA's Supervision Priorities' (February 2021) APRA Website <https://www.apra.gov.au/sites/default/files/2021-01/Information%20Paper%20-%20Supervision%20Priorities%202021.pdf>; APRA, 'NGFS Pledge – Combined statement from APRA and the RBA' (4 November 2021) <https://www.apra.gov.au/ngfs-pledge-%E2%80%93-combined-statement-from-apra-and-rba>.

31 APRA, Information Paper - Climate Vulnerability Assessment Results (November 2022) <https://www.apra.gov.au/sites/default/files/2022-11/Information%20Paper%20-%20Climate%20Vulnerability%20Assessment%20Results_0.pdf>.

remit.[32] APRA responded to this with a Statement of Intent[33] and Corporate Plan 2023-2024.[34]

In April 2024, APRA announced that it would initiate a voluntary survey among its regulated entities, requesting them to self-assess the maturity of their current practices against the CPG 229.[35] This survey follows an initial survey that took place in 2022.[36] The climate risk self-assessment survey aims to enhance the understanding of both APRA and the industry regarding the strategies employed by APRA-regulated entities to identify, assess, and manage climate-related financial risks. APRA will publish information on industry-level insights and themes, and also incorporate insights from the survey into its ongoing supervisory approaches to addressing the financial risks of climate change. APRA will consider repeating the survey in the future years to monitor evolving industry approaches to managing the financial risks of climate change.

In August 2024, APRA released their 2024-2025 Corporate Plan setting out the strategic objectives that will drive their top priorities over the next four years. This includes an increasing expectation of entities to consider the financial impacts of climate risk in decision-making.[37]

ASIC: In recent years, ASIC, the securities and investments regulator, has characterised climate change as a "*systemic risk that could have a material impact on the future financial position, performance or prospects of entities*".[38] In December 2022, then ASIC Commissioner Sean Hughes highlighted the regulatory priority of being "*focused on the oversight of sustainability-related disclosure and governance practices of listed companies, managed funds, superannuation funds and green bonds*".[39]

In May 2023, ASIC announced that climate-related financial risks are among its current supervisory and enforcement priorities.[40] As well as reporting, ASIC has taken a keen interest in the issue of greenwashing. In June 2022 ASIC published *Information Sheet 271 How to avoid greenwashing when offering or promoting sustainability-related products* (**Info Sheet 271**).[41] In June 2023, ASIC argued the policy of little or no ESG disclosures, sometimes referred to as 'greenhushing', has emerged as potentially another form of greenwashing.[42] ASIC has recently taken action in cases relating to greenwashing (outlined further below).

In November 2023, ASIC announced that it has retained enforcement priorities relating to greenwashing for 2024 and that its focus on governance and directors' duties failures has been added as an enduring priority.[43] ASIC's 2024-25 Corporate Plan details its strategic priorities, including "*addressing financial system climate change risk"*.[44]

32 APRA Statement of Expectations, <https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/apra-statement-expectations> (7 June 2023)

33 APRA, Statement of Intent (June 2023) <https://www.apra.gov.au/statement-of-intent>

34 APRA, Corporate Plan 2023-24 <https://www.apra.gov.au/apra-corporate-plan-2023-24>

35 APRA, LETTERS, Climate risk self-assessment survey (April 2024) <https://www.apra.gov.au/climate-risk-self-assessment-survey-0>

36 APRA, Information Paper – Climate risk self-assessment survey (August 2022) <https://www.apra.gov.au/information-paper-climate-risk-self-assessment-survey>

37 APRA, 'Corporate Plan 2024-25' https://www.apra.gov.au/apra-corporate-plan-2024-25.

38 ASIC, 'RG 247 Effective disclosure in an operating and financial review' (August 2019) <https://download.asic.gov.au/media/5230063/rg247-published-12-august-2019.pdf>

39 ASIC Commissioner Sean Hughes, ASIC's current focus: What are the regulator's expectations on sustainability-related disclosures? (07 December 2022) <https://asic.gov.au/about-asic/news-centre/articles/asic-s-current-focus-what-are-the-regulator-s-expectations-on-sustainability-related-disclosures/>

40 APRA Enforcement Priorities, 8 May 2023 <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/>; ASIC MR23-026, 'ASIC to expand enforcement focus areas in the coming year', 15 February 2023 <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-026mr-asic-to-expand-enforcement-focus-areas-in-the-coming-year/>

41 ASIC, Information Sheet 271 (June 2022) <https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>

42 ASIC, ASIC continues action on misleading claims to deter greenwashing misconduct (August 2024) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-185mr-asic-continues-action-on-misleading-claims-to-deter-greenwashing-misconduct/>
<https://asic.gov.au/about-asic/news-centre/speeches/asic-chair-s-afr-esg-summit-speech/>

43 ASIC, 'ASIC announces 2024 enforcement priorities' (21 November 2023) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-310mr-asic-announces-2024-enforcement-priorities/?altTemplate=betanewsroom>

44 ASIC, Corporate Plan 2024-25 (22 August 2024) < https://download.asic.gov.au/media/1t4gbqvs/asic-corporate-plan-2024-25-published-22-august-2024.pdf>

1.2.3. Liability risk: enforcement action by regulators

In accordance with ASIC's priority of taking action against greenwashing, in an August 2024 report, ASIC reported 47 regulatory interventions in relation to greenwashing between 1 April 2023 and 30 June 2024.[45] In June 2024 ASIC indicated that it has issued 19 greenwashing-related infringement notices to date.[46] ASIC has signalled its intention to "*move beyond fines or just infringement notices to actually take in-court action*", and has obtained additional Government funding to expand greenwashing surveillance and enforcement activities.[47]

A notable example of enforcement action by ASIC is the case against Vanguard Investments Australia Ltd, which marked ASIC's first greenwashing civil penalty outcome. In this case, ASIC pursued Vanguard for making false or misleading representations about the ESG criteria applied to its investment fund. The Federal Court of Australia found that Vanguard had misled investors by claiming that all securities in the fund were screened against ESG criteria, while the screening was limited and many securities did not meet the claimed standards.[48]

Similarly, in June 2024 the Federal Court of Australia found that the trustee for superannuation fund Active Super had made various misleading statements to consumers concerning the nature of its investments in a greenwashing action brought by ASIC.[49]

In August 2024, the Federal Court of Australia ordered another superannuation fund, Mercer Superannuation (Australia) Limited, to pay an AUD11.3 million penalty after it admitted to making misleading statements about the ESG credentials of its investment options.[50]

2. Directors' Duties and Climate Change

2.1. Legal framework for directors' duties

Australia is a common law jurisdiction. In Australia, directors' common law and equitable duties have been codified in the *Corporations Act 2001* (Cth) (the **Corporations Act**).[51] However, duties under other laws continue to apply concurrently.[52] Directors must exercise their powers and discharge their duties in "*good faith in the best interests of the corporation"*, and for a *"proper purpose*". The general duty of due care and diligence requires directors to "*exercise their powers and discharge their duties with the degree of due care and diligence that a reasonable person would exercise*" in the relevant circumstances.

The business judgment rule applies in Australia and is codified under section 180(2) of the Corporations Act. This provides a defence for a director in relation to an alleged breach of the duty to act with care and diligence, if they satisfy the requirements listed under section 180(2)[53]. 'Business judgment' is defined as "*any decision to take or not take action in respect of a matter relevant to the business operations of the corporation*." Historically, the business judgment rule has rarely been successfully argued in practice, and only applies to certain types of 'judgments', hence it provides fairly limited protection to directors.

2.2. Guidance on interpretation of directors' duties

45 ASIC, Report 763, 'ASIC's recent greenwashing interventions', May 2023 <https://download.asic.gov.au/media/ao0lz0id/rep763-published-10-may-2023.pdf>

46 ASX listed company pays two infringement notices for greenwashing in market announcements (25 June 2024) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-133mr-asx-listed-company-pays-two-infringement-notices-for-greenwashing-in-market-announcements/>

47 The Australia Institute, Redlight for Greenwashing: ASIC's action on greenwashing | Jennifer Balding (22 March 2024) <https://australiainstitute.org.au/post/redlight-for-greenwashing-asics-action-on-greenwashing-jennifer-balding-address-to-the-climate-integrity-summit/>

48 Australian Securities and Investments Commission v Vanguard Investments Australia Ltd [2024] FCA 308

49 Australian Securities and Investments Commission v LGSS Pty Ltd [2024] FCA 587

50 Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited 2024 [FCA] 850

51 *Corporations Act 2001* (Cth) ss. 180-183.

52 *Ibid*, s. 185.

53 Being, (a) make the judgment in good faith for a proper purpose; (b) do not have a material personal interest in the subject matter of the judgment; (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and (d) rationally believe that the judgment is in the best interests of the corporation.

2.2.1. Legal guidance

Whether a director has exercised a reasonable degree of care and diligence is determined by "*balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to flow to the company from the conduct in question*".[54]

In relation to the duty to act in good faith, directors' judgment as to what is in the 'best interests' of the corporation, "*if exercised in good faith and not for irrelevant purposes, is not open to review in the courts*".[55]

In October 2016, Australian barrister Noel Hutley SC released a seminal legal opinion on directors' statutory duty of care as it applies to climate change (the **2016 Hutley Opinion**). Hutley SC concluded that, as a matter of Australian law, "*climate change risks would be regarded as foreseeable by courts, and relevant to a director's duty of care to the extent that those risks intersect with the interests of the company*". Accordingly, Australian company directors certainly can, and in some cases *should* be considering the impact of climate change risks on their company – and those directors who fail to do so now could conceivably be found liable for breaching their duty of care in the future.[56]

In March 2019, Hutley SC updated the 2016 Hutley Opinion, concluding that there had been a demonstrable shift since 2016 in the way in which Australian regulators, firms and the public perceive climate risk which "*elevate[d] the standard of care that will be expected of a reasonable director*" in discharging their duty of care.[57]

In addition, in November 2019, former Australian High Court judge and financial services royal commissioner Kenneth Hayne stated that it is incumbent on company directors, in discharging their duty to act in the company's best interests, to consider, address and report on climate-related risks:

> *[A] director acting in the best interests of the company must take account of, and the board must report publicly on, climate-related risks and issues relevant to the entity.*[58]

In April 2021, Hutley SC published a further update to the 2016 Hutley Opinion (the **2021 Opinion Update**), stating that:

> *[i]t is no longer safe to assume that directors adequately discharge their duties simply by considering and disclosing climate-related trends and risks; in relevant sectors, directors of listed companies must also take reasonable steps to see that positive action is taken: to identify and manage risks, to design and implement strategies, to select and use appropriate standards, to make accurate assessments and disclosures, and to deliver on their company's public commitments and targets.*[59]

Counsel further opined that in relevant sectors, consideration of net zero

54 Cassimatis v Australian Securities and Investments Commission [2020] FCAFC 52 as discussed in AICD, Director Tool: General Duties of Directors (2021) <https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-tools/individual/director-tool-general-duties-of-directors.pdf>

55 United Petroleum Australia Pty Ltd v Herbert Smith Freehills [2018] VSC 347 [627-629]

56 Noel Hutley SC and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties: Memorandum of Opinion' (October 2016), 2-3 <https://cpd.org.au/wp-content/uploads/2016/10/Legal-Opinion-on-Climate-Change-and-Directors-Duties.pdf>.

57 Noel Hutley SC and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties: Supplementary memorandum of opinion' (March 2019) <https://cpd.org.au/2019/03/directors-duties-2019/>.

58 Kenneth Hayne, 'What Kenneth Hayne says about climate change' (9 December 2019) <https://www.afr.com/politics/federal/what-kenneth-hayne-says-about-climate-change-20191206-p53hiw>; James Fernyhough, 'Hayne rebukes directors on climate risk failure' (9 December 2019) <https://www.afr.com/policy/energy-and-climate/hayne-rebukes-directors-on-climate-risk-failure-20191206-p53hnd>; Ben Hayne, 'No more room for excuses on climate' (9 December 2019) <https://www.afr.com/politics/federal/no-more-room-for-excuses-on-climate-20191208-p53hwk>. Centre for Policy development, 'Full text of Kenneth Hayne AC QC remarks to CPD climate roundtable', Speech delivered to Centre for Policy Development Roundtable in Sydney, 21 November 2019 (9 December 2019) <https://cpd.org.au/2019/12/full-text-of-kenneth-hayne-ac-qc-remarks-to-cpd-climate-roundtable/>.

59 Noel Hutley and Sebastian Hartford Davis, 'Climate Change and Directors' Duties: Further Supplementary Memorandum of Opinion' (23 April 2021) [4] <https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf>. See further, MinterEllison, 'New Hutley Opinion: What does it mean for directors?', (28 April 2021) <https://www.minterellison.com/articles/new-hutley-opnion-what-does-it-mean-for-directors>.

emissions targets are an "*appropriate or necessary*" step to discharge duties.[60] In setting such targets, a company need not have all the answers about how the target will be achieved. However, an announcement of a net zero target carries with it a representation that a company does have a genuine intention, formed on reasonable grounds at the time of making the commitment, to pursue strategies to achieve the target in good faith. Misalignment between that intention and operational strategy places the company, and its directors and officers, at risk of 'greenwashing', and potentially liable for misleading and deceptive conduct in relation to a 'future matter' under the Corporations Act, *Australian Securities and Investments Commission Act 2001*, and the *Australian Consumer Law*. This may, in turn, lead to 'stepping stone' liability for a breach of the directors' duty of care.

In 2022, a legal opinion commissioned by the Australian Institute of Company Directors (**AICD**) has confirmed that directors of companies have considerable latitude in discharging their best interests duty, and that environmental and stakeholder perspectives are legitimate considerations.[61]

Building on the Hutley Opinion (and updates) which focused on climate, on 24 October 2023, a legal opinion was published in relation to directors' duties with respect to nature-related risks (the **Nature Opinion**).[62] The Nature Opinion concluded that nature-related risks to a company could be regarded as foreseeable now, given the large amount of information already available about economic dependency on nature and the rate at which it is being degraded in Australia and globally. The Nature Opinion recommended that directors need to identify their company's dependencies and impacts on nature and consider potential risks these pose to the company. Failure to identify, manage and disclose material nature-related risks may lead to increased shareholder pressure and even litigation against the personal assets of directors.[63]

With respect to nature, a legal opinion dated 24 October 2023 concluded that under the Corporations Act, nature-related risks are within the scope of directors' duties to act with care and diligence, and a failure on the part of a director to identify, manage and disclose material nature-related risks may lead to increased shareholder pressure and even litigation against personal assets of directors (see the Biodiversity Box below).[64]

2.2.2. Regulatory guidance

In June 2018, then ASIC Commissioner John Price made public remarks foreshadowing that directorial liability could arise from a failure to consider risks related to climate change.[65] In September 2018, ASIC recommended that:

> *[D]irectors and senior managers of listed companies need to understand and continually reassess existing and emerging risks that may be applicable to the company's business, including climate risk.*[66]

In February 2021, ASIC outlined 4 steps that company directors can take to manage

60 Ibid [7.2]

61 Brett Walker SC, Gerald Ng, Australian Institute Of Company Directors: The Content Of Directors' "Best Interest" Duty - Memorandum Of Advice (24 February 2022) <https://www.aicd.com.au/content/dam/aicd/pdf/news-media/research/2022/AICD-walker-opinion-feb-2022.pdf>.

62 Sebastian Hartford-Davis and Zoe Bush, Nature-related risks and directors' duties (24 October 2024) <https://commonwealthclimatelaw.org/wp-content/uploads/2023/11/Joint-Memorandum-of-Opinion-Nature-related-risks-and-directors-duties.pdf>

63 Commonwealth Climate and Law Initiative, Australia Company Directors Exposed to Nature-Related Risk: New Legal Opinion (1 November 2024) <https://commonwealthclimatelaw.org/australian-company-directors-exposed-to-nature-related-risk-new-legal-opinion/>

64 Australian Company Directors exposed to nature-related risk: new legal opinion, Commonwealth Climate and Law Initiative Press Release (October 2023) <https://commonwealthclimatelaw.org/australian-company-directors-exposed-to-nature-related-risk-new-legal-opinion/>

65 John Price, 'Climate Change', Speech at the Australian Securities and Investments Commission, Centre for Policy Development: Financing a Sustainable Economy, Sydney, (18 June 2018) <https://asic.gov.au/about-asic/news-centre/speeches/climate-change/>. ASIC Commissioners Sean Hughes (Canberra, 7 February 2019) and Cathie Armour (Sydney, 21 February 2019) also made public addresses concerning climate change risk.

66 ASIC, 'Report 593: Climate risk disclosure by Australia's listed companies' (September 2018), 12 <https://download.asic.gov.au/media/4871341/rep593-published-20-september-2018.pdf>.

climate change risk: 1) consider climate risk, 2) develop and maintain strong and effective corporate governance, 3) comply with the law, 4) disclose useful information to investors.[67]

APRA's CPG 229 highlights that since the ultimate responsibility for sound and prudent management of an APRA-regulated institution's business operations rests with its board of directors, APRA considers it "*prudent practice for the board to seek to understand and regularly assess the financial risks arising from climate change that affect the institution, now and into the future*".[68]

2.3. Directors' liability and litigation risk

Breaching your duties as a director could result in criminal sanctions under the Corporations Act. For example, contravention of the duty of good faith that involves dishonesty or recklessness can result in substantial fines and potential imprisonment for up to 15 years (section 184).

Civil sanctions may result if shareholders take action against directors for breaching their duties. In addition, ASIC[69] and the courts have the power to disqualify and/or penalise directors for failure to comply with their duties under the Corporations Act. In addition, a breach of directors' duties may harm an organisations reputation, resulting in commercial consequences such as increased investor, regulator and consumer scrutiny.

Specifically in relation to climate change, counsel's view in the 2021 Opinion Update was that "*there is reason to think that 'greenwashing' claims of the kind outlined in this memorandum will become an acute source of risk*".[70] This has played out, with a claim lodged in 2021 against an oil and gas company,[71] and a 'books and records' claim (an application by a shareholder seeking access to documents, in this case, those demonstrating the implementation of an environmental policy) against a bank.[72] Greenwashing interventions by ASIC are discussed in more detail above (section 1.2.3).

Shareholders are increasingly looking to hold directors to account for their management of climate-related risks. The Australasian Centre for Corporate Responsibility (**ACCR**), Market Forces and other activist non-governmental organisations have a history of organising shareholder-requisitioned resolutions on climate and broader sustainability-related matters, including in relation to the re-election of board directors in some cases.[73]

3. Directors' Duties and Sustainability Disclosure Obligations

3.1. Narrative sustainability disclosures

3.1.1. Sustainability disclosure frameworks

Many companies already report on a voluntary basis in Australia. In 2022, the Carbon Disclosure Project (**CDP**) reported that 263 Australian companies disclosed environmental information to CDP, representing a year-on-year growth of 37%.[74] In April 2024, ASIC Chair Joe Longo highlighted that nearly 75% of the ASX200 have committed to or are already voluntarily reporting climate-related information against the Task Force on Climate-related Financial Disclosure (**TCFD**) framework.[75]

67 ASIC, Managing climate risk for directors (1 February 2021) <https://asic.gov.au/about-asic/news-centre/articles/managing-climate-risk-for-directors/>

68 APRA, Prudential Practice Guide Prudential Practice Guide CPG 229 Climate Change Financial Risks November 2021 (November 2021) <https://www.apra.gov.au/sites/default/files/2021-11/Final%20Prudential%20Practice%20Guide%20CPG%20229%20Climate%20Change%20Financial%20Risks.pdf> p10

69 Section 206F, Corporations Act 2001

70 Noel Hutley and Sebastian Hartford Davis, 'Climate Change and Directors' Duties: Further Supplementary Memorandum of Opinion' (23 April 2021) [50] <https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf>.

71 ACCR v Santos (NSD858/2021, Federal Court of Australia) <http://climatecasechart.com/non-us-case/australasian-centre-for-corporate-responsibility-v-santos/>.

72 Abrahams v Commonwealth Bank of Australia (NSD864/2021, Federal Court of Australia) <http://climatecasechart.com/non-us-case/abrahams-v-commonwealth-bank-of-australia-2021/>.

73 ACCR, Australian ESG Shareholder Resolutions <https://www.accr.org.au/research/australian-esg-resolution-voting-history/>

74 Treasury, CDP – Submission in response to: climate-related financial disclosures (April 2023) <https://treasury.gov.au/sites/default/files/2023-04/c2022-314397-cdp.pdf>

75 ASIC, Start preparing now: Early ASIC guidance on the mandatory climate disclosure regime (23 April 2024)

The Government is now introducing mandatory climate-related disclosures. In December 2022, the Australian Treasury launched a consultation, stating that "*the Government will introduce standardised, internationally-aligned reporting requirements for businesses to make disclosures regarding governance, strategy, risk management, targets and metrics – including greenhouse gases*".[76] In January 2024, the Treasury published a policy position statement outlining how climate-related financial disclosures will be made mandatory through amendments to the Corporations Act and related legislation.[77]

The *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (the **Bill**), which provides the relevant amendments to existing legislation to introduce mandatory climate-related reporting, was introduced as a draft Bill in April 2024.[78] The Bill was introduced to the Senate on 24 June 2024 and passed by the Senate on 22 August 2024. The Bill finally passed both Houses on 9 September 2024.[79] The key elements of the legislation are set out below.

<u>Commencement</u>: the regime is expected to come into force on 1 January 2025. There will be a phased implementation, with the first set of reporting occurring from 2026.

<u>Scope</u>: A three-tiered staggered approach to implementation is proposed,[80] starting with certain large entities,[81] controlling companies reporting under the National Greenhouse and Energy Reporting (**NGER**) scheme and large asset owners who meet the publication threshold from the 2025/26 reporting period, and descending by size.

<u>Requirements</u>: in-scope companies will be required to prepare sustainability reports with climate statements (and any accompanying notes), any statements prescribed by the Minister and a directors' declaration. The specific content of the climate statements is not set out in detail in the Bill, and will instead be provided by the Australian Accounting Standards Board (**AASB**) through new Australian Sustainability Reporting Standards (**AASB S1** and **AASB S2**). AASB S1 and AASB S2 comprise four main pillars: governance, strategy, risk management (which includes both climate-related risks and opportunities) and metrics and targets. The finalised Australian Sustainability Reporting Standards are expected to be released in late 2024.[82] The Bill was amended by the Australian Government in the Senate to require entities to use two scenarios for scenario analysis: a low warming scenario (1.5°C) and a high warming scenario (> or = 2.5°C). Disclosures of scope 1, 2 and 3 emissions will also be required. Scope 3 emissions reporting is not required until the second reporting year.

Transition plans are not mandated under the Bill, but if an in-scope entity has a transition plan, disclosures related to it must be provided.

The legislation requires the Australian Auditing and Assurance Standards Board (**AUASB**) to prepare audit and assurance standards. As of September 2024, the AUASB is consulting on a possible phased assurance model for climate-related disclosures until mid-November 2024.

<u>Applicability to ISSB</u>: On 26 June 2023, the International Sustainability Standards Board (**ISSB**) issued its finalised

<https://asic.gov.au/about-asic/news-centre/speeches/start-preparing-now-early-asic-guidance-on-the-mandatory-climate-disclosure-regime/>

76 Australian Government, The Treasury, Consultation Paper - Climate-related Financial Disclosures (December 2022) <https://treasury.gov.au/sites/default/files/2022-12/c2022-314397_0.pdf>.

77 Treasury, Policy position statement: Mandatory climate-related financial disclosure (January 2024) <https://treasury.gov.au/sites/default/files/2024-01/c2024-466491-policy-state.pdf>

78 Parliament of Australia, Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7176>

79 Parliament of Australia, Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7176>

80 AASB, AASB ED SR1 (2023) <https://www.aasb.gov.au/admin/file/content105/c9/AASBED_SR1_10-23.pdf> 5 and 6

81 Defined as entities that fulfill two of the following three thresholds: (1) over 500 employees; (2) $1 billion+ in consolidated gross assets; (3) $500 million+ consolidated annual revenue) from the reporting period commencing 1 July 2024.

82 AASB, Climate Disclosures Consultation Update (July 2024) <https://aasb.gov.au/media/oknbquzw/aasb_climatedisclosuresconsultationupdate.pdf >.

sustainability and climate standard, IFRS S1 (general sustainability disclosure standard) and IFRS S2 (climate disclosure standard).[83] IFRS S1 is a foundational standard that defines key concepts that apply across all subsequent topical disclosure standards (such as IFRS S2), including materiality, fair presentation, connecting information, sources of guidance, location and timing of disclosures and comparative information. The climate standard, IFRS S2, builds on the TCFD including the four topics of governance, strategy, risk management and metrics and targets, but requires more detailed and granular disclosures. Such disclosures include the current and future financial impact of climate change risks and opportunities on the business, its cash flows and access to capital, and the current and anticipated actions taken to manage these risks (including through the setting of transition plans and climate targets).

The content of the Bill is based on IFRS S2, as adapted to the Australian market by the AASB through the draft AASB S1 and AASB S2.

3.1.2. Specific sustainability disclosure requirements for listed entities

The mandatory reporting regime will apply to both listed and private entities which meet the relevant threshold criteria. ASIC, which expects more than 6,000 entities will be in-scope, has highlighted that entities should start preparing now.[84] However, expectations with respect to sustainability disclosures already exist for listed entities.

In 2018 ASIC recommended that listed companies disclose meaningful and useful climate risk-related information to investors, and strongly encouraged listed companies with material exposure to climate change to consider reporting voluntarily under the TCFD framework.[85] The Australian Securities Exchange (**ASX**) Corporate Governance Council recommends that a listed entity should disclose (on a comply or explain basis) whether it has any material exposure to environmental risks and, in particular, climate-related risk, and if it does, how it manages or intends to manage those risks.[86]

In August 2019, ASIC revised its regulatory guidance to incorporate climate-related disclosures. *RG228* now refers to the types of climate change risk described by the TCFD as key risks that may need to be disclosed in prospectuses.[87] *RG47* highlights 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 operating and financial reviews.[88] ASIC included climate-related risks, including national climate commitments and relevant information under the TCFD recommendations as part of their recommended focus areas for 2024 reporting.[89]

3.1.3. Specific sustainability disclosure requirements for financial institutions

The mandatory reporting regime will apply to financial institutions. However, expectations with respect to sustainability disclosures already exist for financial institutions.

In June 2022, ASIC published specific guidance for financial institutions on

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83 IFRS, ISSB issues inaugural global sustainability disclosure standards (June 2023) <https://www.ifrs.org/news-and-events/news/2023/06/issb-issues-ifrs-s1-ifrs-s2/>

84 ASIC, Start preparing now: Early ASIC guidance on the mandatory climate disclosure regime (23 April 2024) <https://asic.gov.au/about-asic/news-centre/speeches/start-preparing-now-early-asic-guidance-on-the-mandatory-climate-disclosure-regime/>

85 ASIC, 'Report 593: Climate risk disclosure by Australia's listed companies' (September 2018) 12 <https://download.asic.gov.au/media/4871341/rep593-published-20-september-2018.pdf>

86 The ASX Corporate Governance Council 'Corporate Governance Principles and Recommendations' (4th Edition, February 2019) 27-28 <https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf>.

87 ASIC, Regulatory Guide G228 Prospectuses: Effective disclosure for retail investors <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-228-prospectuses-effective-disclosure-for-retail-investors/>.

88 ASIC, Regulatory Guide 247 Effective disclosure in an operating and financial review (August 2019) <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-247-effective-disclosure-in-an-operating-and-financial-review/>.

89 ASIC, 24-101MR ASIC announces 30 June 2024 focus areas and expanded program to support financial reporting and audit quality (15 May 2024) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-101mr-asic-announces-30-june-2024-focus-areas-and-expanded-program-to-support-financial-reporting-and-audit-quality/?altTemplate=betanewsroom>.

sustainability-related labelling of products and services in Info Sheet 271.[90] The ASIC's Deputy Chair has explained that "*the ASIC administers and where needed enforces a range of provisions in the Corporations Act that relate to disclosure by listed companies and product issuers*" in relation to climate-related disclosure and greenwashing.[91]

3.1.4. Directors' duties regarding sustainability disclosures

With respect to the incoming mandatory climate-reporting regime, there will be a required directors' declaration in relation to the sustainability report. For the first three years after its implementation, this takes the form of a qualified declaration in that directors must confirm '*whether in the directors' opinion, the entity has taken all reasonable steps'* to comply with the legislative requirements*"*.[92] After this initial period, the "*reasonable steps*" liberty will be removed; directors will be required to declare that the substantive provisions of the sustainability report are "*in accordance with this Act"*.

The declaration must be made in accordance with a resolution of the directors, specify the date on which the declaration is made, and be signed by a director.

3.1.5. Liability risk arising from narrative sustainability disclosures

From an enforcement and liability perspective, the legislation introduces civil penalty provisions into the Corporations Act with respect to sustainability reporting such that a failure to disclose, or inadequate disclosure, would attract a civil penalty.

However, the legislation does provide for limited immunity for certain statements in new sustainability reports, termed a "*protected statement*". Protected statements cover scope 3 emissions, climate scenario analysis, and transition plans made in a sustainability report during the first three years of reporting. A statement is also protected if made in a sustainability report in the first year of reporting which relates to climate and at the time it is made, is about the future.

The limitation of liability only applies to private actions; it does not apply to any actions, suits or proceedings if it is criminal in nature or brought by ASIC.

The disclosures under the legislation will be subject to existing liability frameworks concerning directors' duties, and therefore directors could be at risk of liability relating to general disclosure obligations and misleading and deceptive conduct provisions.

3.2. Climate-related disclosures in financial statements

3.2.1. Climate-related disclosures in financial statements

In April 2019, AASB and AUASB updated their joint bulletin on integrating climate risk into accounting estimate assumptions and making climate risk disclosures in the financial statements (the **Joint Bulletin**), squarely bringing climate risk within the scope of external audit and the audit committee role.[93] As outlined in the Joint Bulletin, the potential financial implications arising from climate-related risks may include: asset impairment; changes in the useful life of assets; changes in the fair valuation of assets due to climate-related and emerging risks; increased costs and/or reduced demand for products and services affecting impairment calculations and/or

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

91 ASIC Deputy Chair Karen Chester, Climate change: Urgency, integrity, ambition, Speech at the Carbon Market Institute's 9th Australasian Emissions Reduction Summit, (25 October 2022),<https://asic.gov.au/about-asic/news-centre/speeches/climate-change-urgency-integrity-ambition/>.

92 Parliament of Australia, Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7176#:~:text=Amends%20the%3A%20Corporations%20Act%202001,)%20facilities%3B%20expanding%20the%20licensing%2C>

93 Australian Accounting Standards Board and Australian Auditing and Assurance Standards Board, 'Climate-related and other emerging risks disclosures: assessing financial statement materiality using AASB/IASB Practice Statement 2' (April 2019) <https://www.aasb.gov.au/admin/file/content102/c3/AASB_AUASB_Joint_Bulletin_Finished.pdf>.

requiring recognition of provisions for onerous contracts; potential provisions and contingent liabilities arising from fines and penalties; and changes in expected credit losses for loans and other financial assets.

AASB standards include Australian equivalents to IFRS.[94]

Whilst the IFRS Accounting Standards do not refer explicitly to climate-related matters, IFRS has clarified that "*companies must consider climate-related matters in applying IFRS Accounting Standards when the effect of those matters is material in the context of the financial statements taken as a whole.*"[95] IFRS considers information as material if its omission, misstatement or obscuration could reasonably be expected to influence decisions that primary users of financial statements make on the basis of those financial statements, which provide financial information about a specific company.

A report published by AASB and AUASB in November 2023 found an increase in the climate-related disclosures in the Financial Report (Notes to the Financial Report) from 4.4% in 2018 to 14.9% in 2022.[96] This indicates that Australian entities increasingly recognise the significance of climate-related impacts on financial position and performance.

In its financial reporting and audit focus area for December 2023, ASIC highlighted that, in relation to disclosures in the Operating and Financial Review (which complements the financial report), directors "*may also consider whether to disclose information that would be relevant under the recommendations of the [TCFD]. Following the TCFD recommendations will help position entities for any future reporting under standards being developed by the [ISSB]".*

3.2.2. Directors' duties regarding climate-related disclosures in financial statements

The above developments are relevant to the obligation on Australian directors to give a declaration that the financial statements and notes comply with the accounting standards and give a 'true and fair view' of position and performance.[97]

ASIC's *Information Sheet 183 on Directors and financial reporting* (**Info Sheet 183**) clarifies that:

- A company must keep written financial records that correctly record and explain the company's transactions and its financial position and performance and enable true and fair financial statements to be prepared and audited. A director's obligation extends to ensuring company records are complete and accurate by adopting appropriate accounting policies and designing and implementing appropriate controls and processes. This obligation exists regardless of whether books and records are maintained in-house or outsourced to a third party, or whether they are electronic or in hard copy.
- A company may be required to lodge financial reports with ASIC that are accompanied by a directors' declaration that includes:
    - whether, in the directors' opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due;
    - whether the financial statements and notes comply with accounting standards, and give a true and fair view of the financial position and performance of

94 AASB, General FAQs <https://aasb.gov.au/research-resources/general-faqs/>

95 IFRS, Educational Material: Effects of climate-related matters on financial statements (July 2023) <https://www.ifrs.org/content/dam/ifrs/supporting-implementation/documents/effects-of-climate-related-matters-on-financial-statements.pdf>

96 AASB and AUASB, Trends in Climate-Related Disclosures (November 2023) <https://aasb.gov.au/media/jlilc0cq/aasb-auasb_rr_trendsinclimaterelateddisclosures_11-23.pdf> 14

97 Corporations Act 2001 (Cth) ss. 295-297.

- the company and any consolidated entity; and
  - if the company is listed, whether the directors have been given the declarations required by the chief executive officer and chief financial officer.

  Directors must: 1) read, understand and focus on the contents of the financial report, 2) apply their own mind to, and carry out a careful review of, the financial report and directors' report, and 3) determine that the information contained therein is consistent with the directors' knowledge of the company's financial position and affairs, and 4) ensure that known material matters– or that should be known– are not omitted. [98]

Given the expectations for material climate-related risks and opportunities to be reflected in the financial reports and move towards mandatory reporting, directors should be mindful of considering material climate-related risks and opportunities when performing their duties with respect to financial reporting.

3.2.3. Liability risk arising from financial statements

In Australia, failure by directors to comply with financial disclosure obligations, including not reflecting climate risks and impacts, could lead to serious consequences.

ASIC can impose significant fines on directors who fail to meet their disclosure obligations. This includes not properly disclosing material climate-related risks, which could be considered misleading or deceptive conduct under the Corporations Act. ASIC may pursue civil penalties against directors and companies.

Companies and their directors may also face litigation from shareholders, investors, or other stakeholders for failing to disclose material risks, including climate-related risks. If the non-disclosure leads to financial loss, affected parties may sue for damages.

Directors can be held personally liable for breaches of their duties, including the duty to act with care and diligence under section 180(1) of the Corporations Act. Failure to adequately disclose climate-related risks in financial statements could be seen as a breach of these duties.

ASX can enforce its listing rules, which require listed entities to disclose information that may affect their share price. Failure to disclose climate risks may lead to sanctions, including suspension or delisting. Notably, listed entities' continuous disclosure obligations also have statutory backing under section 674 of the Corporations Act and may be subject to enforcement action from ASIC or litigation from shareholders, investors, or other stakeholders in that context too.

98 ASIC, Information Sheet 183 (23 June 2017) <https://asic.gov.au/regulatory-resources/financial-reporting-and-audit/directors-and-financial-reporting/>

Biodiversity Risk

Australia is considered one of the 17 most mega-biodiverse countries, hosting between 7-10% of all species on Earth.[99] Approximately half of Australia's GDP has a moderate to very high direct dependence on ecosystem services.[100] Industries with a very high direct dependence on nature, such as agriculture, forestry and construction, generate approximately 15.9% of Australia's GDP.[101] The Commonwealth Climate and Law Initiative has published a report on how companies in Australia and other jurisdictions may depend on biodiversity for the functioning of their business models.[102]

The Australian Government is a signatory to the Kunming-Montreal Global Biodiversity Framework (the **GBF**),[103] as well as a number of international initiatives aligned with the proposed action-oriented targets under the GBF. Australia's Strategy for Nature 2019-2030 outlines Australia's approach to biodiversity conservation and how Australia will contribute to the goals of the GBF.[104] It includes national biodiversity targets to protect and conserve 30% of Australia's landmass and 30% of Australia's marine areas by 2030, ensure effective restoration of degraded areas, minimise the impact of climate change on biodiversity and eradicate or control invasive species by 2030.[105] These commitments supplement the Australian Federal Government's Threatened Species Action Plan 2022-2032 (released in October 2022) which maps a pathway to protect, manage and restore Australia's threatened species and important natural places.

On 15 December 2023, the Nature Repair Act 2023 came into effect. This Act establishes a framework for "*a world-first legislated, national, voluntary biodiversity market*" to support transparency and integrity, signalling natural capital as an emerging asset class.[106] The scheme is broadly based on the regulatory architecture already in place for carbon credits in Australia, with a range of adaptions and enhancements to address the unique attributes associated with creating a market relating to nature protection, repair and restoration. The market is due to open in 2025.

Australian Government funding of the Task Force on Nature-related Financial Disclosures (**TNFD**) and ASFI work as part of the TNFD Forum[107] may indicate that Australia will be one of the first movers in adopting the TNFD recommendations into law. The TNFD is a voluntary market-led, science-based and government supported initiative that provides a structured framework for companies to report their interactions with nature. Whether directly or indirectly, all businesses rely on, and interact with, nature at some point in their value chain, therefore the TNFD is likely to influence boardroom decisions across all sectors regarding not only reporting, but also strategic planning and risk management.

Australia's Sustainable Finance Roadmap, released in June 2024, notes that the Government is progressing a number of nature-related initiatives, including encouraging nature-related financial disclosures through the provision of CAD4.1 million in the 2024–25 Budget over two years for the Department of Climate Change, Energy, the Environment and Water to develop tools and guidance to support the voluntary uptake of nature-related

99 UN World Conservation Monitoring Centre, Megadiverse Countries, (2020). It is suggested that Australia is the 6th most megadiverse country in the world.

100 Australian Conservation Foundation, The nature-based economy: How Australia's prosperity depends on nature (September 2022) p.6

101 Ibid.

102 CCLI, Biodiversity Risk: Legal Implications for Companies and their Directors (December 2022) <https://commonwealthclimatelaw.org/wp-content/uploads/2022/12/CCLI_Biodiversity_risk_paper_2022.pdf>.

103 Target 15 of the GBF requires signatories to take "legal, administrative or policy measures to encourage and enable business… [to] monitor, assess and transparently disclose their risks, dependencies and impacts on biodiversity".

104 Department of Climate Change, Energy, the Environment and Water, Australia's National Biodiversity Strategy and Action Plan <https://www.dcceew.gov.au/environment/biodiversity/conservation/strategy>

105 Australia's Nature Hub, Australia's Strategy for Nature 2019-2030 <https://www.australiasnaturehub.gov.au/national-strategy>

106 Department of Climate Change, Energy, the Environment and Water, Nature Repair Market <https://www.dcceew.gov.au/environment/environmental-markets/nature-repair-market>

107 Australian Sustainable Finance Initiative, TNFD & Natural Capital.

financial reporting by businesses and financial institutions.[108] It further notes that the Government is also closely monitoring the work of the ISSB on biodiversity, ecosystems, and ecosystems services, and will consider its sustainability disclosure requirements in light of the global baseline developed by the ISSB.

In Australia, banks are increasingly responding to stakeholder expectations to report on biodiversity and nature-related risk.[109] In November 2023, an application for preliminary discovery was made seeking copies of Australia and New Zealand Banking group (**ANZ**) internal risk management framework due to concerns that the bank was not adequately managing the twin risks of climate and biodiversity loss. The applicant sought information about the bank's risk management systems to understand climate change and biodiversity risks were being adequately governed. The parties agreed that the proceedings would be discontinued in April 2024. [110] As of August 2024, three court filings have been issued by shareholders against Australian banks seeking copies of internal documents.

In October 2023, a legal opinion was published titled 'Nature-related risks and directors' duties'.[111] Counsel concluded that, as a matter of Australian law, nature-related risks *are* risks of harm to the interests of Australian companies, and are risks that would be regarded by a court as being foreseeable at the present time. In addition, "*[d]irectors of companies should at least identify the company's nature-related dependencies and impacts, and consider the potential risks this may pose to the company. Directors who fail to consider nature-related risks could be found liable for breaching their duty of care and diligence."*[112] Consideration With respect to disclosure, companies are required to disclose nature-related dependencies and impacts that pose a material risk of harm to the company in its directors' report and corporate governance statement, and in some situations might also be required to disclose non-material nature-related risks.

Practical Implications for Directors

The steps required to discharge duties to govern and disclose climate risk depend on the unique circumstances of the company and governance situation.[113] However, given that Australia's financial regulators have become increasingly emphatic regarding the need for companies and their directors to adopt climate risk and resilience measures, well-counselled boards will, taking into account the unique circumstances facing each company:[114]

a) maintain systems so that the board and management have the skills and education to remain abreast of material developments in this dynamic area, including access to expert advice where necessary;

b) oversee management's climate risk identification and evaluation, with clear management accountabilities and reporting lines back to the board. This should include monitoring of the integration of climate change within risk management frameworks;

108 The Treasury, Sustainable Finance Roadmap (June 2024) <https://treasury.gov.au/sites/default/files/2024-06/p2024-536290.pdf>

109 Financial Review, Banks preparing new disclosures to show impact of lending on nature (15 August 2022) <https://www.afr.com/companies/financial-services/banks-preparing-new-disclosures-to-show-impact-of-lending-on-nature-20220814-p5b9nv>.

110 Equity Generation Lawyers, (2024), Catherine Rossiter v ANZ Group Holdings Limited, <https://equitygenerationlawyers.com/case/catherine-rossiter-v-anz-group-holdings-limited/>

111 Sebastian Hartford-Davis and Zoe Bush, "Nature-related risks and directors' duties" (October 2023) <https://commonwealthclimatelaw.org/australian-company-directors-exposed-to-nature-related-risk-new-legal-opinion/>

112 Ibid. p.2

114 These include size and sector, the foreseeability and materiality of exposure to climate risks, and that the steps required to discharge duties will be proportionate to that exposure.

c) consider the implications of the transition to net zero for their company, including whether the business should adopt a net zero strategy (including clear interim targets) (and if so, that should be aligned with the Paris Agreement);

d) where emissions reduction targets have been set, ensure that the company has credible transition plans in place to achieve those goals;

e) where board sub-committees are used, delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee (recognising also, however, that the board will be ultimately responsible and need to maintain oversight); and

f) examine reporting and disclosure frameworks and guidance so that disclosures are meeting regulatory (and where relevant investor) expectations and oversee a communication and engagement plan so that there is accountability to stakeholders.

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