Governance News

Weekly wrap up of key financial services, governance, regulatory, risk and ESG developments.

8 November 2023

Contents

Disclosure and Reporting

Review of 2021 changes to the continuous disclosure regime launched

An independent review has been launched into the operation and impact of amendments to the continuous disclosure regime made by Treasury Laws Amendment (2021 Measures No.1) Act 2021 (Amending Act).

For context, these changes introduced a new requirement to prove that an entity or officer is at fault – ie that the entity or officer acted with 'knowledge, recklessness or negligence' - in order to establish a contravention of the continuous disclosure provisions in the Corporations Act 2001 (Cth). You can find a detailed overview of these changes here: Changes to continuous disclosure laws are now permanent - Technical update - MinterEllison

Terms of Reference

Dr Kevin Lewis has been appointed to conduct the Review.

Under the Terms of Reference, Dr Lewis is required to have regard to:

- 'whether the 2021 Amendments are working in support of an efficient, effective, and well-informed market;
- the effect of the 2021 Amendments on the quality and nature of disclosures made by disclosing entities;
- continuous disclosure regimes that operate overseas and the extent to which the Australian regime is consistent with those regimes; and
- whether the 2021 Amendments have given rise to barriers that may prevent compliance with or enforcement of the continuous disclosure obligations'.

For clarity, the review is limited to consideration of the operation of the 2021 amendments only (and has not been tasked with making recommendations on the broader operations of the continuous disclosure regime).

Consultation

The Review is seeking stakeholders' views on operation and impact the 2021 Amendments, including their impact (if any) on:

- the nature and quality of disclosures by disclosing entities
- the ability of investors in Australian listed securities to make informed investment decisions
- class actions (including the potential impact on the volume/type of class actions against disclosing entities if the changes were repealed)
- the availability and/or cost of D&O insurance for disclosing entities
- the competitiveness of Australian equity markets to attract new listings compared to major overseas equities markets
- the impact on ASIC's ability to enforce effectively enforce the continuous disclosure obligations

Why is the review being conducted?

The Amending Act includes a requirement for a review into the changes to be conducted by 14 February 2024 in order for the changes to continuous disclosure to become permanent. That is, if the review does not occur within this timeframe the changes will automatically sunset and the continuous disclosure provisions in the Corporations Act will revert to the form they were in immediately prior to the 2021 amendments.

The consultation paper comments that:

> 'Parliament's decision to require the operation of the 2021 Amendments to be reviewed after 2 years reflected the diversity of views expressed by stakeholders at the time about the possible impact of those amendments. By way of example, the Labor party expressed concerns that the 2021 Amendments 'would strip shareholders of their rights to be adequately informed, damage Australia's corporate governance regime, and allow company directors to get away with failing to disclose important information' and that this 'could damage Australian investment and hurt Australian investors and retirees'. ASIC also expressed concerns about the impact the 2021 Amendments would have on its ability to enforce continuous disclosure laws.'

Next steps

The due date for submissions on the consultation is 1 December 2023.

The reviewer is due to provide their report to the government by 14 February 2024.

Depending on the review findings, Treasury may make recommendations to the government that the 2021 amendments be repealed or amended.

[Source: Treasury Consultation: Continuous Disclosure: Review of liabilities for failure to meet obligations 01/11/2023-01/12/2023]

Greenwashing set to continue to be a top enforcement priority for ASIC

In an article published on the Australian Institute of Company Directors (AICD) website, Australian Securities and Investments Commission (ASIC) Deputy Chair Sarah Court underlined ASIC's continuing focus on tackling greenwashing, confirming that the issue will continue to be a top enforcement priority for the regulator going forward.

Ms Court confirmed that greenwashing is set to be included in ASIC's 2024 enforcement priorities (which are planned to be announced at the ASIC Annual Forum later this month).

Future areas of focus

Ms Court flagged that while to date ASIC's enforcement actions have targeted (potentially) misleading and deceptive conduct:

> 'Future cases may move beyond misleading and deceptive conduct to licence obligations, D&O duties and a range of other obligations. Future areas of interest are likely to include:
>
> – Net zero statements and targets
> – Use of terms such as “carbon neutral”, “clean” or “green”
> – The scope and application of investment exclusions and screens'.

ASIC's enforcement approach: When ASIC is likely to take action

- Ahead of the expected introduction of the new mandatory climate disclosure regime (which is expected to entail 'significant additional and new compliance obligations' read: Introduction of mandatory climate reporting in Australia: Second round of consultation launched - Technical update - MinterEllison and Another step closer towards implementing mandatory climate disclosure in Australia - Post - MinterEllison) Ms Court said that ASIC remains focused on enforcing existing laws.
- To assist industry in meeting their obligations, Ms Court pointed to the guidance issued by ASIC in INFO 271 (summarised) as well as ASIC's summary of the issues identified in surveillance (REP 763, summarised).
- Touching on ASIC's enforcement approach in this context – ie on when ASIC is likely to take enforcement action - Ms Court writes:

> 'We understand many entities are taking genuine steps to work towards net zero or carbon neutral positions. Where public statements are made that assert aspirational environmental positions with a sound basis and supported by business plans and investments to substantiate these goals, ASIC is unlikely to have concerns. However, where these statements are made in marketing campaigns designed to encourage investment or promote products to consumers, with little of substance to back up those assertions or to substantiate how the transition will be achieved, ASIC is likely to have further questions, which may include requests for information and substantiation as to how and when public environmental positions are proposed to be achieved'.

Additional guidance

- Navigating greenwashing risks – July 2023 update - Insight - MinterEllison

[Source: ASIC Deputy Chair Sarah Court, How to avoid greenwashing with ASIC deputy chair, AICD website: 01/11/2023]

Meetings and Proxy Advisers

Qantas shareholders 'strike' on pay

The Qantas Airways Ltd (Qantas) AGM was held on 3 November 2023.

All management proposals were carried with the exception of the proposal to approve the remuneration report (Proposal 4 in the Notice) which received 17% support (this fell short of the 50% required to be carried, and constitutes a 'first strike'.)

> [Note: For context, the 'two strikes rule' means that boards face the prospect of being 'spilled' if 25% or more of shareholders vote against the resolution to approve the company's remuneration report at two consecutive AGMs – that is, if there are two consecutive 'strikes' (25% or more 'against' votes) against the company's remuneration report. For more on the operation of the two strikes rule see: Executive remuneration: a quick guide – Parliament of Australia (aph.gov.au).]

All directors standing for election/re-election were duly elected. All received 92% (or more support) with one exception - Todd Sampson (a member of the board since 2015, a member of both the Remuneration Committee and the Audit Committee and recognised as bringing significant marketing/brand expertise to the board) received 66% support (almost 34% votes 'against').

The result follows a series of controversies at the airline and the early retirement long-term CEO Alan Joyce which has have received wide media coverage.

The table below provides insight into how some larger investors voted on the remuneration report and director elections/re-elections.

TABLE	RESULT	HOW INVESTORS VOTED
Proposal 4 in the Notice: Approval of the Remuneration report	▪ 17% in support (83% against)	▪ Norges Bank Investment Management (NBIM) voted against. The explanation given is as follows: 'The board is responsible for attracting the right CEO and setting appropriate remuneration. A substantial proportion of annual remuneration should be provided as shares that are locked in for five to ten years, regardless of resignation or retirement. The board should provide transparency on total remuneration to avoid unacceptable outcomes. The board should ensure that all benefits have a clear business rationale. Pensionable income should constitute a minor part of total remuneration'. ▪ Legal and General Investment Management (LGIM) voted against citing concerns over 'problematic pay practices'. LGIM's full explanation is as follows: 'A vote AGAINST the remuneration report is warranted. The company reported improved financial results and the board appropriately applied discretion to defer, - payment of the FY23 STI bonus subject to further information and resolution of outstanding legal and governance matters, and - vesting of the FY21 LTI (at maximum) under the one-year holding lock provisions of the LTI, and then potentially subject to malus and claw back. The following concerns for problematic pay practices are raised: - There is a medium concern for misalignment between pay and performance and shareholder returns identified in quantitative pay for performance analysis. -

TABLE	RESULT	HOW INVESTORS VOTED
		Consistent with concerns highlighted in prior years regarding certainty of achievement and vesting, the Recovery Retention Plan (RRP) vested in full, and the company disclosed that it is not subject to malus and clawback. - The former CEO Joyce elected to convert his deferred FY18-FY20 LTI grants into shares after delaying vesting until August 2023, noting material inconsistency with the broad based ASX100 peer group metric which failed to vest, and billions of dollars in losses reported between FY20 – FY22. - Poor, absent, and inferior disclosure of FY23 STI targets and hurdles, and in the absence of such disclosure investors are left to rely on broad, directional shifts in award magnitude and results highlighted by the board, when analysing STI outcomes. - Changes to the structure of the FY24 LTI grant is inconsistent with better market practice given the inclusion of the non-financial performance measure regarding reputation for a substantial portion of the LTI which may lead to misalignment of the board determination of this measure with financial performance. - After the CEO's on-market share sale on 1 June 2023, the former CEO Joyce is disclosed as holding 228,924 shares, which appears to be below the CEO's minimum shareholder requirement of 150 percent of CEO fixed remuneration'. ▪ California Public Employees Retirement System (CalPERS) voted against ▪ California State Teachers Retirement System (CalSTRS) voted against ▪ Vanguard-advised funds voted in support of the proposal on the basis that it considered: 'the structural changes to the executive remuneration plan as an appropriate initial step in aligning Qantas's executive compensation with the board's overall plan to address the reputational issues the company was facing'.
Director elections (Proposals 2a-e in the Notice) ▪ Proposal 2a): Vanessa Hudson (Executive director and (CEO)) ▪ Proposal 2b): William Douglas Parker (Non-executive director appointed in May 2023, Member of both the Safety, Health, Environment and Security Committee and the Remuneration Committee)	▪ Proposal 2a): 99.2% support ▪ Proposal 2b): 98.7% support ▪ Proposal 2c): 99.4% support	▪ NBIM supported all other management proposals put to the meeting including proposals 2a)-e) (in line with management's recommendation). ▪ Vanguard also supported all other proposals, including voting in support of the directors standing for election/re-election. On this, Vanguard considers this was appropriate because it considers the steps already being taken towards board renewal are appropriate. Vanguard states: 'We viewed the staggered stepping-down of three board members, including the board chair, as an appropriate response to recent events. In addition to these three directors,

TABLE	RESULT	HOW INVESTORS VOTED
▪ Proposal 2c): Heather Smith (Non-executive director, appointed in August 2023) ▪ Proposal 2d): Belinda Hutchinson (Non-executive director, Chair of the Audit Committee and a Member of both the Safety, Health, Environment and Security Committee and the Nominations Committee. ▪ Proposal 2e): Todd Sampson (Non-executive director, Member of both the Remuneration Committee and the Audit Committee)	▪ Proposal 2d): 92.7% support ▪ Proposal 2e): 66% support	another nonexecutive director and Qantas's CEO were due to retire following Qantas's 2023 annual meeting. These actions will result in a substantial refreshment of the Qantas board over the next year. In our view, it is important that Qantas maintain a degree of stability on the board during this volatile period. Therefore, we did not consider it necessary or appropriate to withhold support from additional directors up for reelection'. ▪ LGIM voted in support of four of the five directors standing for election/re-election (proposals 2a-d in the Notice), but voted against Proposal 2e (re-election of Todd Sampson as a director). LGIM states: 'Remuneration - Accountability - Escalation - A vote against is applied as LGIM has had concerns with remuneration practices for consecutive years.' ▪ California Public Employees Retirement System (CalPERS) voted in support of 2a) and 2c) but against 2b), 2d) and 2e) ▪ California State Teachers Retirement System (CalSTRS) voted in support of 2a), 2b) and 2c) and against 2d) and 2e)

Ahead of the meeting, the Australian Shareholders Association (ASA) recommended shareholders vote 'against' all proposals except proposals 2b) – to elect Mr Parker to the board - and 2d) – re-election of Ms Hutchinson to the board.

Commenting on the vote result – in particular the strong protest votes against the remuneration report and against director Todd Sampson – the Australasian Centre for Corporate Responsibility (ACCR) said it reflects a high level of shareholder concern over the governance and board leadership of the company.

[Sources: Qantas ASX Announcements: Notice of meeting; Results of meeting]

Institutional Investors and Stewardship

Top Story | Essential sectors that drive Australia's economy

MinterEllison has released the second part its Investor Sentiment Report, exploring the pivotal roles played by financial services, energy & resources, health, infrastructure, real estate, and agribusiness sectors in attracting investment and offering enticing incentives to foreign investors.

You can access the full text here: Essential sectors that drive Australia's economy - Insight - MinterEllison

ESG

Top Story | Nature related risk | Landmark legal opinion cautions directors may be liable for nature-related risk under existing Australian law

New legal opinion outlines why 'directors who fail to consider nature-related risks could be found liable for breaching their duty of care and diligence'.

Key Takeouts

- A new legal opinion authored by Sebastian Hartford Davis and Zoe Bush (commissioned by Commonwealth Climate and Law Initiative and Pollination Law) into the extent to which Australian directors' existing duty under s180 of the Corporations Act 2001 (Cth) permits or requires that they consider nature-related risks has been released.
- The authors opine that as a minimum and in general:

  > 'Directors 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.

- Directors need to undertake their own assessment of whether further action may be required – balancing the potential harm against the potential benefit to the company.
- Directors also have an obligation to ensure their organisation meets relevant disclosure requirements.
- The 2023 Hartford Davis and Bush Opinion builds on an earlier series of landmark opinions on directors' role in managing climate risk that proved influential in sharpening board focus on climate. This latest opinion has the potential to be similarly influential in elevating consideration of nature-related risk to the forefront of directors' minds and to the top of board agendas.

The Commonwealth Climate and Law Initiative (CCLI) together with Pollination Law have published a new legal opinion authored by Sebastian Hartford Davis and Zoe Bush explaining the extent to which the authors consider that directors' existing duty under Australian law to exercise 'care and diligence' already requires directors to take into account nature-related risks and cautioning that they may be held liable for their failure to do so.

The opinion is intended to provide practical guidance to directors, managers and practitioners on this question and builds on the earlier landmark 'Hutley' opinions on climate risk (on which Sebastian Hartford Davis was junior counsel).

Here's our brief breakdown of the key points.

Setting the scene: Why are we talking about 'nature-related risk'?

That nature-loss has implications for the world's economy and for broader society – both of which rely on nature – is increasingly being acknowledged and recognised by investors, regulators and by global standard setters.

As the Taskforce on Nature-related Financial Risks (TNFD) states:

> 'The science is clear. Nature is deteriorating globally and biodiversity is declining faster than at any time in human history. The majority of the vital ecosystem services on which business and society depend, and which provide the foundation for every economy, are in decline…There is growing evidence that this poses risks for businesses, capital providers, financial systems and economies, and that these risks are increasing in severity and frequency.'

To give a sense of the level of the global economy's dependency on nature more than half of the world's gross domestic product (GDP) is moderately or highly dependent on nature and as a result, exposed to risks from nature loss.

Looking at Australia specifically, approximately 49% or $896bn of Australia's GDP has been found to have a moderate to very high direct dependence on "ecosystem services".

What exactly are nature-related risks?

The Taskforce on Nature-related Financial Disclosure (TFND) defines nature-related risk as the:

'potential threats (effects of uncertainty) posed to an organisation that arise from its and wider society's dependencies and impacts on nature.'

For clarity:

- Dependencies in this context refers to the dependencies of organisations on nature - 'the ecosystem services that an organisation relies on in order to function'. These dependencies could be direct – eg reliance by company on clean water to produce its product - or indirect – eg a retailer relying on farmers who need healthy soil and stable weather conditions to grow their crops. Disruption to these dependencies is likely to have operational and financial consequences for organisations.
- Impacts in this context refers to the direct, indirect and/or cumulative effects of an organisation's activities on nature. An example of an indirect impact could be a fast food chain contributing to deforestation or habitat loss through its supply chain's demand for palm oil. This is indirect because the fast food chain is not itself cutting down the trees, or destroying habitat, but its demand for certain products leads to deforestation/habitat loss. Companies' impacts on nature can lead to risk of reputational damage, increased exposure to regulatory action and/or litigation risk and financial losses.

Pressure is building on companies to respond

Market expectations around how companies manage their nature-related risk are increasing as are regulatory expectations.

The authors single out both the signing of the Kunming-Montreal Global Biodiversity Framework (GBF) by almost 200 countries (including Australia) and the release of the Taskforce on Nature-related Financial Disclosure Recommendations (TNFD recommendations) as key 'drivers of the type of market expectations which informs analysis of risk'.

The authors observe that:

> 'Even before the [TNFD] framework was finalised, there was evidence that it was heightening market expectations in relation to nature-related impacts….There is also evidence that the focus on nature-related impacts in the GBF and the TNFD is influencing regulatory requirements in international jurisdictions'.

How does nature-related risk fit into directors' duty to exercise care and diligence?

Importantly, in light of these and other developments, the authors opine that:

> 'At a general level, and subject to the circumstances of the company in question, there are risks arising from dependencies and impacts on nature that would be regarded by a court as being foreseeable at the present time'.

This underpins the author's conclusion that directors in Australia already have an obligation under s180 of the Corporations Act 2001 (Cth) to:

> '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'.

What does this entail in practice (as a minimum)?

The authors make clear that:

> 'It is not feasible to provide any guidance in this opinion on the circumstances of a particular director, company or sector. That is in part because, in determining whether a director has exercised reasonable care and diligence, it is necessary to consider a company's particular circumstances and the position and responsibilities of the director within the company.'

However, at a general level the authors point to the guidance provided by the TNFD – the LEAP approach – as a source of assistance in identifying and assessing nature-related risk issues.

For context, the TNFD's four-phase LEAP risk and opportunity assessment approach. is intended to assist organisations to: 1) Locate the interface with nature; 2) Evaluate the priorities/impacts; 3) Assess material risks/opportunities; and 4) Prepare to respond and report.

Disclosure of nature-related risks

In addition, the authors write that directors should be:

'taking steps to ensure that nature-related risks and impacts are disclosed in accordance with [periodic reporting and continuous disclosure obligations under the Corporations Act 2001 (Cth)]'.

That is, where nature-related dependencies and impacts post a material risk of harm to the company.

Additional disclosures may also be required in some circumstances. The authors write:

> '[companies] may also be required to disclose nature-related impacts that do not pose a material risk of harm to a company where:
>
> – those impacts "would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose" of the company's securities; and/or
> – the company is subject to the European Union's Corporate Sustainability Reporting Directive (CSRD), which requires the disclosure of nature-related impacts regardless of their materiality.'

Additional action may be required?

The authors make clear that having formed a view on whether a company's dependencies and impacts on nature pose a material risk of harm to the company, directors are also obligated to undertake their own assessment of whether further action is required – to 'balance the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question'.

The authors opine that:

> 'Directors who conduct the balancing exercise themselves, and who act (or decline to act) based upon a rational and informed assessment of the company's best interests, will minimise the risk of being found to have failed to exercise due care and diligence. They may also have the protection of the "business judgment rule"….However, the defence will not protect directors who are uninformed, who make no conscious decision, or who exercise no judgment'.'
>
> [Source: Hartford Davis, S., & Bush, Z. (2023). Nature-related risks and directors' duties. Pollination Law and Commonwealth Climate and Law Initiative. Retrieved from: Joint-Memorandum-of-Opinion-Nature-related-risks-and-directors-duties.pdf (commonwealthclimatelaw.org)]

Top Story | Where to start with nature-related risk? Key takeaways from an expert panel

An expert panel discussed the implications for Australian directors of the landmark Hartford-Davis and Bush opinion on directors' role in managing climate risk. Here are our key takeaways.

Key Takeouts

- A new legal opinion authored by Sebastian Hartford Davis and Zoe Bush (commissioned by Pollination Law and the Commonwealth Climate and Law Initiative) concludes that directors' existing duty under Australian law to exercise 'care and diligence' already requires that they take into account nature-related risks and that they could be held personally liable for breaching this duty if they fail to consider nature-related risks.
- An expert panel discussed the implications of this for the boards of Australian companies and touched on the practical steps directors can (and should) take to ensure they are meeting their existing obligations.
- A standout message for boards is that the complexity of the challenge should not stand in the way of action on this issue – doing nothing to identify and consider the nature-related risks relevant to your organisation, is likely to be more risky than doing nothing.

Building on a series of expert opinions from Noel Hutley and Sebastian Hartford Davis on the role of boards in managing climate risk, a new legal opinion authored by Sebastian Hartford Davis and Zoe Bush (commissioned by Pollination Law and the Commonwealth Climate and Law Initiative) concludes that:

> 'Directors 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'.

An expert panel – Sarah Barker (Founding Partner and Board member of Commonwealth Climate and Law Initiative, MinterEllison Partner and Head of Climate & Sustainability Risk Governance), Laura Waterford (Director, Pollination Law), Nicolette Rubinsztein (Non-executive Director) and Zoe Bush (Senior Solicitor in the Environmental Defenders Office's Safe Climate (Corporate) team, and an Adjunct Lecturer at the University of Western Australia Law School) - moderated by Geoff Summerhayes (Chair, Senior Advisor Group Pollination) discussed the implications for boards.

Here are our key takeaways.

Why are we talking about nature?

The starting point for the discussion was acknowledgement that:

- nature underpins and is not separate from the global economy
- Australia's economy is heavily dependent on nature
- the impacts of the rapid deterioration of nature are already being felt – companies are already feeling the direct and indirect effects of their dependencies and impacts on nature
- directors should be thinking of nature as a risk issue

As such directors should be turning their minds to nature-related as a potential source of financial, reputational and legal risk (as well as a source of potential opportunities). This is confirmed by the 2023 Harford Davis and Bush opinion.

Importantly, the panel observed that while global momentum on nature-loss has been building for a number of years, and while nature-loss is an area of increasing focus from many quarters – for example from: investors (eg the launch of Nature Action 100+ initiative); standard setters (eg the establishment of the International Sustainability Standards Board (ISSB) and the release of the first two global sustainability reporting standards); governments, regulators and the community more broadly – it is not (yet) receiving the same attention from boards as other risks.

Many boards are still at the 'why' stage on nature-related risk

The panel agreed that nature-related risk is set to have as large an impact on the way companies operate as the move to net zero, but that as yet, many boards have yet to 'come to grips with the issue'.

Having said this, it was suggested that there is variation in the level of board focus and the level of priority currently being given to nature-related risk with listed companies (generally) more likely than others to be engaged, and more advanced in their understanding.

It was also observed there is some variation along industry lines (though listed companies across sectors were observed to be more engaged than others).

This is understood to be in part because organisations in some sectors – for example, financial services institutions – may consider that they have no direct exposure. However, it was pointed out that many financial services organisations are likely to have some exposure to nature-related risks arising from their indirect nature impacts.

For example, banks may be indirectly exposed to nature-related risks as a result of their lending practices.

To illustrate: lending to agricultural businesses whose operations disrupt ecosystems through deforestation, soil erosion and/or water exploitation, has been linked to a decline in pollinating insects like bees. Falling crop yields is likely to impact the stability of agricultural businesses, which in turn impacts their ability to repay loans. This, in turn, poses a risk to banks, as it could lead to loan defaults.

Separately, it was noted that businesses may be exposed to reputational risks arising from their impacts on nature - even where they are operating within the letter of existing regulation - as a result of rapidly shifting community attitudes. An example of this is a construction company that acquired land for building purposes, with the necessary land-clearing approvals. However, the land to be cleared was koala habitat. The company in this instance ultimately chose not to proceed (despite the costs it had already incurred in acquiring the land) as it assessed the reputational risk of doing so to be more costly than proceeding.

Australian directors are highly exposed relative to directors in other jurisdictions

The combination of the Australian economy's acute level of exposure to nature-related risks, the relatively high bar imposed on directors - ie our relatively strict director's duties and stringent continuous disclosure and misleading and deceptive conduct regimes – and the relative weakness of hard environmental protection laws, means that Australian directors' level of exposure to potential litigation risk in this context is high (relative to other jurisdictions).

This is evident in the high level of climate litigation in Australia relative to other jurisdictions – on a per capita basis, Australia is the global leader of 'climate-related litigation' (read: Climate litigation development: Australia leading the pack - Insight - MinterEllison).

Nature-related risk will likely follow the same trajectory as climate risk, but on 'fast forward'

The panel expects nature-related risk to follow the same trajectory as climate risk though at an accelerated rate.

This is because:

- Nature-loss is occurring at a rapid rate – we are moving ever close towards the edge of several 'tipping points'
- Nature and climate are inextricably linked, rather than separate issues and climate is already on the agenda for most organisations. Nature-related risks could be considered to be a compounding factor, rather than an entirely new risk area for companies to understand (though this is not to diminish the complexity inherent in the task)
- Organisations already have a head-start in that many already have the necessary governance frameworks in place – though they this is not to say no work is required in extending these to integrate nature-related risk. In support, the panel pointed to the high level of uptake of the Taskforce on Climate-related Financial Disclosure framework (TCFD) across listed companies and observed that the newly minted Taskforce on Nature-related Financial Disclosure (TFND) recommendations adopt a similar approach. Likewise, organisations are likely to be able to draw on the lessons learned in other contexts eg implementation of the modern slavery regime.
- The TNFD has been developed to be consistent with the recently released International Sustainability Standard Board (ISSB) global sustainability standards and with the existing TCFD framework. Importantly, while the TFND is not binding on business as yet, the panel expects that it will become so in time.
- The level of investor concern and focus on nature-related risk is increasing. In the US, shareholder proposals on a range of nature-related risk issues are already being filed, and companies are moving to respond. It's expected that Australian investors are likely to follow suit.
- Jurisdictions outside Australia – eg the EU - are already moving to tighten regulation, which has implications for business operating in those jurisdictions, and (the panel suggested) may signal that other jurisdictions will also tighten requirements.

Nature-related risk is a complex area but doing nothing/putting off taking action is the more risky option

The panel acknowledged that nature-related risk is a complex challenge given that the risks for every organisation will be specific to the organisation and its particular circumstances, and that unlike climate risk there is no one metric that can be used to measure progress. Added to this, it was acknowledged that:

- boards may not already have an understanding of nature-related risks and/or existing and/or emerging nature-risk specific frameworks
- there may be data challenges
- boards already have a 'full agenda'.

However, the panel underlined that directors should not allow the difficulty and complexity of the challenge to be an excuse for inaction observing that:

- nature-loss is accelerating and by extension, so are the financial, reputational and legal risks arising from organisations' direct and indirect dependencies and impacts on nature;
- inaction – failure to identify, consider and assess the nature-related risks likely to harm your business - will not insulate boards (or the organisations they lead) from exposure to liability
- regulatory requirements and expectations appear likely to tighten. For companies with markets in the EU, tighter regulation may already limit their ability to sell certain products (eg products such as beef produced on land subject to deforestation post 2020)

  [Note: The 2023 Hartford Davis and Bush opinion includes detailed discussion of the impact of EU regulation on Australian beef production a paragraphs 27 to 28.]

What steps should boards be taking now?

As a first step, it was suggested that:

- Directors be proactive in educating themselves about nature-related risk, by drawing on the materials/data available including the material available on the TNFD website. A joint publication from the CCLI and the Australian Institute of Company Directors - Biodiversity Risk: Legal implications for companies and their directors– was also suggested as a useful resource.
- It was suggested that organisations give consideration to the TNFD's four-phase LEAP risk and opportunity assessment approach. This process assists organisations to: 1) Locate the interface with nature; 2) Evaluate the priorities/impacts; 3) Assess material risks/opportunities; and 4) Prepare to respond and report. Given the urgency of the problem, boards were urged to 'get started' – to prioritise what is a significant, and urgent challenge rather than put off taking action.

  [Source: This article is based on notes taken a panel discussion hosted by Pollination Law entitled "Nature-related Risk and Directors' Duties" 03/11/2023]

The Australian government has opened consultation on its long-awaited sustainable finance strategy

The strategy flags plans (among other things) to legislate a fund-labelling regime for sustainable investment products with Treasury to commence work on this reform from 2024

Treasury has released a consultation paper on the government's long-awaited sustainable finance strategy for feedback – the due date for submissions is 1 December 2023.

Broadly, the 12 priorities in the strategy are structured around three broader/overarching priorities (referred to in the consultation paper as 'pillars'): 1) greater transparency on climate and sustainability; 2) strengthening financial system capabilities; and 3) advancing Australia's leadership and engagement on sustainability.

Announcing the launch of the consultation, Treasurer Jim Chalmers highlighted several questions on which the government is seeking feedback, namely:

- Options for developing a labelling regime for sustainable investment products, including for managed investment products and superannuation options.
- 'Next steps in the development of a sustainable finance taxonomy, including permanent governance arrangements to oversee and maintain the taxonomy.

– Options to enhance the disclosure of corporate transition plans.
– Steps to identify and address data-related challenges faced by financial system companies and investors.
– Plans to step up Australia's international engagement on sustainable finance'.

The table below provides an overview of the key points under each of the government's three headline priorities.

HEADLINE PRIORITIES	KEY POINTS
	Pillar 1: Improve transparency on climate and sustainability
Priority 1: Establish a framework for sustainability-related financial disclosures	▪ Legislate mandatory ISSB-aligned climate reporting regime: The consultation paper confirms the government's intention to legislate mandatory climate-related financial disclosure requirements for large companies and financial institutions with the new requirements planned to commence from 1 July 2024 (to be phased in for other entities over time). ▪ Inclusion of broader sustainability-related disclosures over time: The consultation paper also confirms the government's intention to extend the new mandatory reporting regime to include broader 'globally aligned sustainability related financial disclosure requirements (**including nature**) over time'. ▪ Feedback is sought on opportunities to support implementation including feedback on opportunities to support 'education, guidance or resources' to 'support high quality disclosures, particularly in areas such as Scope 3 emissions reporting and scenario analysis ▪ Feedback is also sought on **preparation for TNFD**: Specifically, the consultation paper calls for views on now the 'government, regulators and industry [should] prepare for global developments in sustainability-related financial disclosure frameworks and standards, including the TNFD' [Taskforce on Nature-related financial disclosure].
Priority 2: Develop a Sustainable Finance Taxonomy	▪ The consultation paper outlines the government's approach to 'supporting the development' of a 'credible and science-based' Australian sustainable finance taxonomy. ▪ It's proposed that the initial focus will be on climate mitigation objectives (consistent with the initial focus on the introduction of mandatory climate disclosure). Among other things, the government's expectation is that the taxonomy will 'incorporate a role for transition finance' and 'have an overarching focus on practicality, useability and international operability'. ▪ Medium term objective: The consultation flags the government's intention to 'make further decisions on the potential regulatory use cases for the taxonomy' during the initial development phase, including decisions about 'how taxonomy criteria could be incorporated into corporate reporting requirements transition planning frameworks, and labelling schemes for sustainable investment products'. On this point, the consultation paper flags that 'It is likely that a legislative approach will give more force to the taxonomy's use cases, provide clearer guidance to markets, and ensure that the taxonomy is an effective foundation of the Government's sustainable finance agenda. However, while the Government will consider these options in the medium-term, a taxonomy will not be directly incorporated into regulatory architecture for financial reporting or product labelling unless and until the Government is satisfied that Australian taxonomy criteria are credible, internationally-aligned, readily useable by financial market participants and will materially support the development of Australia's sustainable finance products, markets and capabilities'. ▪ It's envisaged, that once established the taxonomy will be maintained by 'an appropriate government body to ensure that it is effectively embedded in Australia's regulatory framework'.

HEADLINE PRIORITIES	KEY POINTS
	▪ Feedback is sought (among other things) on which areas should be prioritised for expanding taxonomy coverage (after the initial focus on climate mitigation objectives in key sectors).
Priority 3: Support credible net zero transition planning	▪ The consultation paper confirms the government is 'accelerating and coordinating investments in other policy frameworks' to support 'credible transition planning by firms, financial institutions and investors' including: the development of national sectoral emissions reduction pathways and the development of the sustainable finance taxonomy. ▪ The consultation paper flags that 'the government does not intend to introduce transition planning disclosure requirements that go beyond ISSB-aligned standards in the near term'. It's proposed that the immediate focus will be on: 'the smooth introduction of new climate disclosure requirements, and to work with industry and investors to identify opportunities to support credible transition planning and disclosure. This will provide an opportunity to assess how sectoral pathways, taxonomy and other frameworks can play a role as part of a 'building blocks' approach to supporting better transition planning in the medium-term'. ▪ (Potential) extension of transition planning requirements planned to be considered in 2024: In 2024, it's envisaged that Treasury will work in the Council of Financial Regulators (CFR) to provide updated recommendations on 'whether additional regulatory requirements to promote transparent and credible transition planning are needed, and what further tools, resources and guidance can support best practice transition planning by Australian firms and financial institutions'. It appears that this is expected to entail consultation. Following this consultation the government proposes to finalise its position on transition planning disclosure requirements/additional guidance.
Priority 4: Develop a labelling system for investment products marketed as sustainable	▪ The government plans to: – **legislate a 'labelling regime for investment products marketed as "sustainable"** or similar, including for managed funds and within superannuation. Treasury will commence work on this reform in 2024, consulting closely with regulators and industry stakeholders on policy and legislative design'. – it's envisaged that investment product issuers would also be required to provide additional disclosure to retail investors on sustainable investment products including 'a description of how sustainability is incorporated into the investment process' ▪ It's proposed that Treasury will commence implementation of these reforms in 2024. ▪ As part of this process, it's also planned that the government will 'assess the possible integration of other sustainable finance frameworks, such as the taxonomy'.
Pillar 2: Financial system capabilities	
Priority 5: Enhancing market supervision and enforcement	▪ The consultation confirms that the government's intention to 'continue to support ASIC's capacity to supervise and address market misconduct as it relates to sustainable finance, including to target greenwashing, building on additional resourcing provided to ASIC to accelerate this work in 2023-24'. ▪ The consultation paper flags that the government will consider whether additional regulation is needed to 'address misconduct in sustainable finance markets', and

HEADLINE PRIORITIES	KEY POINTS
	in particular highlights that it will consider regulating ESG ratings providers. The consultation paper states: 'The Government will consider feedback on whether ESG ratings should be captured by financial services regulation, comparably to credit ratings agencies'. ▪ Views are sought on (among other things): – **Whether Australia's 'existing corporations and financial services laws sufficiently flexible to address greenwashing'** – Whether there is a 'case for **regulating ESG ratings as financial services'**
Priority 6: Identifying and responding to potential systemic financial risks	▪ It's proposed that: 'the CFR will continue to expand its work on climate- and sustainability-related financial risks, deepening risk management capabilities and practices across financial regulators and market participants'. ▪ A key measure highlighted in the consultation paper under this priority is the application of the CFR's Climate Vulnerability Assessment process to the household insurance sector.
Priority 7: Addressing data and analytical challenges	▪ In addition to the measures already on foot to improve the availability and quality of sustainability data in key areas, the consultation paper flags plans for the CFR to undertake an assessment and provide recommendations to the government on **how to address key data challenges** including: – 'The estimation of scope 3 (value chain) emissions in large and complex supply chains, sectors or portfolios. – Consistent and accessible understanding of climate scenarios and decarbonisation pathways across economies, sectors and industries, and how they affect individual sectors or firms. – Access to reliable and comparable sustainability data beyond emissions (e.g. physical climate impacts and on nature-related risks and impact). – The availability of corporate sustainability data, including the potential value of a centralised repository and the utility of data reported in a standardised, digital format'. ▪ In terms of timing, it's proposed that the Treasurer will ask that the CFR publish its recommendations by the end of 2024. ▪ Views are sought on: – 'What the priorities [are] for ensuring that data-related initiatives already underway are tailored to meet the needs of firms and investors' – 'What key sustainability data gaps or uncertainties faced by financial institutions in Australia should be prioritised by the CFR?'
Priority 8: Ensuring fit for purpose regulatory frameworks	▪ The consultation states that the government 'will continue to work with financial regulators, governance experts and industry stakeholders to identify policy priorities for mainstreaming sustainability considerations in corporate governance and financial institution decision-making, including taking into account stakeholder feedback from this consultation process'. ▪ The consultation paper points to the government's move to update APRA's Statement of Expectations to 'prioritise the promotion of prudent practices and transparency in relation to climate-related financial risk' as a key measure under this priority. The consultation paper flags that the government is 'open to broader feedback on the possible longer-term direction of prudential policy frameworks in the face of climate change and other sustainability risks.'

HEADLINE PRIORITIES	KEY POINTS
	▪ The government is also seeking views on 'potential enhancements' to the regulatory framework which could 'further integrate consideration of sustainability-related opportunities and risks by companies, financial institutions and regulators'. It's suggested that this might include: 'clarifying how sustainability considerations should be integrated into decision making by companies and specific classes of financial institutions (including banks, insurers, superannuation funds and other managed funds)'. ▪ In the area of superannuation and managed funds, the consultation paper flags plans to: 'assess how regulatory frameworks or industry codes can support effective investor stewardship as a tool to promote long-term corporate performance that contributes to positive sustainability outcomes'. ▪ Investor stewardship: Views are sought on 'What steps could the Government or regulators take to support effective investor stewardship' ▪ Promoting/supporting integration of sustainability-related issues into financial decision making: Views are sought on whether changes to corporate governance obligations (eg directors' duties), prudential frameworks/oversight, and/or regulation of the superannuation system and management investment schemes needed to support 'better integration of sustainability related issues in financial decision making'
Pillar 3: Australian Government leadership and engagement	
Priority 9: Issuing Australian sovereign green bonds	▪ The consultation paper confirms that: 'The first issuance of the Government's sovereign green bond program is expected in mid-2024'.
Priority 10: Catalysing sustainable finance flows and markets	▪ The consultation paper confirms that the Clean Energy Finance Corporation (CEFC) is expected to: 'support the delivery of the government's sustainable finance strategy by expanding its discounted financing across priority sectors and market segments, contributing to the development phase of the sustainable finance taxonomy, and contributing to the development phase of energy assessment tools (such as NatHERS In-Homes) for financial product applicability and consistency with sustainable finance best practice'. ▪ The CEFC is also expected to support the initial phase of the Australian Sustainable Finance Taxonomy 'with a particular focus on sustainability metrics and criteria for the housing and property sector, as well as providing expert advice to the CFR as it oversees this work'.
Priority 11: Promoting international alignment	▪ The consultation paper flags that: 'Priority issues in the next phase of Australia's bilateral and regional engagement will include supporting approaches to transition finance frameworks that are adapted to the needs of our region, and supporting two-way knowledge sharing and capability-building as regional economies adopt new international frameworks like the ISSB climate and sustainability disclosure standards.' ▪ Box 7 at p36 of the consultation paper lists examples of how the government is 'stepping up Australia's global engagement on sustainable finance'.

HEADLINE PRIORITIES	KEY POINTS
Priority 12: Position Australia as a global sustainability leader	▪ The consultation paper states that the government proposes to: 'promote sustainable finance as key pillar of ambitious international engagement on climate and nature, helping to position Australia as a regional and global leader in sustainability. Australia will continue to support innovative financing models and approaches, including blended finance models, to support sustainable investment in our region. This will complement the expansion of direct Government-led financing efforts to support regional sustainability priorities'. ▪ On this second point, the consultation paper flags that 'Looking ahead, in addition to scaling up the overall quantum of Australia's blended finance aimed at climate solutions in the Indo-Pacific, it will be important to ensure that blended finance and investment vehicles take a robust approach to sustainability. This includes both mainstreaming sustainability considerations, as well as credible frameworks for assessing and choosing sustainable activities to support. Taking an innovative approach would also require consideration of new types of blended finance. In particular, those aimed at the types of projects that are hard to finance, such as smaller-scale, SME-focused, projects in least developed countries, as well as new mechanisms to open up flows of private investment toward sustainable activities'.

RIAA has welcomed the consultation, urged the expansion of the proposed mandatory climate reporting regime to include broader sustainability related disclosure

In a statement welcoming the release of the consultation paper, the Responsible Investment Association Australasia (RIAA), the RIAA singled out several aspects of the government's proposed strategy as particularly welcome. These include (among other things):

- strengthened action to prevent greenwashing through ESG product labelling regulations
- the acknowledgement of 'the critically important role of investor stewardship in supporting a stronger and more sustainable economy' and moves to increase transparency in this context.
- support of the Taskforce on Nature-related Financial Disclosures (TNFD) and International Sustainability Standards Board work on sustainability disclosures. RIAA comments:

  'As convenor of the official TNFD Consultation Group for Australasia, RIAA calls on the government to move rapidly beyond climate to adopt the broader ISSB – and eventually TNFD – standards'.

  [Source: Treasury consultation: Sustainable Finance Strategy 02 November 2023 - 01 December 2023]

Implementation of mandatory climate reporting in Australia | NSW Bar Association opposes the government's proposed three year ban on private litigation

Context

- The Australian government plans to phase in new, internationally aligned, mandatory climate disclosure reporting requirements from July 2024 for certain entities.
- An initial round of consultation (read, Moving closer to introducing internationally-aligned climate reporting requirements in Australia: Initial consultation launched) on the proposed approach to developing the standards closed in February 2023. On 27 June, Treasury released a second consultation paper seeking feedback on a number of proposals around implementation. Consultation closed on 21 July 2023. For more on the government's proposed approach see: Introduction of mandatory climate reporting in Australia: Second round of consultation launched
- The content of these new requirements will be set out in new Australian Sustainability Reporting Standards (ASRS) which are being developed by the Australian Accounting Standards Board (AASB).

- The AASB has released a package of three initial draft standards for consultation based on the ISSB standards: IFRS S1 and IFRS S2. The due date for submissions is 1 March 2024. For more see: Another step closer towards implementing mandatory climate disclosure in Australia - Post - MinterEllison
- It's envisioned that the AASB's standards (once finalised) will apply to annual reporting periods beginning on or after **1 July 2024** (for certain entities – Group 1 entities as set out in Treasury's second consultation paper at Table 2, p8) with first disclosures forming part of the Annual Reports from August 2025 onwards.
- However this timing is contingent on the passage of the necessary legislation to establish the mandatory climate disclosure regime (including empowering the AASB to issue the ASRS standards).

NSW Bar Association submission on the government's second round consultation paper

- The NSW Bar Association's submission on the government's proposed approach to legislating the mandatory climate reporting regime raises concerns about the proposed three year bar on private litigants being able to pursue misleading or deceptive conduct claims in relation to forward-looking statements – scenario analysis and transition planning and Scope 3 emissions reporting – for the first three years of the new regime. That is, the government proposes that initially, only the regulator - the Australian Securities and Investments Commission (ASIC) – will be able to pursue court action of this kind.
- The NSW Bar Association makes three submissions on this issue which are summarised in the table below.

THREE SUBMISSIONS ON THE PROPOSED THREE YEAR MORATORIUM	RATIONALE
▪ There should be no moratorium: 'A three-year moratorium on private actions in relation to forward-looking statements and Scope 3 emissions reporting should not be introduced'	The NSW Bar Association considers the imposition of the proposed moratorium is unwarranted for the following reasons: ▪ the important role private litigants play in assisting regulators in holding entities accountable for greenwashing. Given how widespread the issue is known to be -.- the submission cites the findings of the Australian Competition and Consumer Commission's (ACCC's) internet sweep in illustration – it's submitted that regulators do not have bandwidth to undertake this role in its entirety. ▪ the (perceived) likelihood that the proposed moratorium would 'undermine Australia's ability to achieve its 2030 emissions reduction target' ▪ the moratorium would establish an: 'unwarranted zone of immunity for corporations from action by private litigants under provisions of the law that otherwise regulate (and have for many years regulated) corporate behaviour in all other areas of the commercial life of the nation, and which operate to protect individuals from harm that may be suffered as a consequence of "greenwashing" activity'. ▪ the proposed moratorium would unfairly benefit Group 1 entities because: 'Group 1 entities, which according to the timeline proposed on page 8-9 of the Consultation Paper will be subject to the moratorium for the first three years of their exposure to the reporting obligations, compared with Group 2 and 3 entities which will be subject to the moratorium for a shorter period'.
▪ If a moratorium is introduced it should be limited.	It's submitted that if implemented, a moratorium should be limited in the following two respects to ensure it achieves the policy objective of 'encouraging engagement and compliance with the law after the date of the amendments'. – 'Private litigants should not be denied access to the courts and the administration of justice in cases in which misleading or deceptive statements in contravention of the law were made prior to the amendments, or where it can be seen that the disclosures would have been made regardless of the amendments (ie because the corporation was already voluntarily making disclosures of that kind prior to the amendments)'

THREE SUBMISSIONS ON THE PROPOSED THREE YEAR MORATORIUM	RATIONALE
	– …if there is to be a moratorium, it should operate only to limit the remedies that private litigants can seek (for example, limit remedies to declarations and injunctions), rather than entirely prohibit private actions'.

[Source: NSW Bar Association submission: Response to Consultation Paper, 'Climate-related financial disclosure' (June 2023)]

Democrats urge SEC to finalise the proposed climate disclosure rule, and to 'preserve' key elements of the proposal (including Scope 3 disclosure requirements)

- Californian Congresswoman Maxine Waters (Ranking Member of House Committee on Financial Services) has written the US Securities and Exchange Commission (SEC) urging it to 'move quickly' to finalise its proposed climate disclosure rule.
- The letter underlines the following points:
  - Regulatory 'momentum' towards increased transparency is building – 'other federal agencies, state governments, and governments across the globe are embracing climate-related disclosure and accountability'.
  - Making the rule is within SEC's authority/mandate
  - There is 'near unanimous support from investors for the proposed new disclosure requirements
- The letter also outlines the 'key elements' that the Democrats consider should be 'preserved' in the final rule including requirements to disclose:
  - Scope 3 emissions
  - 'issuer's climate targets and transition plans, and progress made towards and expenditures spent towards these targets and plans'
  - 'impacts of climate-related physical and transitional risks in their financial statements, including climate-related inputs, estimates, and assumptions'
  - 'attestation requirements to ensure that the quality of these disclosures are reliable'
  - 'guidance, as contemplated in the proposal, to ensure public companies do not pass on their reporting requirements under the final rule to small private businesses or producers'.
- The full text of the letter is here.

[Source: US House Committee on Financial Services media release (and full text letter) 30/10/2023]

ISSB adoption | NBIM (and others) urge UK government urged to adopt ISSB standards with minimal change

In July 2023 the Secretariat to the UK Sustainability Disclosure Technical Advisory Committee (TAC) published a call for evidence to seek UK views on the IFRS Sustainability Disclosure Standards (IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information and IFRS S2 Climate-related Disclosures) as issued by ISSB and their prospective use in the UK. Responses are planned to be used to inform the UK Sustainability Disclosure TAC's technical assessment of IFRS S1 and IFRS S2

Responses to the consultation have now been published and there appears to be strong support for implementation of the ISSB standards in the UK (with minimal change), including from large investors.

For example, from Norges Bank Investment Management (NBIM).

The chief reason NBIM gives for this is the need for more detailed, comprehensive, consistent, comparable information about how companies are managing their sustainability-related risks/opportunities (beyond climate). NBIM states:

> 'We need consistent, comparable and reliable information from companies on social or environmental issues which are financially material to their business. We rely on information related to the current performance of a company, as well as information on drivers of value that may be predictive of its long-term performance. This information helps inform our investment decisions, our risk management processes and our ownership activities. As a global investor with holdings in 70 different countries we have a clear interest in information

> being reported in a consistent and comparable manner across markets worldwide. We therefore support the International Sustainability Standards Board (ISSB) and its mission to deliver a global baseline of disclosure standards that provide decision-useful information to investors. We have welcomed the mandatory TCFD reporting requirements for large UK companies, but we strongly encourage the UK to endorse the IFRS Disclosure Standards in view of their higher granularity and inclusion of sustainability information beyond climate'.

NBIM considers the IFRS S1 and S2 are 'technically feasible to implement' and encourages the UK to implement the standards as they are.

Similarly, Chartered Governance Institute UK and Ireland supports the adoption of the ISSB standards with minimal change stating:

> 'The endorsement from IOSCO, co-led by the FCA, demonstrates that IFRS S1 and IFRS S2 are fit for purpose in their current form, and it is also a solid indicator of considerable global appetite for these standards. The Institute agrees with the UKEB that ISSB standards should 'act as a minimum global baseline', and ultimately that the implementation of these standards in the UK should only divert from this baseline where absolutely necessary, in order to maintain consistency globally. With the EU's CSRD and the SEC's climate disclosure proposal in the US, companies are already going to face significant complexity when navigating these different reporting requirements. To mitigate further complexity, the closer the UK can stay to the ISSB standards, the better'

[Sources: UK Endorsement of IFRS S1 & IFRS S2 – Call for Evidence 30/11/2023]

ISSB adoption | HKEX pushes back implementation of new 'enhanced' ESG disclosure requirements to 1 January 2025

- Hong Kong Exchanges and Clearing Limited (HKEX) has announced it will delay the planned implementation of new 'enhanced' climate disclosure requirements in the Listing Rules from 1 January 2024 to 1 January 2025.
- HKEX gives two reasons for this:
  - The proposed changes to the Listing Rules (consulted on in April 2023) were informed by the International Sustainability Standards Board (ISSB) exposure draft standard IFRS S2. The exchanges plans to take into account the final standard in finalising the proposed Listing Rules amendments, as well as the guidance around implementation in the (yet to be released) ISSB Adoption Guide, which is expected to be published before the end of 2023.
  - To allow 'issuers more time to familiarise themselves with the new climate-related disclosure requirements'.
- More broadly, HKEX has said it will continue to work closely with the Hong Kong government and other members of the Hong Kong Green and Sustainable Cross-Agency Steering Group (CASG) on the development of a roadmap on the 'appropriate adoption of the ISSB standards for Hong Kong's financial services to align with international standards'.

[Source: HKEX media release 03/11/2023]

$33 trillion coalition backs CDPs campaign for the world's high-emitters to adopt science based targets

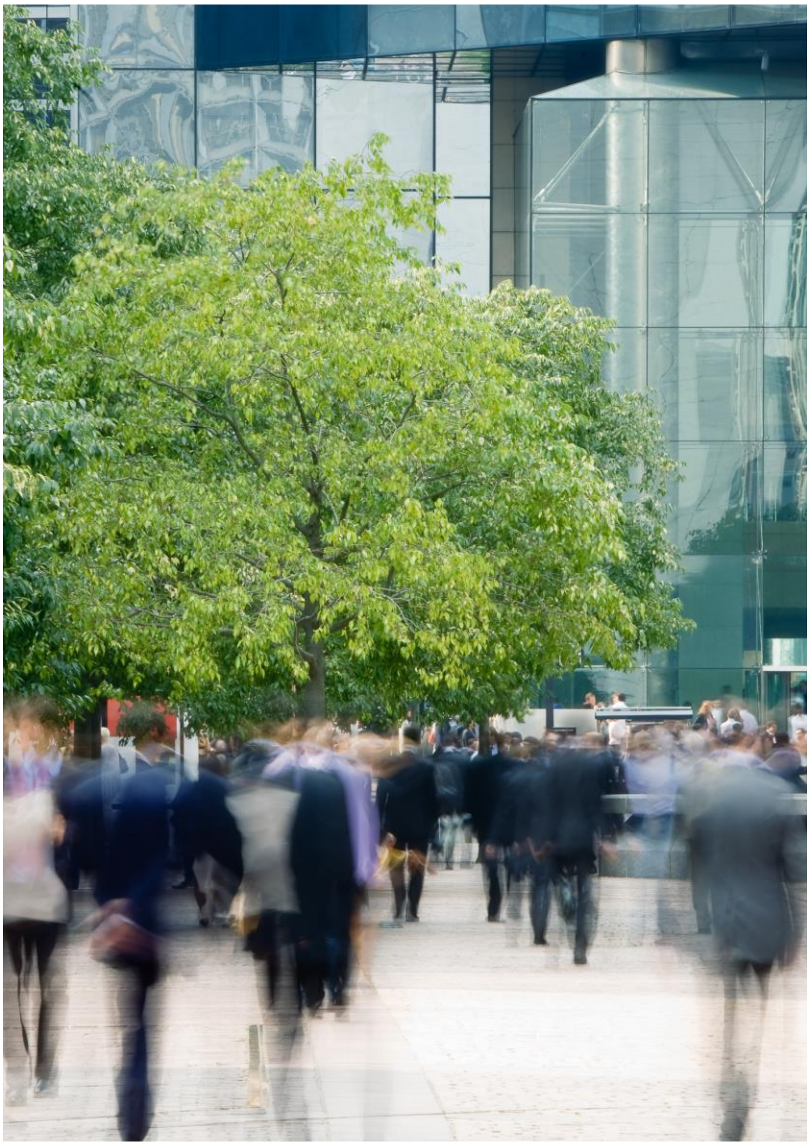
- CDP has been running a multi-year campaign to push companies to adopt science based emissions reduction targets.
- This year, 2100 high emitting companies – eg FedEx, General Electric, Dow Chemical, Eskom, Nippon Steel Corp, Rio Tinto and JD.com – are being pushed to adopt 1.5 aligned, science based emissions reduction targets.
- Backing for the campaign has increased over time with 307 financial institutions and 60 multinational corporations globally with a combined $33 trillion in assets backing this year's push. These include: Legal & General Investment Management, Nomura Asset Management Co., Ltd., Crédit Agricole SA, New York State Common Retirement Fund, British Columbia Investment Management Corporation (BCI) and Cathay Financial Holdings. Joining them in leading the call for companies to set science-based targets are CDP Supply Chain Members including Bayer, BMW AG and L'Oréal.
- According to CDP's statement, since 2020, CDP's campaign has helped drive over 470 high-impact companies to join the SBTi, with 99 companies joining in the last year.

Progress report on the 2022-23 CEP Science Based Targets Campaign

CDP has also released a progress report summarising the outcomes of the previous campaign cycle. Some standout findings, highlighted by the CDP include:

- As a result of the campaign, 99 new high-emitting companies joined the Science Based Target Initiative (SBTi) through CDP's SBT campaign.
- Japan had the highest number of companies joining the SBTi in the 2022-23 cycle

[Source: CDP media release 01/11/2023]



In Brief | (More) evidence there is a strong business case for gender diversity: BlackRock has released a paper – Lifting Financial Performance by investing in Women - outlining the financial benefits of gender diverse workplaces

[Source: BlackRock paper: Lifting Financial Performance by investing in Women November 2023]

In Brief | Companies are 'yet to come up with the details, quantified and costed transition plans needed in this critical decade': Analysis by The Transition Pathway Initiative Centre (based at the London School of Economics and Political Science) of 1000+ companies' transition plans reveals that just 5% quantify how they will meet their greenhouse gas emissions reduction strategy and only 1% of companies are aligning their future capital expenditures with their own long-term decarbonisation goals

[Source: TPI media release 07/11/2023]

In Brief | Major bank outlines plans to work towards the goal of 'becoming a nature positive bank': The Australian Conservation Foundation has 'commended Westpac for becoming the first Australian bank to set a zero-deforestation target for loans to beef, dairy and sheep farming; following the release of Westpac's Natural Capital Position Statement

[Sources: ACF media release 06/11/2023; Westpac: Natural Capital Position Statement]

Financial Services

Top Story | 2024: Licence to crypto

MinterEllison has released a detailed overview of the government's proposed approach to regulating digital asset platforms in Australia.

You can find the full text here: 2024 Licence to crypto - Insight - MinterEllison

Complaints handling delays | ASIC takes court action against super fund

- The Australian Securities and Investments Commission (ASIC) has commenced court action against a superannuation fund over alleged complaints-handling delays.

- Broadly, ASIC alleges that between 22 October 2021 and 13 January 2023, the fund received 337 superannuation complaints but did not comply with notification requirements when it (allegedly) did not:
  - 'respond to 106 complainants within 45 days;
  - inform 85 complainants about why there was a delay in responding to their complaint; and
  - inform 22 complainants about their right to take their compliant to AFCA'.
- ASIC further alleges that the fund

  'failed to operate

efficiently, honestly and fairly when it failed to comply with its procedures, sent delay notifications to complainants when it was not justified to do so, and did not have adequate resources to comply with its internal dispute resolution procedures'.

- ASIC is seeking declarations, pecuniary penalties and other orders against the fund. Full details of ASIC's allegations are included in the Originating Process and Concise Statement.
- Announcing this, ASIC Deputy Chair Sarah Court reiterated calls on funds to 'prioritise dispute resolution procedures to properly protect consumers'.

Broader context

- This is the first court proceeding launched by ASIC under a new regime which came into effect on 5 October 2021. The regime makes certain provisions of ASIC Regulatory Guide 271 Internal Dispute Resolution (RG 271) enforceable, including requirements to respond to most certain superannuation complaints within a set timeframe.
- ASIC's action follows the release by ASIC in December 2022 of a report into complaints handling - REP 751 Disputes and deficiencies: A review of complaints handling by superannuation trustees - which identified that 'some trustees had sub-standard arrangements for managing complaints'. .
- Announcing the release of the two reports, ASIC called on trustees to review their existing processes to ensure compliance with the enforceable obligations and guidance in RG 271 and cautioned that it would take enforcement action where necessary to 'address harm'.
- Complaints handling has also an area highlighted as an area where the government would like to see the sector improve.

[Source: ASIC media release 06/11/2023]

Combatting online scams | ASIC has taken down 2100 scam websites since July 2023 (with 400 more in the process of being taken down)

Following a successful trial, the Australian Securities and Investments Commission (ASIC), working with a third party, has implemented a new 'scam website takedown capability' which (as the name suggests) enables the regulator to remove or limit access to phishing and investment scam websites.

ASIC states that it is targeting:

> 'unregulated, fake or imposter entities offering financial services or investment scams to Australians, including fake trading platforms and crypto-asset investment scams. ASIC expects the takedown service to impact the reach of scammers, particularly those located offshore and reduce the harm caused to Australians'.

According to ASIC, since July 2023 it has taken down 2100 websites, with 400 websites in the process of being taken down. These include: fake investment platforms, crypto-asset scam websites, and imposter scam websites where legitimate financial service businesses are being impersonated.

Bigger picture

ASIC's new take-down capability is part of the government's broader 'Fighting Scams initiative' which aims to disrupt scam activity and protect Australians from financial harm.

It also supports the work of the National Anti-Scams Centre (NASC). ASIC has indicated it is working with a number of government agencies through the NASC to take down investment scam websites that have been reported to them.

For more on this see: First anti-scam centre 'hit squad' to target online investment scams - Post - MinterEllison

[Sources: ASIC media release 02/11/2023; Assistant Treasurer and Minister for Financial Services Stephen Jones media release 02/11/2023]

Implementing ALRC Interim Report A and B recommendations to simplify Treasury portfolio legislation: New regulations registered

- Treasury Laws Amendment (ALRC Financial Services Interim Report) Regulations 2023 (Cth) (Regulations) were registered on 31 October 2023.
- The purpose of the Regulations is to:

'make consequential amendments and other improvements to simplify the Corporations Regulations 2001 (Corporations Regulations) and the Australian Securities and Investments Commission Regulations 2001 (ASIC Regulations) following the changes made by the Treasury Laws Amendment (2023 Law Improvement Package No.1) Act 2023 (Amendment Act), which Parliament passed on 7 September 2023'.

- Broadly, the Regulations both:
  - expand section 9 of the Corporations Act 2001 (Cth) to create a single glossary and remove redundant definitions
  - simplify the use of definitions in the Corporations Regulations in various respects (eg clarifying the meaning of defined terms, making other minor amendments intended to improve navigability and readability)
- The Regulations took effect on 1 November 2023

[Source: Treasury Laws Amendment (ALRC Financial Services Interim Report) Regulations 2023 (Cth)]

AFCA is consulting on its approach to determining compensation in complaints involving financial advisers and managed investment schemes

- The Australian Financial Complaints Authority has released a 'draft approach document' for consultation which essentially sets out its

  'existing procedure, and the principles we may have regard to – such as proportionate liability statutes – when making decisions, apportioning liability and awarding compensation for a loss in investment and advice complaints'.

- The consultation is a first step towards formalising and publishing an 'Approach document' which is intended to clarify for industry how AFCA considers investment and advice complaints involving financial advisers and Managed Investment Schemes and support AFCA's approach being applied consistently. The due date for submissions is 1 December 2023.

[Source: AFCA media release 06/11/2023]

In Brief | The Financial Conduct Authority and the Bank of England are consulting on their proposed approach to regulating stablecoins (including their proposed approach to regulating operators of systemic payment systems using stablecoins). The Bank's proposals 'cover any payment systems in the future that use stablecoins in the UK at systemic scale'. The due date for submissions is 6 February 2024.

[Source: Bank of England media release 06/11/2023]

Risk Management

Top Story | Third party cyber risk awareness for government agencies

In light of government's increasing dependence on third party service providers, and the associated increased risk this entails, MinterEllison has released an article providing insights into third-party cyber risk best practices that government agencies can implement to secure data and protect customers from cyber-attacks.

You can access the full text here: Third party cyber risk awareness for government agencies - Insight - MinterEllison

Privacy Commissioner launches court action against Australian listed company over data breach

- The Australian Information Commissioner has commenced civil penalty proceedings against Australian Clinical Labs Limited (ACL) following an investigation into the company's privacy practices.
- This investigation was launched in response to a February 2022 data breach of ACL's Medlab Pathology business. that was notified to the Office of the Australian Information Commissioner (OAIC) five months later on 10 July 2022.
- This data breach resulted in the unauthorised access/exposure of 100,000+ people's personal information, sensitive health information and credit card information.
- Broadly, the Commissioner

alleges that ACL contravened section 13G of the Privacy Act 1988 (Cth) (during the period May 2021 to September 2022) because the company did not:

- have sufficiently robust cyber security arrangements in place for the protection of the personal information it held from unauthorised access (in alleged contravention of Australian Privacy Principle (APP) 11.1(b))
- carry out a 'reasonable and expeditious assessment' of whether the breach amounted to an eligible data breach, and did not do so within the required 29 day timeframe (in alleged contravention of s26WH(2))
- notify the OAIC of an eligible data breach 'as soon as practicable' after becoming aware that there were reasonable grounds to believe that there had been an eligible data breach (in alleged contravention of s26WK(2))

- It's alleged that these actions:

  'seriously interfered with the privacy of millions of Australians by failing to protect their personal information from unauthorised access or disclosure'.

- Announcing this, Australian Information Commissioner Angelene Falk underlined both the requirement for organisations to have robust protections in place, and once a breach occurs to notify OAIC as soon as possible in order to minimise impacts on individuals impacted. Ms Falk said:

  'Organisations are responsible for protecting the information they hold, including effectively managing cyber security risk…When a data breach occurs, organisations are responsible for notifying the Office of the Australian Information Commissioner and affected individuals as a way of minimising the risks and potential for harm associated with a data breach'.

- ACL has stated in response that:
  - It will be defending the OAIC claim
  - 'assert[ed] that its cyber security systems are robust'.
  - Emphasised that OAIC's allegations

  'relate to its systems and process during the relevant period only and the AIC is not alleging that any ACL data has been compromised other than the data involved in the Medlab incident notified to the market on 27 October 2022'.

- ACL adds that it is not clear what the (potential) financial impact of OAIC's action may be:

  'The AIC claim does not specify the level of any penalty it intends to seek in the event that the claim is established. ACL cannot rule out the possibility that any penalty payable in the event that the claim is established will be material'.

  [Source: OAIC media release 03/11/2023]

In Brief | Boohoo is reportedly facing an investor-led class action seeking compensation after allegations of modern slavery in the company's supply chains led to a significant drop in value of the company

[Sources: The Telegraph 26/10/2023; Daily Mail 27/10/2023]

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Contacts

Mark Standen
Consultant

—

mark.standen@minterellison.com
T +61 2 9921 4902 | **M** +61 412 104 902

Siobhan Doherty
Partner

—

siobhan.doherty@minterellison.com
T +61 2 9921 4339 | **M** +61 413 187 544

Kate Hilder
Consultant

—

kate.hilder@minterellison.com
T +61 2 9921 8785