

FEBRUARY 2024 ESG POLICY UPDATE— AUSTRALIA

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Australia Corporate Alert

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AUSTRALIAN UPDATE

Draft Legislation – Climate-Related Financial Disclosures

The Australian Government has released [Treasury Laws Amendment Bill 2024: Climate-related financial disclosure](#), which is draft legislation confirming mandatory reporting of climate-related financial disclosure requirements.

The legislation introduces new reporting requirements, which will build on the existing financial reporting framework for entities that lodge financial reports under Chapter 2M of the Corporations Act 2001 (Cth) (Corporations Act).

This will impact Australian companies, disclosing entities, registered schemes and registrable superannuation entity licensees.

New Sustainability Report

If passed, the new requirements will require the inclusion of a new 'sustainability report' to be lodged with the Australian Securities and Investments Commission (ASIC), in addition to annual financial statements.

The sustainability report is to consist of the climate statement, notes to the climate statement (if any), a directors' declaration about the statements and any additional statements relating to matters concerning environmental sustainability required by a legislative instrument.

Climate statements will be those statements required by the sustainability reporting standards issued by the Australian Accounting Standards Board. As noted in our [article](#) (also in our [November 2023 ESG Policy Update](#)), the sustainability reporting standards have been released in draft and are open for comment until 1 March 2024.

Commencement

The requirement to prepare a sustainability report will be progressively phased in, generally based on the size of the entity.

Financial year starting on or after	Entities which satisfy two of the following three criteria		
	Number of employees	Gross asset value	Consolidated revenue
Group 1	>500	>AU\$1 billion	>AU\$500 million

1 July 2024				The draft legislation has also introduced a threshold of AU\$5 billion or more for
Group 2	>250	>AU\$500 million	>AU\$200 million	
1 July 2026				
Group 3	>100	>AU\$25 million	>AU\$50 million	
1 July 2027				

registered schemes or registerable superannuation entities which will be required to report from 1 July 2024. However, the financial services industry has identified significant anomalies and gaps with the current classification of large asset owners and has made submissions to the Department of the Treasury to clarify the application to registered schemes, superannuation trustees and the consolidated groups of which they may be part. It is expected that further clarification of the application of the AU\$5 billion threshold will emerge from these consultations.

Audit

Climate-related disclosures will be subject to similar assurance requirements to those currently in the Corporations Act. The legislation requires the sustainability report to be audited by the auditor of the financial report supported by technical climate and sustainability experts where appropriate. Whilst the Auditing and Assurance Standards Board will set out a pathway for phasing in these requirements over time, assurance of scope 1 and scope 2 emissions disclosures will commence from 1 July 2024.

Disclosure

Investors will be notified of their right to obtain a copy of the most recently lodged sustainability report through disclosures set out in the product disclosure statement or prospectus (as applicable).

The Australian Government is currently reviewing submissions and will provide feedback shortly.

Bill Introduced to Appoint a Commonwealth Anti-Slavery Commissioner

The Australian Government introduced the [*Modern Slavery Amendment \(Australian Anti-Slavery Commissioner\) Bill 2023 \(Cth\)*](#) (Bill) on 30 November 2023. If enacted, it will amend the [*Modern Slavery Act 2018 \(Cth\)*](#) (MSA) and establish the role of an Australian Anti-Slavery Commissioner (Commissioner). The Bill comes in response to John McMillan AO's recommendation for the establishment of an anti-slavery commissioner in the [*Modern Slavery Act 2018 Review*](#), tabled in the Australian Parliament in May 2023.

The Bill proposes that the Commissioner will have the responsibility of promoting compliance with the MSA by, among other things, engaging with reporting entities and the community, supporting victims of modern slavery and advocating to the Australian Government on matters relating to modern slavery. The Commissioner would have the power to request information from Commonwealth agencies if the Commissioner reasonably believes that the Commonwealth has information relevant to the performance of the Commissioner's functions. However, the Commissioner would not have the power to investigate or resolve complaints concerning individual actual or suspected instances of modern slavery.

Investors to Consider Climate Lawsuit Risks

[Research conducted](#) by the University of Melbourne's Arjuna Dibley and Oxford University associate professor Thom Wetzer contends that investors and regulators are overlooking trillions of dollars in damages from climate lawsuits when evaluating financial risks of major energy companies. The research also calls for an overhaul in how climate litigation risks are assessed.

According to the research, approximately 2,500 climate lawsuits have been filed globally, with one corporation potentially facing payouts totalling approximately US\$8.5 trillion.

Climate lawsuits are particularly prevalent in Australia with 134 filed as of November 2023, second only to the United States (1,678).

The research indicates that climate litigation presented a direct threat to companies through lawsuits that are ultimately successful, but the threat of litigation could also hurt businesses by raising borrowing costs or forcing policy changes, emissions reductions or enhanced disclosure requirements of such businesses.

Dr Dibley said that investors, financial regulators, policymakers and companies had 'largely neglected' climate liability risks affecting companies being sued or subjected to other legal interventions.

Dr Dibley said that 'we have many of the largest historical emitters in this country, and so Australian investors, regulators and others should be particularly focused on this category of risk.'

The research suggests five ways that climate-related legal risks could be assessed by investors and regulators, including:

1. Market-impact analysis;
2. Analysis using the social cost of carbon;
3. Attribution of climate change damages;
4. Estimating costs of accelerated climate mitigation; and
5. Qualitative analysis.

Effects of ASIC's Greenwashing Efforts

In an [article](#) (paywall) published in The Australian on 14 January 2024, ASIC says it wants to be 'feared' by the financial services sector, even at the risk of a reversal of the drive towards sustainable investments.

ASIC chair Joe Longo made 'no apology' about ASIC's greenwashing enforcement efforts, and noted that 'if people say to me, "Oh, well, you know, it all makes it really difficult for us to run our business because it has a chilling effect." Well, you know what, I intend to have a chilling effect over activity that is misleading and deceptive.'

ASIC's recent actions have already had significant effects – [this report](#) from the Responsible Investment Association of Australia indicated a 16% decrease in the size of the domestic responsible investment market to AU\$1.3 trillion from 2021 to 2022. The report notes that 'evolving standards and increased regulatory scrutiny have led to tightening definitions of responsible investment by some large international investment managers who reported a smaller proportion of responsible investment assets under management in 2022 than in 2021.'

THE VIEW FROM ABROAD

The Rise of Anti-ESG Bills in US State Legislatures

In the United States, certain lawmakers are pushing to remove environmental, social and governance (ESG) considerations as investment criteria. These actions follow from partisan allegations of ESG-focused investments activities being used to fund 'political agendas' rather than stakeholder interests.

Recently, dozens of bills were introduced as part of this ongoing campaign. Some of the most noteworthy proposed bills include:

- Bill HB 1267 in New Hampshire (voted down by a legislative committee) – would have made it a felony punishable by up to 20 years in prison for an official to 'knowingly' make investment decisions using ESG criteria;
- Bill H4699 in South Carolina – would prohibit state agencies and local towns from offering tax subsidies to companies participating in ESG scoring or rating systems; and
- Bill H1301 in Florida – would prohibit the state's transportation department from considering ESG-related factors when dealing with future projects.

When faced with this resistance, many businesses are now making a conscious effort to avoid ESG references, for example, by removing ESG references from corporate reports, committee reports and letters to investors.

While the notion of ESG has become politicised in the United States, it is met with a lesser degree of hostility in Australia. This is in part attributable to the approach by government bodies to enforce ESG considerations through disclosure obligations and imposing penalties for noncompliance. For example, with respect to governance disclosures, ASIC guidance provides that a company's annual report should include ESG considerations as these risks are increasingly likely to affect the company's financial performance. The investment community in Australia also has a significant influence on the strategic direction of investees and that influence is increasingly directed towards ESG considerations.

European Union Bans Unfounded Environmental Claims

On 17 January 2024, the European Parliament passed a [directive](#) to:

- Ban the use of misleading and general environmental claims; and
- Improve product labelling.

This comes after months of negotiations over how environmental claims will be regulated in Europe. The Greens member of the European Parliament said, 'this new legislation puts an end to misleading advertising for supposedly environmentally friendly products and thus enables consumers to make sustainable choices'. European Union Members have two years to introduce the new rules.

The directive requires sustainability claims to be based on approved certification labels established by public authorities. This aims to put an end to greenwashing and unfounded generic claims such as 'environmentally friendly', 'natural', 'biodegradable', 'climate neutral' or 'eco' and also introduces a total ban on using carbon offsetting schemes to substantiate claims.

The law will also focus on the durability of goods, and bans:

- Unfounded durability claims;
- Prompts to replace consumables earlier than necessary; and
- Presenting goods as repairable when they are not.

Lindsay Otis, a policy expert on global carbon markets at Carbon Market Watch noted that 'the European Union is taking leadership in combating greenwashing... [and] carbon neutrality claims have been shown to be unintelligible to consumers, and they must stop. Today marks the end of outlandish and baseless advertisements that tell European consumers that they can take carbon-neutral flights, wear carbon-neutral clothes, and eat carbon-neutral food.'

Major Updates to Biodiversity Standards

On 26 January 2024, the Global Reporting Initiative set a new global standard to improve organisational transparency and accountability on biodiversity impacts. [GRI 101: Biodiversity 2024](#) (New Biodiversity Standard) encourages organisations to 'publicly disclose their most significant impacts on biodiversity throughout their operations and supply chain'.

The New Biodiversity Standard facilitates the reporting of impacts across the supply chain and includes:

- Reporting requirements on the 'most significant impacts on biodiversity' rather than on all impacts;
- Disclosure requirements on location-specific information in relation to biodiversity impacts;
- New disclosure obligations requiring organisations to report on the 'direct drivers of biodiversity loss' and changes to the state of biodiversity (i.e. the type, size and condition of ecosystems affected or which may be affected); and
- New disclosure requirements for an organisation to report on impacts they have on society as a result of their operations.

The New Biodiversity Standard promotes enhanced reporting standards with respect to an organisation's impacts on biodiversity. Consequently, consumers are able to make more 'informed assessments' about an organisation's impact and contributions to sustainable development. [Click here](#) to find a list of frequently asked questions about the Biodiversity Standard.

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