APRIL 2024 ESG POLICY UPDATE—AUSTRALIA

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Australia Corporate Alert

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AUSTRALIAN UPDATE

Australian Competition and Consumer Commission Enforcement Priorities for 2024-2025

The Australian Competition and Consumer Commission (ACCC) has announced its enforcement and compliance priorities for 2024-2025 (2024-5 Priorities). The three key themes are sustainability, cost of living pressures and the digital economy. Many of its key priority areas from last year remain.

The 2024-5 Priorities include:

- Concerns relating to environmental claims and sustainability (i.e., issues related to greenwashing);
- Competition, consumer, fair trading and pricing concerns in the supermarket sector, with a focus on food and groceries;
- Promoting competition in essential services with a focus on telecommunications, electricity, gas and financial services;
- Consumer and fair trading issues in the digital economy, with a focus on misleading or deceptive advertising within influencer marketing, online reviews, in-app purchases and price comparison websites; and
- Improving industry compliance with consumer guarantees, with a focus on consumer electronics, and also targeting misconduct by retailers in connection with delivery timeframes.

The ACCC also confirmed that it will continue its focus on its enduring priorities, which include:

- *Existing enduring priorities* – Cartel conduct, anti-competitive conduct, product safety, consumers experiencing vulnerability or disadvantage, and conduct impacting First Nations Australians; and
- *New enduring priorities* – Small businesses and scams.

Climate Reporting for Small Businesses

On 19 March 2024, the Australian Securities and Investments Commission (ASIC) published a release outlining what small businesses need to know in regard to climate reporting and greenwashing.

Although small businesses will not be subject to the government's proposed mandatory climate-related financial disclosure laws (Proposed Climate-Related Disclosure Laws) for large businesses and financial institutions, small

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businesses may form part of the supply chain of larger businesses meaning that they may need to consider climate-related reporting issues, even if they do not have any direct climate reporting obligations.

This is because the "scope 3" emissions of a large business may include the emissions of its small business suppliers. Scope 3 emissions are indirect greenhouse gas emissions that are not otherwise scope 1 or scope 2 emissions and that are generated in the wider economy. Some examples include the transportation of purchased fuels, use of sold products and services, and flying on a commercial airline by a person from a supplier. Under the Proposed Climate-Related Disclosure Laws, reporting entities must disclose certain information based on their scope 3 emissions.

Once the Proposed Climate-Related Disclosure Laws come into effect, ASIC will work with small businesses to develop practical guidance in relation to the requirements of the new laws and how the new laws may impact them.

ASIC's article also drew attention to Information Sheet 271, which outlines how to avoid greenwashing when offering or promoting sustainability-related products. ASIC encouraged small businesses to consider the guidance if they intend to make sustainability-related claims in connection with the promotion or offering of financial products or services.

First Prosecution Action for Failing to Have a Director Identification Number

ASIC has commenced its first prosecution action against a director in the Downing Centre Local Court for failing to comply with the obligation to have a director identification number (DIN).

On 19 March 2024, a director was formally charged with one count of contravening section 1272C(1) of the *Corporations Act 2001* (Cth) by failing to have a DIN. An interim non-publication order was granted by the Court prohibiting the identification of the defendant. The charges were listed for a further mention on 16 April 2024 and the interim nonpublication order was also extended to this date.

From 5 April 2022, intending new directors must apply for a DIN before being appointed.

The maximum penalty for failing to have a DIN is 60 penalty units, which currently equates to AU$13,320.

Federal Court Rules on Greenwashing Civil Penalty Action

On 28 March 2024, the Australian Federal Court handed down its verdict on a greenwashing civil penalty action brought by ASIC.

Justice Michael O'Bryan found that Vanguard Investments Australia Ltd (Vanguard) as responsible entity (RE) had contravened section 12DF(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) by making false and misleading representations about certain environmental, social and governance (ESG) screens applied to investments in a quoted bond index fund (Fund), which tracks the Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Adjusted Index (Index).

The RE represented in a range of communications that the ESG screen applied at the Index level and excluded companies with significant business activities involving fossil fuels, alcohol, tobacco, gambling, military weapons and civilian firearms, nuclear weapons and adult entertainment.

However, the ESG screen had limitations when applied that meant a significant proportion of securities in the Index, and therefore the Fund, were from issuers that were not researched or screened against applicable ESG

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criteria. Corporate securities make up around 50% of the Fund's holdings and, of those, 10% were not captured by the ESG screening process as represented by the RE.

The Federal Court found, and the RE admitted, that statements it made concerning ESG screening were false or misleading. In particular, representations that the Fund offered an "ethically conscious" investment opportunity by tracking the Index were false or misleading.

Vanguard made these representations in:

- 12 product disclosure statements;
- A media release;
- Website publications;
- An online interview; and
- A presentation at a funds management event.

The Federal Court will consider the appropriate penalty to impose on the RE for the conduct in August.

Australian Fund Managers Optimistic About Sovereign Green Bond Fund Offering

The Australian Government is set to market its first sovereign green treasury bonds (Green Bonds) in April 2024 that are consistent with international standards and the Sustainable Finance Strategy consulted on in November 2023.

The Green Bonds, supported by the Green Bond Framework, are designed to:

- Attract dedicated funding for government expenditures that contribute to climate change mitigation, adaptation and environmental goals;
- Provide investors an opportunity to diversify their investment portfolios towards sustainable assets;
- Improve sustainability-related reporting by public sector entities; and
- Catalyse growth in key sustainable finance products and markets.

The Green Bonds will be 10-year Australian Treasury bonds issued by the Australian Office of Financial Management on behalf of the Australian Government, with the proceeds to be allocated to certain eligible green government expenditures.

Betashares' responsible investments director Greg Liddell points out that the "issuance of a treasury green bond will allow ethical and responsible investors to add exposure to 10-year Australian Treasury bonds, while also ensuring proceeds are used in ways that align with their values."

The Australian Government is set to conduct a four-week roadshow in April 2024, run by various Australian and international banks as joint lead managers, to market the Green Bonds to institutional investors across Australia, the United Kingdom, Europe and Asia leading up to the issuing of the bonds in June 2024.

Whilst a timeline is yet to be set, exchange-traded Green Bonds are expected to be available to retail investors in 2025.

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Release of Consultation Draft 5th Edition Corporate Governance Principles

As previously reported by K&L Gates, the Australian Securities Exchange (ASX) Corporate Governance Council (Council) recently released its consultation materials for the proposed 5th Edition of its Corporate Governance Council Principles and Recommendations (Draft Principles). The Council's Draft Principles sets out 33 general recommendations and seven additional recommendations that are applicable to listed companies in certain circumstances.

The Council has anticipated that the final version of the Draft Principles will be released in early 2025, for the possible commencement on or after 1 July 2025.

This means that the proposed recommendations may apply to entities for their (as applicable):

- Annual report ending 31 December 2025; or
- Annual report ending 30 June 2026.

The Council is now seeking submissions from interested stakeholders on the consultation materials and answers to the consultation questions. Submissions can be made via the online ASX portal and close on 6 May 2024.

Some of the proposed recommendations in the Draft Principles include:

- *Improved Gender Balance on Boards* – Under proposed recommendation 2.3, S&P/ASX 300 index entities should adopt a measurable objective to achieve a gender balanced board with at least 40% women and 40% men, an increase of 10% in favour of women.
- *Tenure of Auditors* – Recommendation 4.3 proposes that listed entities disclosure the tenure of their auditing firm and audit engagement partner, along with when that appointment was last comprehensively reviewed and the outcome of that review.
- *Disclosure ESG Risks* – The proposed recommendation 7.4 outlines that entities should disclose material foreseeable ESG risks. These risks include risks relating to cyber attacks, data protection, climate change and artificial intelligence, and would, in certain circumstances, be in addition to disclosure obligations under the draft Australian Sustainability Reporting Standards – Disclosure of Climate-related Financial Information.

THE VIEW FROM ABROAD

European Union Introduces Corporate Sustainability Due Diligence Guidelines

On 15 March 2024, the European Union Council voted to approve the Corporate Sustainability Due Diligence Directive (CS3D). CS3D has two main objectives: (one) to require companies to carry out due diligence in their supply chains to avoid adverse environmental and human rights impacts, and (two) to ensure accountability for such adverse impacts.

The due diligence obligations require companies to:

- Integrate due diligence into their policies and risk management systems;
- Identify, assess and prioritise potential and actual adverse impacts;

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- Prevent and mitigate potential adverse impacts;
- Bring actual adverse impacts to an end, or minimise the extent of those adverse impacts;
- Remediate any actual adverse impacts;
- Carry out meaningful engagement with stakeholders;
- Establish and maintain a notification mechanism and complaints procedure;
- Monitor the effectiveness of due diligence policy and measures; and
- Communicate publicly on due diligence.

CS3D will come into effect through a two-year implementation period and will be phased in for companies as follows:

Timeline for publishing CS3D related disclosures	EU company	Non-EU company
Three years (2027)	Employees: >5,000 employees Global revenue: €1.5 billion	Net EU revenue: €1.5 billion
Four years (2028)	Employees: >3,000 employees Global revenue: €900 million	Net EU revenue: €900 million
Five years (2029)	Employees: >1,000 employees Global revenue: €450 million	Net EU revenue: €450 million

Once the final text of CS3D is approved by European Parliament (currently scheduled for 24 April 2024), member states will have up to two years to transpose the directive into national law.

The US Government Invests US$6 Billion to Decarbonise Its Industrial Sector

As part of the United States Government's "Investing in America" agenda, the US Department of Energy announced its intention to provide up to US$6 billion in funding for 33 projects across more than 20 states to:

- Decarbonise energy-intensive industries;
- Reduce industrial greenhouse gas emissions;
- Support union jobs;
- Revitalise industrial communities; and
- Strengthen the nation's manufacturing competitiveness.

This investment is funded by the Infrastructure Law and Inflation Reduction Act and such projects aim to create and maintain tens of thousands of jobs and accelerate the emergence of decarbonisation technologies required for the government's climate and domestic manufacturing goals.

The projects will focus on the highest emitting industries where decarbonisation technologies will have the greatest impact. Such industries include:

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- Chemicals and refining (seven projects);
- Cement and concrete (six projects);
- Iron and steel (six projects);
- Aluminium and metals (five projects);
- Food and beverage (three projects);
- Glass (three projects);
- Process heat (two projects); and
- Pulp and paper (one project).

Together, these projects are expected to reduce the equivalent of more than 14 million metric tons of carbon dioxide each year. This investment is the largest investment in industrial decarbonisation in US history and aims to position US manufacturers and workers to transition to a clean energy economy.

Read about the Investing in America agenda here.

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