DIRECTORS' RESPONSIBILITIES FOR SUSTAINABILITY REPORTING—ASIC'S VIEWS

Date: 16 December 2024

Australia Asset Management and Investment Funds Alert

By: Jim Bulling, Clive Cachia, Alex Parker

INTRODUCTION

When directors and officers of reporting entities are assessing how to prepare for complying with the new sustainability reporting obligations, it is tempting to look to the Australian Securities and Investments Commission's (ASIC) approach to enforcement of “greenwashing” as a starting point. However, reporting entities should be aware of the differences in ASIC's enforcement approach between the two.

ASIC'S ENFORCEMENT APPROACH

Greenwashing misconduct refers to misleading and deceptive statements made by entities about their green credentials. ASIC interventions are founded on long-established laws that prohibit misleading and deceptive conduct.

Climate-related financial disclosures by reporting entities are to be made in the same context as their financial statements. As a result, directors will need to ensure that the sustainability report presents a true and fair view of the organisation's position and prospects and that the view is neither misleading nor deceptive.

ASIC GUIDANCE ON SUSTAINABILITY REPORTING IN CONSULTATION PAPER 380

On 7 November 2024, ASIC released its Consultation Paper 380 on sustainability reporting, which was accompanied by a draft Regulatory Guide 000 Sustainability Reporting (Draft RG).

The Draft RG reaffirms that climate-related disclosures will be subject to the existing liability framework in the *Corporations Act 2001* (Cth) (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), including directors' duties, misleading and deceptive conduct provisions and general disclosure obligations. Set out below are the material highlights of the Draft RG.

Directors' Duty of Care and Diligence in Relation to Sustainability Reporting

Directors have a positive duty to exercise their powers with the care and diligence that a reasonable person would exercise in the circumstances. In discharging these obligations, directors should consider that material climate-related physical and transition risks, like all other material risks, pose a foreseeable risk of harm to the interests of

©2005-2026 K&L Gates LLP. All Rights Reserved.

the entity and that these considerations should inform the directors' declaration in relation to any climate-related financial disclosures set out in the reporting entity's sustainability report.

Ability to Rely on Third Parties

Whilst directors may rely on special knowledge or expertise of others in relation to sustainability reporting, they still need to make an independent assessment of the information or advice provided, using their own skills and judgement and rely on such information or advice available at the time in good faith.

Obligations to Establish Operation Systems to Assess Climate-Related Risks and Opportunities

In the Draft RG, ASIC states that directors should have adequate systems for the identification, assessment, monitoring, prioritisation, disclosure and response to any material climate-related risks and opportunities.

ASIC notes that having possession of timely and accurate information about material climate-related risks and opportunities will enable boards to make informed judgements about the extent of foreseeable harms to the interests of the reporting entity, as well as assist the reporting entity in complying with its sustainability reporting obligations.

Scope of Directors' Obligations to Keep Records

Entities required to prepare a sustainability report for a financial year must keep written sustainability records, which are the documents and working papers that explain the methods, assumptions and evidence from which the sustainability report is prepared, including in relation to governance, strategy, risk management, and metrics and targets. Such records include any financial records, and boards should ensure that documents are available upon request by ASIC and are provided to auditors promptly to support the auditor's opinion on the sustainability report.

Bases Upon Which a Reporting Entity May Make Statement of No Climate Risks

Where statements of no financial risks or opportunities relating to climate are to be made, reporting entities may lodge a climate statement under s296B(1) of the Corporations Act, which should include a statement explaining how the entity determined that it had no such financial risks or opportunities.

Lodging a climate statement under s296B(1) still requires an assessment in accordance with the Australian Accounting Standards Board (AASB) S2 whether there are any material financial risks or opportunities relating to climate, in addition to the maintenance of sustainability records, to substantiate the assessment.

Bases Upon Which a Reporting Entity May Make Statements With Forward-Looking Climate Information

The Draft RG highlights that forward-looking climate information must comply with relevant components of the AASB S2 and that it is expected to be useful for existing and potential investors, lenders and other creditors and users.

Under the Corporations Act and the ASIC Act, representations about future matters will be taken to be misleading unless there are reasonable grounds for making the representations. Reporting entities that are disclosing entities

©2005-2026 K&L Gates LLP. All Rights Reserved.

must also comply with their continuous disclosure obligations, including for forward-looking information in the climate statement, when relevant facts or circumstances change.

Exceptions to Directors' Obligations Under Proportionality Mechanisms Under AASB S2

The Draft RG incorporates guidance on proportionality mechanisms under AASB S2, which provides that an entity is required to use all “reasonable and supportable” information that is available to the entity at the reporting date “without undue cost or effort.”

AASB S2 states that the assessment of what constitutes “undue cost or effort” depends on the entity's specific circumstances and requires a balanced consideration of the costs and efforts for the entity and the benefits of the resulting information for primary users. It is acknowledged that this assessment can change over time as circumstances change and need not include an exhaustive search for information to identify all possible climate-related risks and opportunities.

For example, information that is used by the entity in preparing its financial statements, operating its business model, setting its strategy and managing its risks and opportunities is considered to be available to the entity without undue cost or effort.

ASIC states that despite reporting entities having an opportunity to rely (to an extent) on reasonable and supportable information that is available without undue cost or effort, entities should not assume that any lack of a disclosure will be excused, and directors are encouraged to ensure that companies review their approach at the start of each reporting period.

This guidance from ASIC is somewhat contradictory to other commentary from ASIC recommending a “pragmatic and proportionate approach” in relation to sustainability reporting in the initial reporting periods. We understand that the industry is seeking further clarification from ASIC on the scope of the ”without undue cost or effort” proviso.

Exceptions to Directors' Obligations Under Transitional Arrangements

There are some transitional arrangements that have been included in the legislation which provide that liability for misleading and deceptive conduct in relation to the most uncertain parts of a climate statement (defined as ”protected statements”) will be the subject of certain limited immunities.

This immunity applies to statements in sustainability reports prepared for financial years commencing during the first three years after 1 January 2025.

Whilst no legal action can be brought against a person in relation to protected statements during the period of modified liability, this does not prevent criminal proceedings or proceedings brought by ASIC. Additionally, the modified liability settings do not extend to statements voluntarily made outside of a sustainability report, including where a statement is reproduced, quoted or summarised in an investor presentation or in promotional material. Such statements will not be covered by the modified liability settings unless the disclosure is required under a Commonwealth of Australia law (for example in relation to continuous disclosure obligations).

©2005-2026 K&L Gates LLP. All Rights Reserved.

ASIC ENFORCEMENT TOOLS

We note that the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (Cth) will enhance ASICs supervisory and enforcement powers including new directions powers. In circumstances where ASIC considers a statement made by an entity in a sustainability report is incorrect, incomplete or misleading, ASIC may require an entity to:

- Confirm that the statement is correct or complete;
- Explain the statement;
- Provide information or documents that substantiate or support the statement;
- Correct, complete or amend the statement; or
- Publish the corrected, completed or amended statement, or give the statement to specified persons, in accordance with the direction.

HOW CAN WE HELP?

The expectations for directors regarding sustainability reporting differ from those related to greenwashing and align more closely with the established standards for financial reporting. We can assist directors of reporting entities in various aspects of preparing and publishing sustainability reports. This includes:

- Designing and implementing due diligence programs;
- Ensuring alignment of disclosures with other public documents;
- Providing advice on limited immunities;
- Supporting record-keeping practices; and
- Facilitating legal sign-off.

Our experience can help ensure compliance and enhance the quality of sustainability reporting.

If you have any questions regarding sustainability reporting, please feel free to reach out. We're here to help clarify any concerns or provide additional information you may need.

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



JIM BULLING
CONSULTANT

MELBOURNE
+61.3.9640.4338
JIM.BULLING@KLGATES.COM



CLIVE CACHIA
PARTNER

SYDNEY
+61.2.9513.2515
CLIVE.CACHIA@KLGATES.COM



ALEX PARKER
LAWYER

MELBOURNE
+61.3.9640.4328
ALEX.PARKER@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.