

# CLIMATE CHANGE GUIDANCE

## ADVISING ON CLIMATE RISK

### ANNEXURE B

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THE LAW SOCIETY  
OF NEW SOUTH WALES

## ANNEXURE B

# ADVISING ON CLIMATE RISK

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# ANNEXURE B

## 1 UNDERSTANDING AND ADVISING ON YOUR CLIENTS' AND YOUR FIRM'S CLIMATE IMPACT

### 1.1 INTRODUCTION TO TERMINOLOGY

**Adaptation** means the actions taken to adjust to actual or expected climate change and climate impacts, to moderate harm or take advantage of opportunities.

**Carbon neutral** means the balancing out of the amount of carbon dioxide emitted by an activity with a combination of emissions reduction, emissions avoidance and offsetting. It is different from 'net zero' and the two terms should not be used interchangeably.

**Greenhouse gasses (GHGs)** are the seven gases covered by the Kyoto Protocol: carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulphur hexafluoride (SF<sub>6</sub>) and nitrogen trifluoride (NF<sub>3</sub>).

**Greenwashing** is the practice of making false or misleading environmental claims.

**Mitigation** means the actions to reduce or prevent greenhouse gas emissions. Some examples include: switching to low-carbon energy carriers, reducing energy demand in end-use sectors such as transport, enhancing energy efficiency, soil and vegetable carbon sequestration, among many others.<sup>1</sup>

**Net zero** means a state in which the amount of greenhouse gases being emitted by human activity into the atmosphere is equal to or less than the amount of greenhouse gases being removed from the atmosphere. The term covers all greenhouse gases, not just carbon dioxide.

**Offsets** are a way to compensate for an activity's greenhouse gas emissions by reducing or avoiding greenhouse gas emissions or increasing greenhouse gas removals through external activities. Offsetting should only be used to compensate for residual emissions (see definition 1. below).

**Physical risks** are i) acute risks that are event driven, including increased severity of extreme weather events and ii) chronic risks that are driven by longer-term shifts in climate patterns that may cause sea level rise or chronic heat waves.

**Removals** are actions that remove greenhouse gases from the atmosphere, such as reforestation and soil carbon enhancement.

**Residual emissions** are greenhouse gas emissions whose reduction remains technically or economically unfeasible.

**Science-based targets** are targets that align with what the latest climate science considers to be necessary to meet the goals of the Paris Agreement, i.e. limiting global warming to well below 2°C above preindustrial levels and pursuing efforts to limit warming to 1.5°C, with no or low overshoot.

**Scope 1 emissions** are the direct greenhouse gas emissions from sources that are owned or controlled by an entity; for example, emissions from company vehicles.

**Scope 2 emissions** are the indirect greenhouse gas emissions from the generation of purchased electricity consumed by the entity.

**Scope 3 emissions** are all other indirect greenhouse gas emissions that occur as a consequence of the entity's activities but occur from sources not owned or controlled by the entity. For example, the emissions that occur from the customer's use of the entity's product or services.

**Scope 4 emissions** (or 'advised emissions') are greenhouse gas emissions that occur outside an entity's value chain. For lawyers, these are the emissions associated with matters on which they advise clients and will likely be the most significant emissions associated with their practice.

**Transition plan** is a time-bound action plan that outlines how an entity will reposition its assets, operations and business model to reduce its greenhouse gas emissions.

**Transition risks** are the risks arising from the transition to a lower carbon economy through policy, legal, technology and market changes and reputational risk tied to changing customer or community perceptions.

### 1.2 MEASURING EMISSIONS

Measuring the greenhouse gas (GHG) emissions of an organisation is the essential first step in any action to develop a response to climate change.

A number of entities provide tools to estimate business emissions. For example, the SME Climate Hub's [\*Business Carbon Calculator\*](#) creates a summary of annual emissions and also provides resources for small to medium sized businesses to develop robust net zero commitments.

1. See generally, Climate Change Authority, *Prospering in a low-emissions world*, (2020) accessed [here](#).

The [National Greenhouse Accounts \(NGA\) Factors](#) also provide methods to help companies and individuals estimate GHG emissions.

To go beyond an estimate and develop a more accurate, auditable and transparent measurement of a business' emissions, the globally authoritative methodology is set by the [GHG Protocol Corporate Accounting and Reporting Standard](#). The GHG Protocol also provides resources such as a [training webinar](#) and [calculation tools](#).

Applying the GHG Protocol will enable a business to develop an understanding of the different sources of GHG emissions associated with the organisation and its activities. From there, it is possible to start to identify the opportunities to reduce emissions and create an emissions reduction plan.

## 1.3 REDUCING EMISSIONS

An emissions reduction plan for an organisation should align with the goals of the [Paris Agreement](#) and be consistent with the commitments made at Federal and State level in Australia to reach net zero by 2050. This involves making setting targets for short, medium and long-term emissions reductions, including steep emissions reductions in the period to 2030.

The [Science-Based Targets Initiative](#) (SBTi) provides criteria and recommendations for setting near-term and 2050 targets. The SBTi provides a target validation route for larger companies, which involves detailed feedback and support from the SBTi's technical experts and enables the companies to demonstrate the robustness and credibility of their emissions reduction plans. A more streamlined route is available for small and medium sized businesses.

There are a range of frameworks and guidelines for reducing emissions and setting targets. Resources for small to medium sized businesses are available through the [SME Climate Hub \(UN Race to Zero\)](#).

## 1.4 PROMOTING YOUR CLIMATE-RELATED CREDENTIALS

It is important that materials that promote an organisation's approach to climate change are accurate and not misleading, to ensure they cannot give rise to claims of greenwashing. In the context of legal firms, advertising, marketing or promotion in connection with a law practice that is false or misleading is prohibited by rule 36.1 of the [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 \(NSW\)](#).

If an organisation describes itself as sustainable, 'net zero', or makes similar claims regarding its response to climate change, it is necessary to consider whether those claims can stand up to external, objective scrutiny. Given the [increased scrutiny](#) of law firms' Scope 4 or 'advised' emissions, it is prudent to consider the emissions associated with matters on which advice is given to clients, which are often the most significant emissions associated with law firms' practice.

## 1.5 THIRD PARTY VALIDATION

Obtaining independent validation can bring greater rigour, credibility and transparency to an entity's emissions reporting and net zero targets.

The [SBTi](#) is the leading global framework for setting corporate net zero targets and SBTi validation provides the most authoritative confirmation that a company's plan aligns with the most up-to-date climate science.

Figure 2

### Governance

The organisation's governance around climate-related risks and opportunities

### Strategy

The actual and potential impacts of climate-related risks and opportunities on the organisation's businesses, strategy.

### Risk Management

The processes used by the organisation to identify, assess, and manage climate-related risks

### Metrics and Targets

The metrics and targets used to assess and manage relevant climate-related risks and opportunities



## 1.6 IMPLEMENTING NET ZERO STRATEGIES

There are many publicly available resources to assist organisations in developing or implementing net zero transition strategies, including the [UK's Transition Plan Taskforce](#) and the [TPT Framework](#) which provides a practical and useful complement to ISSB Standards.<sup>2</sup>

The Taskforce on Climate-related Financial Disclosures (TCFD)<sup>3</sup> and TNFD<sup>4</sup> provide conceptual frameworks for managing climate and nature related risks and opportunities, including strategy and governance, reporting and disclosure frameworks for understanding and reporting climate risk (and nature-related risks in the case of TNFD) within corporate value chains and supply chains.

This provides a starting point for the strategic governance challenge and then the operationalising of strategy and risk management through the use of contractual relationships that form the organisation's value and supply chains.

These frameworks provide a means of analysing climate risks and GHG footprints and are a starting point for an initial audit and developing net zero transition strategies, including offsets for hard to abate emissions. These frameworks apply to larger corporate entities and are in the case of TCFD in the process of becoming mandatory requirements.

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See [The Chancery Lane Project](#) (TCLP) reference materials in relation to climate aligned clauses.

These include:

- Net Zero drafting checklist (linked [here](#))
- Writing contracts for net zero – definitions and sample wording (linked [here](#))
- Just transition issues in climate transition plans (CTPs) and climate contracting (linked [here](#)) - see also Transition Plan Taskforce: [transitiontaskforce.net/wp-content/uploads/2023/10/TPT\\_Disclosure-framework-2023.pdf](#)
- Climate clauses: Net Zero Best in Class (linked [here](#))
- Net Zero Transition map (linked [here](#))
- TCLP Case studies – [PLMJ](#) and [New Zealand Green Investment Finance](#)

See also [Race To Zero Campaign | UNFCCC](#) and the [Ambitious corporate climate action - Science Based Targets](#).

## 1.7 ADVISING CLIENTS ON THEIR CLIMATE-RELATED REPRESENTATIONS

A client's climate-related representations could include representations about the sustainability of their products, their emissions reductions targets, transition plans and position statements on climate change.

It is important that any climate-related representations are accurate to avoid potential liability for misleading or deceptive conduct under the *Corporations Act 2001* (Cth), [Australian Consumer Law](#) and/or the [Australian Securities and Investments Commission Act 2001](#) (Cth).

In Australia, greenwashing is a major focus of litigation by private claimants and enforcement action by regulators. A particular focus of greenwashing actions has been representations regarding companies' net zero emissions commitments. In the [opinion](#) of Noel Hutley SC and Sebastian Hartford-Davis, net zero commitments (and other predictions about a company's ability to mitigate climate risks) are capable of constituting representations as to future matters. Representations as to future matters will be taken to be misleading if the representor does not have reasonable grounds for making the representation: [Australian Consumer Law](#) s 4; [Australian Securities and Investments Commission Act](#) (Cth) s 12BB; [Corporations Act 2001](#) (Cth) s 769C.

The ACCC's [draft greenwashing guidance](#), which was released in July 2023, may be of assistance when advising clients on greenwashing risks associated with their climate-related representations. The ACCC identified eight principles for "trustworthy environmental claims":

1. Make accurate and truthful claims. In particular:
  - a. Do not overstate the level of scientific acceptance.
  - b. Do not exaggerate environmental benefit.
  - c. Only make meaningful claims.
  - d. Make sure comparisons are transparent and fair
  - e. Ensure that you have reasonable grounds for any representations about future matters, such as net zero goals.
2. Have evidence to back up your claims.
3. Do not hide important information.
4. Explain any conditions or qualifications on your claims.
5. Avoid broad and unqualified claims.
6. Use clear and easy to understand language.
7. Visual elements should not give the wrong impression.
8. Be direct and open about your sustainability transition.

ASIC's [Information Sheet 271](#), "How to avoid greenwashing when offering or promoting sustainability-related products", may also be of assistance.

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2. [transitiontaskforce.net/wp-content/uploads/2023/10/TPT\\_Disclosure-framework-2023.pdf](#).

3. [FINAL-2017-TCFD-Report.pdf](#) ([bbhub.io](#)).

4. [The Taskforce on Nature-related Financial Disclosures](#) ([tnfd.global](#)).



## 1.8 CLIMATE ALIGNED CLAUSES

In looking at business operations holistically and where climate aligned clauses may be useful, updating governance frameworks to account for climate-related risks and opportunities in business models, value and supply chains is the initial starting point in understanding the extent of the climate risk faced by an organisation and the development of net zero transition strategies. This is also a data challenge in ensuring the organisation has access to verifiable and accurate data from which to make decisions.

Corporate governance documents (constitutions, charters and the like) can be updated to include sustainability ambitions and net zero transition targets and plans. Clearly, any public statements regarding strategies and ambitions and how they are operationalised need to have a reasonable basis, and must be underpinned by prudent risk management and robust assumptions, otherwise there is a heightened liability risk associated with false and misleading conduct – or ‘greenwashing’ (see [greenwashing risk in relation to public statements](#) – linked [here](#)).

In addition to the governance task, there is a related process for an organisation to understand how its contractual relationships which make up its value chain can be used to support its strategic ambitions. This requires a detailed consideration of its contractual matrix – its upstream and downstream supply chains and the extent to which those contracts require or can be modified to:

- provide necessary information on climate risk, to assist with understanding the extent of risk and opportunity, and
- provide mechanisms to mitigate such risks or exploit opportunities to create a more resilient and sustainable business. This may include structured incentive arrangements relating to more sustainable outcomes, termination rights for ‘greener’ supply and other contract risk management tools or innovations.

[\*The Chancery Lane Project\*](#) (TCLP) is a not-for-profit organisation and the largest global network of lawyers and business leaders using the power of climate contracting to deliver fast and fair decarbonisation. TCLP has developed over 100+ peer reviewed climate clauses, 70+ glossary terms and a suite of tools to help organisations to consider how they may decarbonise contracts. Resources include:

- Glossary and sample wording;
- Climate transition plans and climate contracting

- Template clauses which are peer reviewed and tailored to domestic market practices
- Useful case studies

For other resources, see section 1.6.

## 1.9 FINANCE

While currently a small portion of the overall financing market, sustainable financing options are rapidly proliferating and there is appetite at both lender and borrower level to look at financing options that fund green and sustainable projects (use of proceeds), as well as more sustainable business operations (sustainability linked funding). This is particularly the case as funders seek to reshape lending portfolios in order to meet ESG commitments, as well as Principles of Responsible Investment,<sup>5</sup> Net Zero Banking Alliance,<sup>6</sup> the Equator Principles,<sup>7</sup> in the context of project finance, and other sustainability commitments. This is occurring across the investment and lending spectrum including institutional markets, SMEs, business banking, mortgage and consumer lending.

Organisations like the Australian Sustainable Finance Institute<sup>8</sup> and the Clean Energy Finance Corporation<sup>9</sup> are seeking to create a roadmap for a more sustainable, resilient and inclusive financial sector, develop taxonomies and standards and provide catalytic capital to private finance to support an acceleration in investment to meet Australia’s legislated target of reducing emissions by 2030 by 43% from 2005 base levels and net zero by 2050.

While sustainable finance currently represents a small portion of overall institutional financing (circa 1%), there is a growing public market in green, sustainable, social and sustainability-linked (GSSS) bonds and loans. This is largely dedicated to the institutional borrower market, involving major domestic and international institutional lenders, although there is a growing push to mainstream offerings and into SME and retail markets. Non-bank lenders and funds have also moved into the sustainable finance and impact investing space. One of the major challenges is the data challenge in ensuring borrowers have the requisite degree of sophistication in order to sponsor or originate projects that meet relevant disclosure and certification standards. This is also spawning the growth in ESG data analytic and ratings agencies, as well as standard setting and certification bodies.

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5. [PRI | Home \(unpri.org\)](#).

6. [Net-Zero Banking Alliance – United Nations Environment – Finance Initiative \(unepfi.org\)](#).

7. [Home Page - Equator Principles Association \(equator-principles.com\)](#)

8. [ASFI](#).

9. [Home - Clean Energy Finance Corporation \(cefc.com.au\)](#).

There are also fast-growing green consumer asset finance and retail offerings, including those underwritten by the CEFC and provided by domestic banks and non-bank lenders (for instance, home solar panel and battery financing).<sup>10</sup> The CEFC has also provided financing in the social and affordable housing space to fund energy efficient appliance and energy systems.<sup>11</sup>

Impact investment, targeting measured environmental and/or social outcomes, is relatively modest (\$500B globally and \$30B in Australia), but is growing quickly.<sup>12</sup>

Sustainable finance taxonomies are being developed around the world which define green activities and projects incorporating ‘Do No Significant Harm’ and ‘Minimum Social Standards’ (the EU’s Taxonomy now has legal effect,<sup>13</sup> and this trend will likely follow in Australia) and the UNEPFI and other organisations like the International Platform on Sustainable Finance<sup>14</sup> are working on the inter-operability and alignment of global standards and taxonomies,<sup>15</sup> including the Common Ground Taxonomy<sup>16</sup> being developed between the EU and China. In Australia, *ASFI* has developed a roadmap to transform the Australian financial markets and has appointed the Climate Bonds Initiative<sup>17</sup> (which is working on many taxonomies around the globe) and experts to a Technical Expert Working Group developing Australia’s Sustainable Finance Taxonomy.<sup>18</sup>

There are a number of principles-based documents supporting the issue of GSSS funds and financial products, as well as International Standards Organisations<sup>19</sup> and

Standards Australia standards relating to more operational aspects associated with risk management, environmental management systems and green and sustainable finance.

Loan and bond market bodies (such as the Loan Markets Association (LMA),<sup>20</sup> Asia Pacific Loans Market Association (APLMA),<sup>21</sup> Loan Syndications and Trading Association (LSTA)<sup>22</sup> and the International Capital Markets Association (ICMA)<sup>23</sup> have developed principles for the issue of GSSS bonds and loans for project (use of proceeds) based finance, as well as corporate (sustainability-linked) funding.

For examples, see:

- [Green Loan Principles - LSTA](#)
- [Sustainability Linked Loan Principles \(SLLP\) - LSTA](#)
- [Sustainable Finance | ICMA » ICMA \(icmagroup.org\)](#)<sup>24</sup>

While green and sustainability linked loans and bonds will be useful for green or low impact projects which are taxonomy aligned (given their use of proceeds or purpose-based format), where the asset or project meets green taxonomy requirements, sustainability linked financing will be key for transitioning business models more broadly. This later form of finance, which establishes KPIs and then specific Sustainability Performance Targets (SPTs) within KPIs to incentivise operational improvements around sustainability initiatives, will become more critical for transitioning ‘hard to abate’ carbon intensive industries and businesses.<sup>25</sup>

10. [Housing - Clean Energy Finance Corporation - Clean Energy Finance Corporation \(cefc.com.au\).](#)

11. [Clean energy and community housing - Clean Energy Finance Corporation \(cefc.com.au\).](#)

12. [Impact Reports - Responsible Investment Association Australasia \(RIAA\)](#)

13. [EU taxonomy for sustainable activities \(europa.eu\).](#) The EU Taxonomy works alongside the Corporate Sustainability Reporting Directive (CSRD) for companies and the Sustainable Finance Disclosure Regulation (SFDR) for financial market participants.

14. [International Platform on Sustainable Finance - BETTER FINANCE.](#)

15. [1104-ipsf-common-ground-taxonomy\\_table-call-for-feedback\\_en.pdf \(europa.eu\).](#) [Common-Framework-of-Sustainable-Finance-Taxonomies-LAC\\_-ENG-Executive-Summary.pdf \(unepfi.org\)](#)

16. [CGT\\_Phase2report\\_final.pdf \(hkgreenfinance.org\).](#)

17. [Climate Bonds Initiative | Mobilizing debt capital markets for climate change solutions.](#)

18. [About the Australian Taxonomy — ASFI.](#)

19. [ISO - ISO 14001 and related standards — Environmental management. ISO/TC 322 - Sustainable finance.](#)

20. [Loan Market Association - the authoritative voice of the EMEA market \(lma.eu.com\).](#)

21. [Asia Pacific Loan Market Association \(aplma.com\)](#)

22. [The LSTA - LSTA.](#)

23. [The International Capital Market Association » ICMA \(icmagroup.org\).](#)

24. [Sustainable Finance | ICMA » ICMA \(icmagroup.org\).](#)

25. GSSS finance can be used in a transition context and there is market discussion around the use of the ‘transition finance’ label as a distinct form of sustainable finance. The OECD has recently issued recommendations to encourage the development of transition finance as a discrete form of sustainable finance- [Commission Recommendation \(EU\) 2023/... of 27 June 2023 on facilitating finance for the transition to a sustainable economy \(europa.eu\).](#) This Recommendation builds on the EU’s sustainable finance framework and on elements from leading international initiatives for transition finance such as the OECD Guidance on Transition Finance, the G20 Framework for Transition Finance, the Report on Transition Finance of the International Platform on Sustainable Finance and the Report of the United Nations High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities.

## 2 LEGAL FRAMEWORKS AND POLICIES

### 2.1 COMMONWEALTH

#### 2.1.1 Key institutions

##### Climate Change Authority

The Climate Change Authority (CCA), a statutory agency established under the [Climate Change Authority Act 2011 \(Cth\)](#), provides independent, expert advice to the Australian Government on climate change policy (ss 10, 11). The CCA also conducts reviews under the [Carbon Credits \(Carbon Farming Initiative\) Act 2011 \(Cth\)](#) (which enables Australia's carbon crediting scheme) and the [National Greenhouse and Energy Reporting Act 2007 \(Cth\)](#) and related instruments, such as the [Safeguard Mechanism](#) (s 11). In addition, it can conduct special reviews on request by the Australian Parliament or the Minister responsible for climate change, such as the Review of International Offsets (2022) (s 59).

Under s 14 of the [Climate Change Act 2022](#), the CCA provides advice to the relevant Minister in preparing an annual climate change statement. The CCA must also, if requested by the Minister, provide advice on the GHG emissions reduction targets to be included in Australia's new or adjusted nationally determined contributions.

In discharging its functions, the CCA must have regard to a variety of factors, from the need for climate change responses to be economically efficient to the need to support an effective global response to climate change (s 12).

##### Clean Energy Regulator

The Clean Energy Regulator (CER) is an independent statutory authority established under the [Clean Energy Regulator Act 2011 \(Cth\)](#) to administer schemes legislated by the Australian Government for measuring, managing, reducing or offsetting Australia's carbon emissions.

Relevant schemes include Australia's carbon crediting scheme (previously known as the Emissions Reduction Fund), National Greenhouse and Energy Reporting System, Australian National Registry of Emissions Units, Safeguard Mechanism and Renewable Energy Target.

##### Australian Renewable Energy Agency

Established in 2012 under the [Australian Renewable Energy Agency Act 2011 \(Cth\)](#) (ARENA Act), the Australian Renewable Energy Agency is an independent and dedicated Commonwealth funding agency.

ARENA is empowered to grow the renewable energy industry by supporting renewable energy technologies, from research and development to demonstration and near-commercial deployment (s 8, ARENA Act). ARENA also

delivers specific programs such as the Driving the Nation Fund to co-invest in projects to reduce emissions from Australia's road transport sector.

ARENA works in partnership with the **Clean Energy Finance Corporation** (CEFC) to cover the spectrum of renewable energy innovation. Established under the [Clean Energy Finance Corporation Act 2012 \(Cth\)](#) to accelerate investment in Australia's transition to net zero emissions, and supports near-commercial and commercial projects.

Direct investments by the CEFC, using debt and equity funding, attract private-sector capital for investments in clean energy technologies, and the CEFC invests venture capital in early-stage clean technology companies through its Clean Energy Innovation Fund. Established in 2016, the Fund draws on the technical expertise of ARENA with final approval for investment commitments provided by the CEFC Board.

##### Taskforce on Nature-related Financial Disclosures

The [Taskforce on Nature-related Financial Disclosures](#) (TNFD) has developed a set of disclosure recommendations and guidance for organisations to report and act on evolving nature-related dependencies, impacts, risks and opportunities.

The recently released TNFD recommendations and guidance provides an equivalent governance framework for nature and biodiversity risks as the TCFD in the context of climate related risks and looks at the intersection of an entity and its value and supply chains, including across four realms (Land, Fresh water, Oceans and Atmosphere) and 34 realm related biomes and the environmental assets and ecosystems services associated with the independence on such realms and biomes. The significant point for solicitors is that climate risk relates to carbon pollution or GHG, while nature related risk involves many complex and co-dependent systems, and so poses an even more comprehensive understanding of risk and appropriate risk management in connection with value chains.

The TCFD cycle from 2015 to 2023 moved from voluntary, to 'voluntary', to mandatory. The TNFD is likely to have a quicker cycle and a more complex series of systems to consider under the conceptual framework.

See the [TCFD](#) Guidance and [Knowledge Hub](#).

#### 2.1.2 The umbrella framework of the Climate Change Act 2022 (Cth)

The [Climate Change Act 2022 \(Cth\)](#) (Climate Act) provides a framework for implementing Australia's national climate objectives. The legislation establishes Australia's GHG emissions reduction targets, requires annual climate change statements, and confers advisory functions on the CCA.

While these targets and other measures bind the Commonwealth Government only, they will form the basis for further sectoral reforms.



## Targets

Australia is a Party to the [2015 Paris Agreement](#) and required to communicate its Nationally Determined Contribution (NDC) every five years, setting out the Australian Government's commitments to reducing emissions (Art 4). Each successive NDC must reflect a higher level of ambition compared to the previous version (Art 4.3).

Australia communicated its updated NDC to the United Nations under Article 4 of the Paris Agreement on 16 June 2022.<sup>26</sup> As part of the updated NDC, Australia committed to achieving net zero emissions by 2050, as well as a new, higher 2030 target of 43 percent below 2005 levels. These commitments are incorporated into domestic law by the Climate Act.

The new 2030 target is to be implemented as both a single-year 'point' target and a multi-year emissions budget (s 10) that is calculated using a 'straight-line trajectory which takes a linear decrease from 2020 to 2030'.<sup>27</sup>

These national emissions reduction targets have been embedded in federal legislation (such as the *National Greenhouse and Energy Reporting Act 2007* discussed below), and the objectives and functions of a variety of Commonwealth Government agencies, via the *Climate Change (Consequential Amendments) Act 2022* (Cth). Examples include the ARENA, the CEFC, the CCA and Infrastructure Australia.

## Transparency and accountability measures

The CCA (discussed above) must assess and publish progress against these targets and advise government on future targets, including the 2035 target (s 15). This advice must include an assessment of the social, employment and economic benefits of any new or adjusted targets and the physical impacts of climate change in Australia (s 15(1A)).

In addition, the Climate Act requires the responsible Minister to prepare and table in Parliament an annual climate change statement addressing a variety of matters, including:

- Progress made during the year towards achieving emission reduction targets;
- international developments relevant to addressing climate change;
- the effectiveness of the Australian Government's policies in achieving targets and reducing emissions in sectors covered by those policies;

- the impacts of the Government's policies to achieve targets on rural and regional Australia; and
- risks to Australia from climate change impacts (s 12).

The CCA is required to give the relevant Minister advice relating to the preparation of an annual climate change statement, which the Minister must take into account (s 14).

The Climate Act must be independently reviewed within five years of commencement and then every 10 years after completion of the previous review (s 17).

As part of the first Annual Statement to Parliament in December 2022, the Commonwealth Government agreed with the CCA's advice that it should develop a plan showing Australia's pathway to net zero emissions by 2050, including Australia's 2035 emissions reduction target and policy priorities for achieving it (p 8).

## 2.1.3 Australia's Nationally Determined Contribution under the Paris Agreement and the Safeguard Mechanism

### NGER

The [National Greenhouse and Energy Reporting Act 2007 \(Cth\)](#) (NGER Act) provides the building blocks for measuring and reporting on the emissions of Australia's largest companies.

The NGER Act establishes a single national framework for reporting and disseminating company information about GHG emissions, energy production, energy consumption and other information (s 3).

Corporations that meet an annual NGER threshold in relation to GHG emissions, energy production and energy consumption must register with the CER, and submit annual reports of GHG emissions, energy production, energy consumption, and other information (ss 12, 13, 19).

Failure to comply with the reporting requirements of the NGER Act may result in civil and financial penalties for both the registered corporation and the chief executive officer of the corporation (see Part 5).

Information collected under the NGER Act provides the basis for assessing liability in relation to the Safeguard Mechanism, discussed below.

26. Australia's Nationally Determined Contribution, available at: [https://unfccc.int/sites/default/files/NDC/2022-06/Australias\\_NDC\\_June\\_2022\\_Update\\_%283%29.pdf](https://unfccc.int/sites/default/files/NDC/2022-06/Australias_NDC_June_2022_Update_%283%29.pdf).

27. Ibid 9.

## Safeguard Mechanism

The *Safeguard Mechanism* was established under Part 3H of the NGER Act. Together with the reporting obligations under the NGER Act, it provides a framework for Australia's largest industrial emitters to measure, report and manage their emissions.

The Safeguard Mechanism applies to 'designated large facilities' (s22XJ, NGER Act), which are those that emit more than 100,000 tonnes of scope 1 (direct) carbon dioxide equivalent (CO<sub>2</sub>-e) emissions each year (s 8, *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (Safeguard Rules)).<sup>28</sup>

Designated large facilities must keep their GHG emissions below a baseline limit (known as emissions limits) (ss 22XJ, 22XF). Grid-connected electricity generators are subject to an aggregate limit on emissions.

Each financial year, a designated large facility must prove their net emissions for that year are below their baseline, and the electricity generation sector must stay below its aggregate baseline (ss 22XE, 22XF). If a facility exceeds their baseline, they must manage their excess emissions in accordance with the NGER Act or face pecuniary penalties (See Part 5, NGER Act).

## Safeguard Mechanism reforms

Since the Safeguard Mechanism commenced on 1 July 2016, reported covered emissions from designated large facilities have grown over 4 per cent from 131.3 Mt CO<sub>2</sub>-e in 2016-17 to 136.9 Mt CO<sub>2</sub>-e in 2020-21, as the baselines applied to facilities were not reduced downwards over time.<sup>29</sup> Under 2016 policy settings, these aggregate emissions were projected to reach 146 Mt CO<sub>2</sub>-e in 2029-30.<sup>30</sup>

The NGER Act was therefore amended by the *Safeguard Mechanism (Crediting) Amendment Act 2023 (Cth)* (Safeguard Amendment Act) to drive emissions reductions across covered facilities and meet Australia's legislated emissions reduction targets under the Climate Act (see above).<sup>31</sup>

The Safeguard Amendment Act also established a new framework for issuing 'safeguard mechanism credits' (SMCs). Further detailed provisions to implement the

scheme are contained in the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (Safeguard Rule) as amended by the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Reforms) Rules 2023*.

The reforms apply to all facilities under the Safeguard Mechanism, except for grid-connected generators, which will continue to be covered by the sectoral baseline (ss 7, 57 Safeguard Rule).

A brief overview of the key elements of the reforms is provided below.

### 1. Setting proportional and enforceable baselines for each designated large facility

All covered facilities must now ensure their net GHG emissions do not exceed the baseline applicable to the facility, i.e. total emissions from the covered facilities, less any offset from the surrender of Australian carbon credits (ACCUs) or SMCs (ss 22XH, 22XK, NGER Act).

The responsible emitter (s 22XH) has a duty to ensure that a covered facility's greenhouse emissions do not exceed the baseline during a financial year (s 22XF). In the event of exceedance, an 'excess emissions situation' exists (s 22XE).

Options for managing excess emissions include: purchasing and surrendering ACCUs or SMCs (see below); applying to borrow baseline from the following year (ss 48-50, Safeguard Rule); applying to become a trade-exposed baseline-adjusted facility and receiving a discounted decline rate (ss 39-42, Safeguard Rule); and applying for a multi-year monitoring period to allow more time to reduce emissions (s22XG(5), NGER Act; ss 65-67, Safeguard Rule). These options are discussed below and on the CER's website.<sup>32</sup>

Where a responsible emitter fails to manage excess emissions by the CER's compliance date, the CER can take a variety of enforcement actions under Part 5 of the NGER Act, including the imposition of substantial civil penalties.

28. According to the Clean Energy Regulator, approximately 219 large industrial facilities fall into this category, with combined covered emissions of 137.5 (million tonnes CO<sub>2</sub>-e) across various facilities, including mining, gas production and processing, manufacturing, and transport facilities.

29. Safeguard facility emissions are published by the Clean Energy Regulator at: <https://www.cleanenergyregulator.gov.au/NGER/The-safeguard-mechanism/safeguard-data/safeguard-facility-reported-emissions>.

30. Department of Climate Change, Energy, the Environment and Water, December 2022, Australia's emissions projections 2022, available at: <https://www.dcceew.gov.au/climate-change/publications/australias-emissions-projections-2022#:~:text=In%20June%202022%20Australia%20updated,emissions%20budget%20from%202021%2D2030>

31. The emissions of facilities covered by the Safeguard Mechanism would be capped at 100MtCO<sub>2</sub>e by 2030, which is a reduction on the 137 MtCO<sub>2</sub>e emitted in 2020-21 (see s 3, NGER Act).

32. See [www.cleanenergyregulator.gov.au/NGER/The-Safeguard-Mechanism/The-Safeguard-Mechanism-for-financial-years-commencing-on-or-after-1-July-2023/Managing-excess-emissions-for-financial-years-commencing-on-or-after-1-July-2023](https://www.cleanenergyregulator.gov.au/NGER/The-Safeguard-Mechanism/The-Safeguard-Mechanism-for-financial-years-commencing-on-or-after-1-July-2023/Managing-excess-emissions-for-financial-years-commencing-on-or-after-1-July-2023).

Emissions from covered facilities are reported through the NGER Act scheme and the CER is required to publish information about all covered facilities for each reporting year (s 24, NGER Act). The reforms expanded these publication requirements to include the baselines for all covered facilities, their use of ACCUs and SMCs, and methodologies used in generating ACCUs. Where facilities use ACCUs and SMCs to offset for more than 30 per cent of their emissions, the covered facility will be required to provide a report detailing the reasons why more onsite abatement is not being achieved.

## 2. Declining baselines over time to achieve a 'net emissions budget'<sup>33</sup>

Emissions baselines will decline over time, at a set rate of 4.9% each year to 2030 (ss 3 and 22XL, NGER Act; s 32, Safeguard Rule).

The Safeguard Amendment Act amends the objects of the NGER Act to include a net GHG emissions level of 100 million tonnes of CO<sub>2</sub>-e from covered facilities for the financial year commencing 1 July 2029, and a total cap of 1,233 million tonnes of CO<sub>2</sub>-e for all financial years between 2020 and 2030 (s 3, NGER Act).

Importantly, the overall emission of greenhouse gases from covered facilities after 2030 must continue to decline based on five-year rolling averages toward zero net CO<sub>2</sub>-e emissions by the 2049 – 2050 financial year (s 3, NGER Act).

## 3. Exceptions and flexible compliance options

Baselines will decline for all covered facilities at the same rate with some exceptions. One of those exceptions is certain 'trade-exposed baseline-adjusted' facilities, which can access financial support and potentially a lower baseline decline rate by applying to the CER (ss 34 – 43, Safeguard Rule).

Another, which applies to all covered facilities, is the ability to apply for multi-year monitoring periods until 2030 (s22XG(5), NGER Act; ss 65–67, Safeguard Rule). The CER can vary multi-year period declarations in cases of non-compliance (s 69B, Safeguard Rule).

Facilities can also apply to borrow up to 10% of a facility's baseline up until 2030 on certain conditions (s 47, Safeguard Rule). However, it cannot rely on both borrowed SMCs and a multi-year monitoring period (s 51, Safeguard Rule).

If emissions from new or expanded covered facilities threaten the achievement of these outcomes, then the responsible Minister will need to consult on and consider whether changes to the Safeguard Mechanism are required (s 22XS, NGER Act).

## 4. Creating emissions reductions incentives through Safeguard Mechanism Credits

SMCs can be issued by the CER where a covered facility's total GHG emissions are below its baseline level (s 22XNA, NGER Act; s 56 Safeguard Rule). Each tonne of emissions represents one SMC, which may be traded to allow other covered facilities to reduce their net emissions to meet their baseline (s 56, Safeguard Rule).

The process for applying for and issuing SMCs is prescribed in the Safeguard Rules, as amended by the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Reforms) Rules 2023* (see ss 56, 58A).

## 5. Clarifying interactions with ACCU projects

ACCUs may still be used to offset a facility's emissions (ss 22XM and 22XK, NGER Act). However, where a facility needs to surrender ACCUs for more than 30% of its baseline, it must submit a statement to the CER, which the CER will publish, setting out why more carbon abatement was not undertaken at the facility (s 72C, Safeguard Rule).

The only carbon credits that can be issued under the Safeguard Mechanism are SMCs (s 22XNA, NGER Act).

The CER can no longer enter into a carbon abatement contract under Australia's carbon crediting scheme (see below) in relation to a project that reduces emissions at a facility covered by the Safeguard Mechanism, unless certain conditions apply (s 9(8) *Carbon Credits (Carbon Farming Initiative) Rule 2015*).

### 2.1.4 Australia's carbon crediting scheme

The Commonwealth Government's main land sector abatement policy is Australia's carbon crediting scheme, previously known as the Emissions Reduction Fund. The scheme is established under the *Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)* (CFI Act) and the *Carbon Credits (Carbon Farming Initiative) Rule 2015 (Cth)* (CFI Rule).

33. A 1,233 million tonne 10-year limit on total net safeguard emissions. The baseline decline is reasonably expected to result in less than 100 million tonnes of net safeguard emissions in 2030, and baselines will be set at zero from 30 June 2049.

The CFI Act establishes a framework for the issue of Australian carbon credit units to a variety of actors (see the definition of ‘person’ in s 5) for eligible offsets projects (s 27(2)(a) or (b)).

Key eligibility requirements for projects are that the project be carried out in Australia, covered by a methodology determination made under the CFI Act and passes the additionality test (s 27(4), CFI Act).

Defined ‘methods’, developed by the CER in conjunction with a variety of stakeholders, and approved by the Minister, set out which activities are eligible to earn ACCUs and how emissions reductions are to be measured, verified and reported (s 106).<sup>34</sup> Participants receive one ACCU for every tonne of emissions they reduce or avoid.

Methods can only be made if the Emissions Reduction Assurance Committee confirms they comply with legislated Offsets Integrity Standards (ss 106(4B), CFI Act).

The CER is responsible for administering the scheme, which includes project monitoring, administering the carbon abatement purchasing process, compliance, enforcement and providing project and scheme information.

ACCUs generated by eligible offsets projects may be purchased by the Commonwealth. The CER, on behalf of the Commonwealth Government, enters into carbon abatement contracts to purchase eligible carbon credit units (s 20B, CFI Act).

In order to do so, the CER uses one or more carbon abatement purchasing processes in accordance with legislated purchasing principles (ss 20C, 20G(3), CFI Act). The purchasing process could include a competitive process of reverse auctions or tender processes (s 20F, CFI Act).

Details regarding the purchase process and contract duration are set out in Part 2A of the CFI Rule (see also s 20CA, CFI Act).

The CER has also developed different types of carbon abatement contracts, including optional delivery contracts where the seller has the right, but not the obligation, to sell ACCUs from one project to the Government at an agreed price over a set period.<sup>35</sup>

Participants may also sell ACCUs privately to buyers in the secondary market.<sup>36</sup>

More than 1,700 emissions reduction projects are registered under the scheme.<sup>37</sup>

The findings of the 2022 Independent Review into the integrity of ACCUs under the Emissions Reduction Fund can be found here: <https://www.dcccew.gov.au/climate-change/emissions-reduction/independent-review-accus>.

In response to the Independent Review, the Commonwealth Government has issued the *Clean Energy Regulator (Human-Induced Regeneration Projects) Direction 2023 (Cth)*.

The *Australian National Registry of Emissions Units Act 2011* (Cth) establishes the Australian National Registry of Emissions Units for ACCUs, SMCs and Kyoto units.

## 2.1.5 Buildings and energy efficiency

The *Building Energy Efficiency Disclosure Act 2010* establishes a national scheme to require the disclosure of information about the energy efficiency of large commercial office buildings over a certain meterage at the point of sale, lease, and sublease. The information is published via a building energy efficiency certificate.

The *Greenhouse and Energy Minimum Standards Act 2012* (Cth) (GEMS Act) establishes greenhouse and energy minimum standards (GEMS) for regulating the energy efficiency of electrical equipment supplied or used in Australia.

The Commonwealth Government can set GEMS via Ministerial determinations, including in relation to labelling requirements to promote consumer awareness.

The GEMS Act is administered by the GEMS Regulator, which monitors and enforces the Act and maintains a GEMS register. The Greenhouse and Energy Minimum Standards (Registration Fees) Instrument 2013 (No. 2) specifies the fees payable under the GEMS Act.

## 2.1.6 Other

The *Offshore Electricity Infrastructure Act 2021* (OEI Act) regulates the construction, operation and decommissioning of offshore renewable energy infrastructure.

The OEI Act applies to the ‘Commonwealth offshore area’, which spans from three nautical miles from the Australian coast to the boundary of Australia’s exclusive economic zone (s 8).

Among other matters, the OEI Act provides a framework for the relevant Minister to declare specified areas suitable for offshore infrastructure activities (s 17) and to grant licences allowing proponents to undertake offshore infrastructure activities in specified areas (see Chapter 3). The OEI Act also establishes the Offshore Infrastructure Registrar to administer the licensing scheme (Chapter 5, Part 1).

34. Methods are available for a variety of activities in the economy, including improving the energy efficiency of commercial buildings and industrial facilities and capture and combustion of landfill gas.

35. See CER, ‘Understanding Carbon Abatement Contracts’: [www.cleanenergyregulator.gov.au/ERF/Want-to-participate-in-the-Emissions-Reduction-Fund/Step-2-Contracts-and-auctions/understanding-carbon-abatement-contracts](http://www.cleanenergyregulator.gov.au/ERF/Want-to-participate-in-the-Emissions-Reduction-Fund/Step-2-Contracts-and-auctions/understanding-carbon-abatement-contracts).

36. See CER, <https://www.cleanenergyregulator.gov.au/ERF/About-the-Emissions-Reduction-Fund>.

37. See <https://www.cleanenergyregulator.gov.au/ERF/project-and-contracts-registers/project-register>.



See also the [Offshore Electricity Infrastructure Regulations 2022](#) and the [Offshore Electricity Infrastructure \(Regulatory Levies\) Regulations 2022](#).

The [Offshore Petroleum and Greenhouse Gas Storage Act 2006](#) (OPGGGS Act) and associated regulations provides a framework for exploring and recovering petroleum and greenhouse gas storage activities in Commonwealth waters.

The [Treasury Laws Amendment \(Electric Car Discount\) Act 2022](#) (Cth) provides the legislative framework to support the Government's Electric Car Discount.

The [Ozone Protection and Synthetic Greenhouse Gas Management Act 1989](#) (Cth) controls the manufacture, import, export, use and disposal of substances that deplete ozone in the stratosphere and contribute to climate change.

## 2.2 REGULATORS

### 2.2.1 ASIC

#### Greenwashing

ASIC's [2024 enforcement priorities](#) include enforcement action on misleading conduct in relation to sustainable finance, including greenwashing.

ASIC's [2023 enforcement priorities](#) also included enforcement action on greenwashing. ASIC issued infringement notices and commenced civil penalty proceedings in the Federal Court, with a [particular focus](#) on:

- statements about net zero emissions commitments that do not appear to have a reasonable basis;
- the use of terms such as 'carbon neutral', 'clean' and 'green';
- inaccurate or vague labels in sustainability-related funds; and
- the scope and application of sustainability-related investment screening.

In June 2022, ASIC released [Information Sheet 271](#) to provide guidance on how to avoid greenwashing when offering or promoting sustainability-related products.

#### Disclosures

ASIC's [Regulatory Guide 247](#) states that the operating and financial review contained in listed entities' annual directors' reports should include a discussion of ESG risks where those risks could affect the achievement of financial performance or the outcomes disclosed. Climate change is identified as a systemic risk that could have a material impact on the future financial position, performance or prospects of entities. It encourages directors to "consider whether it would be worthwhile to disclose additional information that would be relevant under integrated reporting, sustainability

reporting or the recommendations of the TFCF, where that information is not already required" for the operating and financial review: 247.64-247.66.

In 2018, ASIC [released a report](#) containing the observations and findings from a surveillance project examining climate risk disclosure by listed companies in Australia. It sets out high-level recommendations relating to the consideration and disclosure of climate risk.

### 2.2.2 ACCC

The ACCC's [2023-24 compliance and enforcement priorities](#) include "[c]onsumer, product safety, fair trading and competition concerns in relation to environmental claims and sustainability".

In March 2023, the ACCC [published the results](#) of an "internet sweep" of environmental claims. Of the 247 businesses reviewed, the ACCC considered that 57% were making "concerning" claims about their environmental credentials. It identified the following "key issues" with those claims:

1. vague and unqualified claims;
2. a lack of substantiating information;
3. use of absolute claims;
4. use of comparisons;
5. exaggerating benefits or omitting relevant information;
6. the use of aspirational claims, with little information on how these goals would be achieved;
7. use of third-party certifications; and
8. use of images which appear to be trustmarks.

In July 2023, the ACCC released [draft guidance](#) on environmental and sustainability claims, which is discussed further below.

In December 2023, the ACCC published eight principles to help businesses ensure any environmental marketing and advertising claims they make about their products or services are clear and accurate, and do not mislead consumers. The principles comprise the ACCC's [final guidance on environmental claims](#), which sets out the ACCC's view of good practice when making environmental claims, as well as making businesses aware of their obligations under the *Australian Consumer Law*.

At the time of writing, the ACCC has not publicly announced any greenwashing enforcement action. However, it has [indicated](#) that it is conducting several investigations into alleged misleading environmental claims and will take enforcement action where appropriate to do so.



### 2.2.3 APRA

In November 2021, APRA published its [\*Prudential Practice Guide GPC 229 Climate Change Financial Risks\*](#) to provide APRA-regulated entities with guidance on managing financial risks and opportunities that may arise from climate change.

During 2021-22, APRA conducted a climate risk vulnerability assessment to assess the nature and extent of climate risks to Australia's five largest banks. The aggregated findings of that assessment were published in an [\*information paper\*](#) released in November 2022.

## 2.3 NEW SOUTH WALES

### 2.3.1 Climate change legislation and policy

In December 2023, the [\*Climate Change \(Net Zero Future\) Act 2023 \(NSW\)\*](#) was passed, which commits the State of NSW to cutting GHG emissions by at least 50% by 2030 and reaching net zero by 2050. The Act also establishes an independent Net Zero Commission.

The NSW Government has also created a new stand-alone [\*Department for Climate Change, Energy, the Environment and Water\*](#).

Previously, the NSW Government relied on policy approaches, including its [\*Net Zero Plan Stage 1: 2020–2030\*](#) that aims to deliver on the net zero by 2050 objective of the [\*2016 NSW Climate Change Policy Framework\*](#). In a plan update released in September 2021, the NSW Government adopted an interim target of achieving a 50% reduction in the state's emissions compared with 2005 levels by 2030. The [\*NSW Climate Change Adaptation Strategy \(2022\)\*](#) set out the Government's approach to managing climate change impacts.

The NSW [\*Climate Change Fund\*](#) also invests in climate change mitigation and adaptation programs, including to implement the [\*Net Zero Plan and Electricity Infrastructure Roadmap\*](#).

### 2.3.2 Renewable electricity infrastructure legislation

Much of the legislative focus has previously been on coordinating investment in new renewable energy generation and network infrastructure in NSW.

The 2020 NSW Electricity Infrastructure Roadmap provides the policy framework for transforming NSW's electricity system into one that is 'cheap, clean and reliable'.<sup>38</sup>

The Roadmap is underpinned by the [\*Electricity Infrastructure Investment Act 2020\*](#) (NSW) (EII Act), which is designed to reduce investment risk in renewable energy infrastructure.

One of the key measures in the EII Act is a process for the Minister to declare a geographical area of within NSW a 'Renewable Energy Zone' (REZ), and specify the generation, storage or network infrastructure that will be implemented in that REZ.

The EII Act also contains a raft of measures to encourage investment in new generation, storage, network and related infrastructure and support local economic development and manufacturing. Key components include: an energy security target for electricity supply each year; a framework for cost recovery by network operators who construct and operate network infrastructure; derivative arrangements for persons who construct and operate generation, storage and firming infrastructure; and contributions from distribution network service providers.

### 2.3.3 Other relevant legislative frameworks

Land use planning mechanisms mediate numerous important climate change impacts, including heat, flooding and bushfires. However, the key planning Act in NSW, the [\*Environmental Planning and Assessment Act 1979\*](#) (NSW) does not impose a direct requirement for decision-makers to consider climate change impacts under the Act or provide guidance on how to address adaptation or build resilience.

The NSW [\*Protection of the Environment Operations Act 1997\*](#) contains a number of licensing and pricing mechanisms relevant to climate change mitigation, including protection of the environment policies (PEPs) (there are currently no PEPs), load-based fees, pollution reduction plans and load reduction agreements. In accordance with its statutory objectives and duties under the [\*Protection of the Environment Administration Act 1991\*](#), the Environment Protection Authority has recently published a Climate Change Policy and Climate Change Action Plan 2023-26 to address the 'causes and consequences' of climate change in NSW.<sup>39</sup>

The [\*State Environmental Planning Policy \(Resilience and Hazards\) 2021\*](#) aims to promote an integrated and co-ordinated approach to land use planning in the coastal zone consistent with the objects under the [\*Coastal Management Act 2016\*](#) (NSW) (clause 2.1).

38. <https://www.energy.nsw.gov.au/nsw-plans-and-progress/major-state-projects/electricity-infrastructure-roadmap>.

39. See sections 6 and 9.

## 3 PRACTICE AREAS

### 3.1 CORPORATE LAW

#### 3.1.1 Overview

Climate change poses physical risks (such as the threat of drought, fire and/or flood) and transitional risks (such as legal, market and/or technological change) to companies and their businesses. These risks can have direct and indirect impacts on a company's prospects.

Although the *Corporations Act 2001* (Corporations Act) contains no directors' duty specifically in relation to climate risks, existing duties will encompass climate risk considerations to the extent that they are material to the company (which will often be the case). This may create a legal impetus for boards to scenario plan, make disclosures in accordance with guidance, and respond to the reputational and financial implications of physical and transitional climate risks.

The Law Society of England and Wales has published a guide which provides general information in relation to advice to companies on climate risk governance and greenwashing: [Climate risk governance and greenwashing risks: guidance for solicitors advising companies | The Law Society](#). The guide includes a questions framework- 'a list of climate-related issues to be covered in best practice advice in private practice or in-house legal teams to the executive team and the board.'

#### 3.1.2 Care and diligence

Climate change will be, for most businesses, a reasonably foreseeable risk requiring consideration by the board. In that context, directors' duty of care and diligence will require careful consideration of potential climate change related risks for their business and, to the extent those risks are material, proactive steps to mitigate or otherwise address them as an aspect of their duty to act with care and diligence, pursuant to s 180 of the Corporations Act.

Noel Hutley SC and Sebastian Hartford Davis' opinion<sup>40</sup> is that the duty of care and diligence obliges directors to:

- obtain knowledge about their business' activities and the effect of climate change on their business;
- consider and disclose climate-related risks; and
- take reasonable steps to ensure that positive action is taken to address climate-related risks.

Section 180 of the Corporations Act includes subjective and objective elements, with the standard of care and diligence expected of directors likely to evolve as broader societal expectations also evolve. This has been an area of focus for activist groups, which have framed novel claims with a view to ascertaining what care and diligence requires in practice. For example, in early 2023, environmental charity ClientEarth commenced proceedings in the UK, in the form of a derivative action against Shell's directors.<sup>41</sup>

The action alleged that Shell's directors breached their duties by "failing to manage the material and foreseeable risks posed to the company by climate change", including failure to properly prepare Shell for the low-carbon transition.

However, the UK High Court refused permission for ClientEarth to continue its derivative action on the basis it disclosed no prima facie case of actionable breach of duty. The Court held that ClientEarth sought to impose absolute duties on Shell's directors which cut across their general duty to have regard to many competing considerations and it was improper for the Court to hear an appeal on merits from management decisions.

Although directors' duties are formulated slightly differently in Australia, a similar claim could be brought in Australia and it is conceivable that the same reasoning could apply.

In addition, directors must adequately oversee the company's compliance with applicable legal obligations, such as under environmental law or consumer law, and may be subject to "stepping stone" liability to the extent the company breaches the applicable legal requirements and it can be shown that they failed to exercise care or diligence in performing their oversight function.

#### 3.1.3 Good faith and best interests

Climate change related risks and opportunities may also be relevant to directors' duty to act in good faith in the best interests of the company, pursuant to s 181 of the Corporations Act.

Brett Walker SC and Gerald Ng's opinion<sup>42</sup> is that the best interests duty plainly allows directors to consider the long-term interests of the company and shareholders, including the company's reputation and the interests of customers, employees and the community at large, so long as there is a rational justification with reference to the long-term interest of the company.

The balancing of short- and long-term considerations is particularly relevant to directors' decision-making on near-term financial investments or strategic changes, as against the longer term ability of the company to create enduring value for shareholders.

40. See 2016 opinion [here](#), 2019 opinion [here](#) and Further Supplementary opinion dated 23 April 2021 [here](#).

41. For more information, see [here](#).

42. The opinion can be accessed [here](#).

### 3.1.4 Future trajectory in directors' duties and climate risks

Climate risks are likely to be increasingly captured by directors' duties due to:

- More guidance from Australian regulators, such as ASIC, the ACCC and APRA, directed to companies and directors concerning climate risks, such that climate risks are more likely to be understood as reasonably foreseeable and requiring action.
- increased guidance from voluntary disclosure frameworks such as the TCFD and TNFD, that provide an indicative standard of conduct.
- growing pressure from shareholders, activists and other stakeholders for companies to take action on climate and the exposure of businesses to climate risks, including by way of shareholder requisitions for companies to adopt climate transition action plans and scenario analysis or requisitions for companies to divest from, adapt or invest in particular assets.
- the likely adoption of mandatory disclosure frameworks, namely standard 'S2' developed by the ISSB – as being considered as a basis for legislative change in the UK and Australia.<sup>43</sup>

For further information regarding the movement towards clearer guidance on physical and transitional climate risks, see the section of this resource titled "Financial Reports: TCFD". See also [AICD Guidance](#) and Pollination Group's [opinion](#) on nature-related risk.

## 3.2 MERGERS AND ACQUISITIONS

As organisations consider business models and value chains in the context of net zero transition strategies, it is clear that acquisition and divestment transactions may have a material impact on such strategies, including on size of GHG footprints and impact on net zero transition strategies and related public disclosures.

There are a range of strategic considerations which need to be factored into due diligence and merger and acquisition (M&A) evaluation processes when considering the implications of climate risk and embedded GHG/carbon footprints and 'acquired emissions' when an organisation considers acquiring a target entity. This also extends to financing associated with such acquisitions and whether sustainable finance options may be available.

Due diligence risk assessment always involves an assessment of 'materiality' thresholds and a consideration of relative bargaining power of seller and purchaser, which then involves balancing the extensiveness of due diligence investigations against warranties and indemnities, price adjustment arrangements and credit risk associated with such measures (including cost, availability and adequacy of warranty insurance).

Materiality considerations and a preliminary assessment of climate risk exposure for acquired assets (if asset only acquisition) or underlying assets (if a share acquisition) will determine how extensive climate risk due diligence should be. Recognising that climate related risk is a financial risk and has long term valuation implications means that such due diligence is increasingly becoming a significant element of standard M&A processes (particularly for specific industry carbon intensive sectors, however given supply chain interdependencies, should be a part of all business acquisitions). Accordingly, climate risk should be considered early on in acquisition and divestment processes, establishment of data rooms and diligence reports and transaction document design (particularly warranties, indemnities and exclusions).

In terms of design, climate risk due diligence should consider and use the now market accepted physical, economic transition and litigation and liability risk taxonomy to align with strategic governance and reporting and disclosure frameworks and to enable information to be analysed and purposed within the context of the acquirer's own climate risk governance.

There is a broader fiduciary aspect given the expenditure of corporate resources and due care and fiduciary responsibilities. Accordingly, there are a number of strategic factors to consider in any business acquisition (whether assets only or entity based) and the design of appropriate diligence and risk management and documentation processes. Given heightened focus on climate related risk and the long-term implications of such risks on value, standard M&A processes need to be modified specifically to address such risks.

Due diligence processes therefore need to account for 'acquired emissions' and merger implementation issues (e.g. available synergies) and financing considerations (availability and use of sustainable funding options) – including the implications of the transaction for the acquiring organisation's net zero transition strategy (for instance, is it positive? What does it do to transition pathways? Is there an ability to achieve GHG synergies or savings and what are the implications for waste systems and more circular / sustainable models for the post acquisition business?).

43. At the time of writing, the Treasury was consulting on [Climate-related financial disclosure: exposure draft legislation](#): the Bill requires entities that lodge financial reports under Chapter 2M of the Corporations Act, meet certain minimum size thresholds, and/or have emissions reporting obligations under the NGER scheme, to make disclosures relating to climate in accordance with sustainability standards made by the AASB. The amendments phase in the new obligations over a period of four years. See also: ['A director's guide to mandatory climate reporting' \(Version 1, 3 October 2023\)](#), [AICD](#), [Deloitte](#), [MinterEllison](#)

44. See <https://sdgs.un.org/goals>

Due diligence checklists should be updated to address ESG issues more broadly beyond climate related risk (eg modern slavery and other supply chain issues and sustainability claims – including United Nations Sustainable Development Goals statements<sup>44</sup>), but in relation to climate risk specifically, there is a need to consider the target's risk governance (including its disclosures) and its operations from a physical, transition and liability risk perspective.

This would include an analysis of any climate or sustainability statements made by the target, any stakeholder or regulatory threats or actions against the target and operational aspects of the target's business, including understanding its GHG footprint, technology and regulatory threats, transition strategy and financing arrangements. Likewise, the target's business model, contractual and financing arrangements need to be considered from a strategic and tactical perspective, as well as synergy opportunities (and the assumptions and challenges associated with achieving such synergies). This would also include analysing transition scenarios and associated modelling.

In addition to due diligence checklists, data room and request for information processes and reports, typical sale of business or share documents may need to be modified to accommodate these matters. In the context of acquisition documents, there will be structuring issues to consider, particularly around conditions precedent, warranties and indemnities, price adjustments and warranty insurance.

Industry and sector specific considerations also need to be considered in the context of climate risk and M&A transactions, particularly for the seven energy and land-use systems that produce the world's emissions – Power, Industry, Mobility, Building, Agriculture, Forestry and other land use and Waste. For instance, transactions relating to mining and resources, including critical minerals and other carbon intensive industries (such as oil and gas, cement, iron and steel, chemicals, aviation and shipping) will require more extensive due diligence and risk management.

Interestingly, the ACCC recently considered and prioritised the public interest or benefit of reducing emissions over the risk of competitive detriments in its authorisation of Brookfield and MidOcean's acquisition of Origin Energy. The ACCC determination reflects the increasing urgency for Australia to progress its energy transition and reach its legislated target of reducing emissions by 2030 by 43% from 2005 base levels and net zero by 2050. As such, there may be strategic benefits from a climate risk perspective which may drive M&A activity.

### 3.3 CONSTRUCTION AND INFRASTRUCTURE

Given the long-term nature of buildings and infrastructure assets, it is critical to consider design features and construction materials which can reduce the extent of embedded or embodied emissions in such assets.

*State Environmental Planning Policy (Sustainable Buildings SEPP) 2022* (SB SEPP) is a policy framework aimed at promoting sustainable building practices and reducing the environmental impact of the built environment in NSW. To help achieve this, the SB SEPP introduces embodied emissions measurement and reporting for all building types and associated materials.<sup>45</sup>

Whole of life principles which consider construction and operating methods and costs balancing more expensive construction methods and materials with lower operating and maintenance costs are prevalent in public-private partnerships (PPP) and other procurement modes and will increasingly consider use of green materials (e.g. steel and cement) and lower energy components (lighting, heating and cooling) as well as circularity (reduced waste in demolition and operations).

These concepts are generally considered as part of PPP and other procurement processes, as part of a value for money evaluation. Net zero strategies mean that emissions factors will become a more significant consideration and take greater weighting in building and infrastructure procurement processes.

The Infrastructure Sustainability Council and other peak bodies and government agencies have recently released the Infrastructure Net Zero strategy<sup>46</sup> to drive these processes. A number of major developers<sup>47</sup> have signed up to the Responsible Steel's Steel Zero<sup>48</sup> initiative and there are other sustainability initiatives, such as responsibly sourced concrete.<sup>49</sup>

PPP model contract principles and project deeds and evaluation processes are being updated to account for climate risk factors and seek to drive more sustainable infrastructure procurement to meet Commonwealth and State and Territory government net zero commitments.

Clearly, these principles apply to all construction processes for goods and services more broadly (beyond building materials and supplies) and the need for more circular business models.<sup>50</sup>

45. *Research commissioned in 2021 by the Commonwealth Government and done by the Green Building Council of Australia found embodied emissions made up 16% of Australia's built environment footprint in 2019. Without deliberate action, this could increase to 85% by 2050, as buildings become more efficient and the power grid decarbonises through increased renewables. Embodied Emissions Technical Note (nsw.gov.au).*

46. *Infrastructure accelerates towards net zero - ISCouncil.*

47. *Lendlease joins SteelZero initiative to reduce carbon emissions in the steel industry.*

48. *SteelZero | ResponsibleSteel.*

49. *Responsibly sourced concrete and BES 6001 (concretecentre.com).*

50. *Embodied Carbon Footprint Database - Circular Ecology.*