CLIMATE CHANGE GUIDANCE

ADVISING ON CLIMATE RISK

ANNEXURE B

As at August 2025

THE LAW SOCIETY
OF NEW SOUTH WALES

ANNEXURE B

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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 (CO2), methane (CH4), nitrous oxide (N2O), hydrofluorocarbons (HFCs), perfluorocarbons (PCFs), sulphur hexafluoride (SF6) and nitrogen trifluoride (NF3).

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.[1]

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 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.

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

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

the *Corporate Standard | GHG Protocol*. 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 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 is 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*.

1.4 Promoting your climate-related credentials

It is important that materials that promote an organisation's approach to climate change be 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 for firms 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.

Similarly, solicitors practicing in-house may be asked to provide legal advice on proposed communications and marketing material for offering or promoting sustainability-related products (eg, Green Home Loans, Green Deposit Products or Social Impact Funds).

Organisations may also publish material in connection with their annual reporting cycle including climate targets, transition plans, and frameworks.

In-house solicitors will need to be alert to legal and regulatory risks arising in these contexts including mitigating greenwashing and prohibitions against misleading and deceptive conduct (see section 1.7 below) and *ASIC's Information Sheet 271*, "How to avoid greenwashing when offering or promoting sustainability-related products".

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 orgaisation'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

1.5 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.

Third party validation may also be provided for specific products and segments. For example, the Asia Pacific Loan Market Association recently published the Second Edition of Guidance for Green, Social and Sustainability-Linked External Reviews. The Guidance aims to promote increased clarity and transparency for the most common types of external review used in the loan market, thereby generating increased liquidity to sustainable finance more broadly. (See further section 1.9 below).

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 (TPT) and the TPT Framework which provides a practical and useful complement to ISSB Standards.[2]

The Taskforce on Climate-related Financial Disclosures (TFCD) provided a conceptual framework for managing climate-related risks and opportunities, including strategy and governance, reporting and disclosure frameworks for understanding and reporting climate risk. The TCFD has been formally disbanded and its work taken up by the IFRS Foundation. The new standards are IFRS 1 *General Requirements for Disclosures of Sustainability-related Financial Information* and IFRS 2 Climate-related Disclosures.[3]

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.

In September 2023, the Taskforce on Nature-related Financial Disclosures (TNFD) published its recommendations. These drew inspiration from the success of the TCFD, and contain many similar concepts and approaches, which have been adapted to the very different context of nature and biodiversity. There are also new elements which did not appear in the TNFD's recommendations.[4] Please see 2.4 for more detail.

These frameworks provide a means of analysing climate risks and GHG footprints and can be 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 (the former) TCFD in the process of becoming mandatory requirements.

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

These 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
- See also *Race to Zero*

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 be 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 greenwashing guidelines, released in December 2023, may be of assistance when advising clients on greenwashing risks associated with their climate-related

2. *https://www.ifrs.org/sustainability/knowledge-hub/transition-plan-taskforce-resources/*
3. *https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s1-general-requirements/*
4. *Recommendations-of-the-Taskforce-on-Nature-related-Financial-Disclosures.pdf*

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 or omit 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 environmental sustainability transition.

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,[5] Net Zero Banking Alliance,[6] the Equator Principles,[7] 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[8] (ASFI) and the Clean Energy Finance Corporation[9] (CEFC) are seeking to implement a roadmap for a more sustainable, resilient and inclusive financial sector, develop

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).*

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.

In June 2024, the Federal Government released its Sustainable Finance Roadmap (Roadmap), which sets out the Government's vision for the implementation of key sustainable finance reforms and related measures.[10] The Roadmap is based on three pillars and ten priorities:

Pillar 1: Improve transparency on climate and sustainability

- **a.** Implementing climate-related financial disclosures
- **b.** Developing the Australian Sustainable Finance Taxonomy
- **c.** Supporting credible net zero transition planning
- **d.** Developing sustainable investment product labels

Pillar 2: Financial system capabilities

- **e.** Enhancing market supervision and enforcement
- **f.** Identifying and responding to systemic financial risks
- **g.** Addressing data and analytical challenges
- **h.** Ensuring fit for purpose regulatory frameworks

Pillar 3: Australian Government leadership and engagement

- **i.** Issuing Australian sovereign green bonds
- **j.** Stepping up Australia's international engagement

The Roadmap is part of the Government's broader Sustainable Finance Strategy.[11] It represents an advancement in integrating sustainability into the financial system following the introduction of mandatory disclosure of climate-related financial risks and opportunities.[12] The Roadmap aims to mobilise private capital required to achieve net zero, modernize financial markets, and maximise economic opportunities associated with energy, climate and sustainability goals. This highlights a 'climate first, not only' approach that makes clear that climate and nature-related risks and opportunities is a critical part of Australia's economic and environmental strategy.

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 relates to data i.e. to ensure borrowers have the requisite degree of sophistication in order to sponsor or originate projects that meet relevant disclosure and certification standards, and so the transaction parties can set meaningful and sufficiently ambitious Key Performance Indicators to mitigate greenwashing. This is also spawning the growth in ESG data analytic and ratings agencies, as well as standard setting and certification bodies.

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). The CEFC has also provided financing in the social and affordable housing space to fund energy efficient appliance and energy systems.[13]

The global market, targeting measured environmental and/or social outcomes, has grown significantly, over the last five years, with the Global Impact Investing Network (GIIN) estimating the size of global impact investing market to be worth more than $1.57 trillion USD in 2024, growing at a compound annual growth rate of 14% since 2019.[14] In Australia, the responsible investing market was estimated to be worth $1.9 trillion in 2023, increasing by 24% since 2022 (with a modest $30B in Australia).[15]

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,[16] and this trend will likely follow in Australia) and the UNEPFI and other organisations like the International Platform on Sustainable Finance[17] are working on the inter-operability and alignment of global standards and taxonomies,[18] including the Common Ground Taxonomy[19] being developed between the EU and China.

In Australia, the ASFI has developed an independent roadmap to transform the Australian financial market.[20]

10. *https://treasury.gov.au/publication/p2024-536290*
11. *https://treasury.gov.au/sites/default/files/2023-11/c2023-456756.pdf*
12. See 2.1.2.
13. *Clean energy and community housing - Clean Energy Finance Corporation (cefc.com.au).*
14. Sizing the Impact Investment Market 2024 – Global Impact Investing Network.
15. *RIAA-Responsible-Investment-Benchmark-Report-Australia-2024.pdf*
16. *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.
17. *International Platform on Sustainable Finance - BETTER FINANCE.*
18. *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)*
19. *https://finance.ec.europa.eu/document/download/e83394d0-daf1-487e-b1bf-922731767a10_en?filename=241113-common-ground-taxonomy-multi-jurisdiction-activity-tables_en.pdf*
20. *Australian Sustainable Finance Roadmap – ASFI.*

The roadmap was created through consultation with industry experts, stakeholders, financial institutions and regulatory agencies and made 37 key recommendations relating to leadership, integrating sustainability into practice, building economic, social and regulatory resilience nationally and promoting sustainable finance markets. Amongst these, ASFI recommended the implementation of a sustainable finance taxonomy in Australia. ASFI, in partnership with the Federal Government, is currently in the initial development phase of creating the sustainable finance taxonomy.[21]

The Australian sustainable finance taxonomy aims to:

- provide common definitions for sustainable economic activities in Australia;
- help direct private investment to activities that will support Australia's transition to net zero emissions; and
- help prevent greenwashing.

The initial development phase is being overseen by the Australian Council of Financial Regulators' Working Group, supported by expertise from the Taxonomy Technical Expert Group.[22] This phase will cover climate mitigation criteria for six priority economic sectors, which align with the Federal Government's decarbonisation plans, including electricity generation and supply; minerals, mining and metals; buildings; manufacturing and industry; transport; and agriculture and land use.[23]

There are a number of principles-based documents supporting the issue of GSSS funds and financial products, as well as International Standards Organisations[24] 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),[25] Asia Pacific Loans Market Association (APLMA),[26] Loan Syndications and Trading Association (LSTA)[27] and the International Capital Markets Association (ICMA)[28] 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 *Sustainable Finance | ICMA » ICMA (icmagroup.org)*[29]

In Australia, the Federal Government issued the first Green Treasury Bond on 4 June 2024 by syndication.[30] The green bond program enables investors to back public projects that drive Australia's transition to net zero by 2050 and attracts further green capital to Australia by increasing transparency around climate outcomes. The Green Treasury Bond is supported by the Green Bond Framework, which sets out the Federal Government's environmental priorities and outlines how green bonds will be used to finance eligible expenditures.[31]

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 by a pricing ratchet mechanism, will become more critical for transitioning 'hard to abate' carbon intensive industries and businesses.[32]

21. *Sustainable finance taxonomy – The Treasury.*
22. *Taxonomy Technical Expert Group.*
23. *Net Zero – Department of Climate Change, Energy, the Environment and Water.*
24. *ISO - ISO 14001 and related standards — Environmental management. ISO/TC 322 - Sustainable finance.*
25. *Loan Market Association - the authoritative voice of the EMEA market (lma.eu.com).*
26. *https://www.aplma.com/*
27. *The LSTA - LSTA.*
28. *The International Capital Market Association » ICMA (icmagroup.org).*
29. *Sustainable Finance | ICMA » ICMA (icmagroup.org).*
30. *Green Bond program – The Treasury.*
31. *Green Bond Framework – The Treasury.*
32. *https://finance.ec.europa.eu/publications/sustainable-finance-package-2023_en*

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, Capacity Investment Scheme, New Vehicle Efficiency Standard and Guarantee of Origin Scheme.

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 and is responsible for the administration of much of the funding committed via the *Future Made in Australia Act 2024* (Cth).

Clean Energy Finance Corporation

ARENA works in partnership with the Clean Energy Finance Corporation (CEFC) to cover the spectrum of renewable energy innovation. The CEFC was 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. In total, the CEFC invests in renewable energy, energy efficiency and low emissions technologies, via the $11.5 billion CEFC General Portfolio; the $19 billion Rewiring the Nation Fund; the $1 billion Household Energy Upgrades Fund™; the $500 million Powering Australia Technology Fund; the $300 million Advancing Hydrogen Fund and the $200 million Clean Energy Innovation Fund.

National Reconstruction Fund Corporation

Supplementing the CEFC and ARENA is the National Reconstruction Fund Corporation (NRFC) which has low emissions technology and renewable energy as one of its priority areas of investment set out in the *National Reconstruction Fund Corporation (Priority Areas) Declaration 2023*. The NRFC has $15 billion to invest across its portfolio to enhance Australia's manufacturing capacity and accelerate decarbonisation.

Net Zero Economy Authority

The Net Zero Economy Authority (NZEA) was established in December 2024 by the *Net Zero Economy Authority Act 2024* (Cth). The NZEA's role is to promote orderly economic transformation as Australia moves to a net zero emissions economy. Its functions include encouraging participation and investment in net zero transformation initiatives and supporting workers in emissions-intensive industries who are or will be affected by Australia's transition to a net zero economy.[33]

33. Net Zero Economy Authority Act 2024 (Cth) s 16 .

2.1.2 The mandatory climate reporting regime

In September 2024, Australia's mandatory climate reporting legislation, Schedule 4 of the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Act 2024* (Cth) (Climate Reporting Legislation) entered into force. The Climate Reporting Legislation requires entities meeting certain size thresholds to disclose their climate-related risks and opportunities. Three groups of entities are captured, with the largest entities (Group 1) required to make disclosures in line with the Australian Sustainability Reporting Standards' Climate Standard, AASB S2, from the reporting period commencing 1 January 2025 (i.e. FY2026). Group 2 and 3 entities are required to disclose from FY2027 and FY2028, respectively. For an overview of Group size thresholds and phase-in dates, see ASIC's Sustainability Reporting guidance *here*.

AASB S2 is derived from the International Sustainability Standards Board (ISSB) Climate Standard, IFRS S2, which is based on, but significantly builds on, the TCFD pillars of governance, strategy, risk management and metrics and targets. Disclosures are to be made annually in a separate Sustainability Report (Sustainability Report) within the Annual Reporting suite.

Directors are required to issue a Directors' Declaration that in their opinion, the Sustainability Report complies with the Climate Reporting Legislation and AASB S2, although for the first three years of the regime directors are only required to declare that the reporting entity has taken 'reasonable steps' to ensure compliance (Qualified Directors' Declaration). The Sustainability Report must also be subject to mandatory assurance, with assurance requirements being phased in over time (see the AUASB assurance timetable for more details).

2.1.3 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.[34] 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. Australia is due to submit its second NDC in 2025.

The new 2030 target is being 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'.[35]

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).

34. Australia's Nationally Determined Contribution, available at: *https://unfccc.int/sites/default/files/NDC/2022-06/Australias%20NDC%20June%202022%20Update%20%283%29.pdf.*

35. Ibid 9.

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).

Capacity Investment Scheme Program

The Climate Act was amended in 2025 to establish the Capacity Investment Scheme Program (CIS). The CIS is a Commonwealth revenue underwriting scheme designed to stimulate investment in renewable energy generation and clean dispatchable capacity, such as battery storage. By providing revenue certainty, the scheme aims to help deliver the Australian Government's target of 82% renewable electricity by 2030 and support a 'reliable, affordable and low-emissions energy system' (s 5, *Industry Research and Development (Capacity Investment Scheme Program) Instrument 2023*).

The CIS operates through a competitive tendering process, in accordance with Australian Government-set objectives and capacity targets in each jurisdiction. These objectives and targets have been set through Renewable Energy Transformation Agreements between the Australian Government and state and territory governments.

Successful projects enter into a Capacity Investment Scheme Agreement with the Australian Government. This agreement establishes the following revenue protection mechanism:

- **Revenue Floor**: If a project's revenue falls below a predetermined level, the government compensates the shortfall.
- **Revenue Ceiling:** If revenue surpasses the set ceiling, a portion of the excess is returned to the government (subject to an agreed annual cap).

Information on the CIS tendering process can be found here: *https://www.dcceew.gov.au/energy/renewable/capacity-investment-scheme/changes-to-future-tender-process*.

The *Electricity Infrastructure Legislation Amendment Act 2025* (Cth) amended the Climate Act to require the Australian Government to implement, modify, or oversee the CIS, which is now a prescribed program under s 33 of the *Industry Research and Development Act 1986* (Cth). (Climate Act, s 15C). These arrangements must deliver at least 23 GW of renewable energy and 9 GW of clean dispatchable capacity by 2030 (Climate Act, s 15C(b)).

To maintain investor confidence, both houses of the Australian Parliament must approve any modification or revocation of a CIS prescription (Climate Act, s 15D(1)). If the Climate Change Authority (CCA) identifies a material risk to meeting CIS targets, the Minister must address it in the annual climate change statement (Climate Act, s 15C(2)).

2.1.4 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.

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' (s 22XJ, NGER Act), which are those that emit more than 100,000 tonnes of scope 1 (direct) carbon dioxide equivalent (CO_2-e) emissions each year (s 8, *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (Safeguard Rules)).[36]

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.

36. According to the Clean Energy Regulator, approximately 219 large industrial facilities fall into this category, with combined covered emissions of 137.5 (million tonnes CO2-e) across various facilities, including mining, gas production and processing, manufacturing, and transport facilities.

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_2-e in 2016-17 to 136.9 Mt CO_2-e in 2020-21, as the baselines applied to facilities were not reduced downwards over time.[37] Under 2016 policy settings, these aggregate emissions were projected to reach 146 Mt CO_2-e in 2029-30.[38]

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).[39]

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 (s 22XG(5), NGER Act; ss 65-67, Safeguard Rule). These options are discussed below and on the CER's website.[40]

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.

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'[41]

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 CO2-e from covered facilities for the financial year commencing 1 July 2029, and a total cap of 1,233 million tonnes of CO2-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 CO2-e emissions by the 2049 – 2050 financial year (s 3, NGER Act).

37. Safeguard facility emissions are published by the Clean Energy Regulator at: *https://cer.gov.au/markets/reports-and-data/safeguard-facility-covered-emissions-data-2022-23.*

38. **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*

39. The emissions of facilities covered by the Safeguard Mechanism would be capped at 100MtCO2e by 2030, which is a reduction on the 137 MtCO2e emitted in 2020-21 (see s 3, NGER Act).

40. See *https://cer.gov.au/schemes/safeguard-mechanism/managing-excess-emissions.*

41. 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.

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).*

2.1.5 New Vehicle Efficiency Standard

The *New Vehicle Efficiency Standard Act 2024* (NVES Act) took effect on 1 January 2025, introducing Australia's first legally binding vehicle efficiency standard for reducing carbon dioxide emissions from certain road vehicles. It applies to new passenger cars and light commercial vehicles. Compliance obligations begin on 1 July 2025.

The NVES Act brings Australia's fuel efficiency standards into line with those of other major markets. By 2050, the Australian Government expects the Act to reduce greenhouse gas emissions by about 321 million tonnes and save Australian motorists about $95 billion in fuel costs.

The NVES Act applies to 'covered vehicles' (s 12). A vehicle is covered if it is a type 1[42] or type 2[43] vehicle, a person holds a road vehicle type approval for it, and that person first enters it onto the Register of Approved Vehicles (RAV) on or after 1 July 2025 (s 12). [44]

Vehicles with a gross vehicle mass of over 4.5 tonnes are exempt (s 16).

Some vehicles may qualify for concessional entry into the RAV under specific conditions (s 28).

Compliance obligations fall on manufacturers, importers, and suppliers of covered vehicles.[45]

42. Generally passenger cars and light off-road vehicles.
43. Generally light commercial vehicles but also heavy off-road passenger vehicles. A 'heavy off-road passenger vehicle' is generally a vehicle with a towing capacity of 3 tonnes or more and a body on frame chassis (which includes some SUVs and 4WDs): s 15.
44. The Minister may also determine the status for a class of vehicle (s 29).
45. The NVES Act itself does not explicitly state that manufacturers, importers, and suppliers are the obligated parties. However, the source of this obligation can be inferred from the definition of 'covered vehicles' and who controls them under the Act. Under s 12 of the NVES Act, a vehicle is a 'covered vehicle' if a person holds a road vehicle type approval for it. A road vehicle type approval, granted under the Road Vehicle Standards Act 2018 (RVSA), is a prerequisite for entering a vehicle onto the Register of Approved Vehicles (RAV)—a requirement before a vehicle can be supplied in Australia for the first time. To obtain a road vehicle type approval, an applicant must meet the criteria set out in s 19 of the Road Vehicle Standards Rules 2019, which require the applicant to:

- Control or have access to information about the vehicle's design, components, and manufacturing process relevant to compliance (s 19(1)(b));
- Ensure the consistent production of compliant vehicles (s 19(1)(c)); and
- Facilitate inspections of manufacturing premises for compliance assessment (s 19(1)(d)).

Since holding a road vehicle type approval is a condition for covered vehicle status under the NVES Act, approvals are typically held by manufacturers (for locally produced vehicles), importers, and suppliers operating under the RVS framework.

Once a vehicle is entered onto the RAV, the responsible person must ensure it meets final emissions values (s 17), which are calculated in accordance with Part 2, Division 3.

A person's final emissions value for a year is their interim emissions value for that year, reduced by the number of units they have extinguished to lower it (s 18).

The interim emissions value is determined by comparing the vehicle's actual CO2 emissions against the emissions targets specified by the Act, which can be adjusted for each vehicle's characteristics such as mass (s 21).

A positive value means the vehicles have exceeded the target emissions, while a negative value indicates they have performed better than required (see Part 2, Div 3).

'Emissions targets' under the NVES Act are calculated, among other factors, by reference to 'headline limits' on a vehicle's emissions (CO2 kg/year), which have been legislated for the first five years (ss 21, 22). From 2030 onwards, targets will be determined by the Minister through legislative instruments (NVES Act, s 22). The Minister has authority to set or adjust headline limits (s 31), mass adjustment factors, and reference MIROs (s 32).

Headline limits will tighten annually (s 31), with the first review in 2026 to assess limits for 2030–2035 (s 93). Any changes will be subject to public consultation (NVES Act, s 36).

Entities responsible for covered vehicles must comply with the emissions targets by:

- Selling more fuel-efficient, low-emission, or zero-emission vehicles; or
- Managing compliance units, issued when a vehicle performs better than expected (NVES Act, ss 39, 42, 45). These units can be used for future compliance or traded.

Entities that fail to meet their compliance obligations may be subject to civil penalties (NVES Act, ss 17, 18). Non-compliance actions include issuance of infringement notices and civil penalties under the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (Regulatory Powers Act) (ss 76-78) and an adverse publicity order in relation to the duty to ensure that a final emissions value is zero or less (s 83).

The NVES Regulator will be responsible for enforcement and oversight, including maintaining the unit registry (NVES Act, ss 51).

2.1.6 Future Made in Australia Reforms

The *Future Made in Australia Act 2024 (Cth)* (FMA Act) establishes the legal framework for the $22.7 billion Future Made in Australia agenda, designed to drive private sector investment in strategic industries over the next decade. Recognising the economic and strategic opportunities of the global shift to net zero, the Act seeks to build a resilient and diversified economy by attracting private investment, supporting clean energy industries, and strengthening economic security.

At the heart of the Act is the *National Interest Framework*, which directs significant public investments through two key streams. The *net zero transformation* stream targets sectors where Australia has a sustained competitive edge in a net-zero economy, while the *economic resilience and security* stream focuses on industries critical to long-term national stability (s 7).

The Act mandates *sector assessments* to identify industries that align with the National Interest Framework.

Under section 6, the Minister may instruct the Secretary to assess whether a sector offers a sustained comparative advantage in a net-zero economy and whether public investment is needed for it to contribute meaningfully to emissions reduction at an efficient cost (ss 6(1), 8). The assessment must also consider how to remove barriers to private investment in the sector, where doing so serves the national interest (s 6(2)).

Relevant considerations include job creation potential, capability development, and economic security (s 8(1)). Additionally, under section 8(1A), every assessment must evaluate the sector's impact on fossil fuel demand—such as coal, crude oil, or natural gas—and how to manage that impact in line with an orderly net zero transition. It must also assess the sector's decarbonisation potential within global supply chains and its role in reducing global greenhouse gas emissions.

All support under the *Future Made in Australia program* must comply with the *community benefit principles* in section 10. These principles ensure support fosters safe, secure, and well-paid jobs, advances workforce skills, and strengthens local industries, including those in First Nations communities.

The Act explicitly prohibits support for coal, crude oil, and natural gas extraction, as well as infrastructure projects facilitating their extraction (s 10A).

Recipients of support must develop a *Future Made in Australia plan* detailing how their project will deliver these community benefits (s 11).

Transparency is a core requirement. Under section 11A, Commonwealth entities and companies providing Future Made in Australia support must publish annual reports detailing recipients and amounts awarded. The Minister retains regulatory authority over key aspects of the Act's implementation, including the process for applying for support and the required content of Future Made in Australia plans (s 12).

2.1.7 New Guarantee of Origin Scheme

With global markets tightening emissions rules and requiring certified low-emission products, Australian

exporters require a Government-backed system to verify the low-carbon credentials of renewable electricity, hydrogen, and other clean industries. Without reliable verification, they risk market exclusion or higher compliance costs under emissions-based trade rules and carbon border adjustment mechanisms.

The *Future Made in Australia (Guarantee of Origin) Act 2024* (Cth) establishes a framework to measure, track, and verify the emissions intensity and renewable status of key products, including renewable electricity and hydrogen. By offering government-backed certification, the Guarantee of Origin (GO) scheme can facilitate compliance with international trade rules, support emissions reporting, and ensure consistency in the recognition of low-emissions production.

The GO scheme also ensures continued recognition of renewable energy generation and emissions performance after the Renewable Energy Target expires in 2030.

Product Guarantee of Origin certificates

The GO scheme certifies products like hydrogen and ammonia through Product Guarantee of Origin (PGO) certificates, which track production, delivery, consumption, and associated emissions. Certification requires the Minister to issue a methodology determination, setting production pathways and emissions sources (s 29).

Registered participants can apply to the CER to register production, delivery, or consumption profiles, with the option to hold multiple profiles (Part 3, Div 4).

A production profile holder may create PGO certificates for batches produced at a specified facility (s 49). A delivery profile holder can, in certain cases, update PGO certificates with transport or storage details (ss 54, 55). A consumption profile holder may request the CER to add consumption data to registered certificates (s 57).

The CER registers PGO certificates on the GO Register upon request and conducts annual reconciliation checks, requiring participants to verify their reported information (ss 60, 61). If discrepancies arise, the Regulator can correct or invalidate certificates based on reconciliation findings or other grounds (ss 62, 65).

Renewable Electricity Guarantee of Origin certificates

The GO scheme certifies renewable electricity through Renewable Electricity Guarantee of Origin (REGO) certificates, which track the time, location, and method of renewable electricity generation by 'eligible renewable energy sources' (s 69).[46] They facilitate the transition from Large-scale Generation Certificates (LGCs), which expire in 2030.

A registered participant may apply to the CER to register a renewable electricity facility, which may include generation systems, energy storage systems, or aggregated systems (ss 74, 75). The CER registers a facility only if it meets the required component criteria (ss 78-81). Once registered, the applicant becomes the 'eligible registered person' for the facility (s 82).

The eligible registered person may create REGO certificates for the facility's eligible electricity amount over a specified time period, calculated using a prescribed formula (s 91). Certificates correspond to whole megawatt-hours (MWh) of generated or dispatched electricity. In some cases, REGO certificates may also be created for residual amounts of electricity that do not sum to a whole MWh (s 92).

Once created, REGO certificates can be registered with the CER, making the eligible registered person their 'registered owner' (s 104).

Certificates may be transferred, retired, or corrected if errors arise. Civil penalties apply for improper certificate creation (ss 106-110). The scheme also integrates with the *Renewable Energy (Electricity) Act 2000* (Cth), ensuring proper baselines and preventing double-counting of renewable electricity (see, for example, s 99).

GO Register

The CER maintains the GO Register, which contains information regarding registered persons, profiles, PGO certificates and REGO certificates, and registered renewable electricity facilities (Part 5). It may order audits to assess compliance with this Act and relevant provisions of the Criminal Code. Audited persons must provide facilities, assistance, and relevant information or documents upon request (Part 7).

For breaches of civil penalty provisions, the CER may seek civil penalty orders from a court under Part 4 of the Regulatory Powers Act. Alleged contraventions of certain offences or civil penalties may result in infringement notices under Part 5 (Part 8).

The Regulator may accept and enforce compliance undertakings under Part 6 of the Regulatory Powers Act, and courts may issue injunctions under Part 7 to prevent or compel compliance with specific provisions (Part 8).

While the scheme initially applies to renewable electricity and hydrogen, it creates a statutory foundation for future expansion to low-carbon liquid fuels, green metals, and other emissions-reduction technologies, reinforcing Australia's low-emissions energy transition.

To further embed the GO scheme into Australia's regulatory framework, the *Future Made in Australia (Guarantee of Origin Consequential Amendments and Transitional Provisions) Act 2024* (Cth) introduces key legislative

46. Under s 69, eligible renewable energy sources include hydro, wind, solar, wave, tidal, ocean, geothermal, various forms of biomass, agricultural and food waste, landfill gas, and sewage gas. Fossil fuels, fossil fuel-derived materials, and native forest biomass are expressly excluded.

changes aligning GO-related audits and reporting with existing greenhouse gas and energy tracking frameworks by modifying the *National Greenhouse and Energy Reporting Act 2007* (Cth) (NGER Act).

2.1.8 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).

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).[47] Participants receive one ACCU for every tonne of emissions they reduce, avoid, or sequester.

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.[48]

Participants may also sell ACCUs privately to buyers in the secondary market.[49]

More than 1,700 emissions reduction projects are registered under the scheme.[50]

The findings of the 2022 Independent Review into the integrity of ACCUs under the Emissions Reduction Fund and responses to the Review can be found *here*.

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

2.1.9 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.

2.1.10 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).

47. 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.
48. See CER, 'Carbon Abatement Contracts': *https://cer.gov.au/schemes/australian-carbon-credit-unit-scheme/how-to-participate/carbon-abatement-contracts.*
49. See CER, *https://cer.gov.au/schemes/australian-carbon-credit-unit-scheme/accu-scheme-methods/domestic-commercial-and-industrial-wastewater-method/guide-to-domestic-commercial-and-industrial-wastewater-method/about-emissions-reduction-fund*
50. See h*ttps://cer.gov.au/markets/reports-and-data/accu-project-and-contract-register.*

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).

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* 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 *2025 enforcement priorities* include enforcement action on greenwashing and misleading conduct involving ESG claims.

ASIC's 2024 enforcement priorities and 2023 enforcement priorities also included enforcement action on misleading conduct in relation to sustainable finance, including greenwashing.

In 2023, 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. The Information Sheet provides an overview of the regulatory requirements for communications about sustainability-related products and the prohibitions against misleading and deceptive statements and conduct. It also offers recommendations for ensuring the truthfulness and clarity of communications about sustainability-related products, such as avoiding vague terminology, providing detailed explanations for investment decisions, investment screening criteria and the use of any sustainability-related metrics.

In late 2022, ASIC took its first greenwashing action against an energy company, which paid over $53,000 to comply with four infringement notices concerning alleged false or misleading sustainability-related statements. Similar notices were issued to an investment manager and a superannuation trustee.[51]

Between July 2022 and June 2024, ASIC made over 80 regulatory interventions to address greenwashing misconduct, including commencing three civil penalty proceedings and issuing 19 infringement notices.[52] The interventions addressed the following issues:

- insufficient disclosure on the scope of ESG investment screens and investment methodologies;
- underlying investments that are inconsistent with disclosed ESG investment screens and investment policies; and
- sustainability-related claims made without reasonable grounds or without sufficient detail.[53]

Many of ASIC's enforcement actions have resulted in corrective disclosure outcomes such as amendments to company prospectuses and market announcements retracting or clarifying previous statements about net zero emissions targets.[54]

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

51. See *https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-379mr-asic-issues-infringement-notice-against-superannuation-trustee-for-greenwashing/.*
52. See *https://www.asic.gov.au/regulatory-resources/find-a-document/reports/rep-791-asic-s-interventions-on-greenwashing-misconduct-2023-2024/*
53. See *https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-185mr-asic-continues-action-on-misleading-claims-to-deter-greenwashing-misconduct/*
54. See *https://www.asic.gov.au/regulatory-resources/find-a-document/reports/rep-763-asic-s-recent-greenwashing-interventions/.*

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

In March 2025, ASIC released a *Regulatory Guide 280* on sustainability reporting requirements under Ch 2M of the *Corporations Act 2001* (Cth).

ASIC is also responsible for the administration and enforcement of Australia's new mandatory climate-related financial disclosure regime, which commenced on 1 January 2025 following the passage of the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Act 2024* (Cth) in late 2024.

2.2.2 ACCC

The ACCC's *2025-26 compliance and enforcement priorities* include 'Consumer, fair trading and competition concerns in relation to environmental claims and sustainability, with a focus on greenwashing'. Similarly, the *2023–24 compliance and enforcement priorities* included "[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.

Following the results of the internet sweep, the ACCC commenced several investigations into potentially misleading environmental claims across the packaging, consumer goods, food manufacturing and medical devices sectors. The ACCC announced its intention to take enforcement action where appropriate.[55]

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*.

In November 2023, the ACCC accepted a court-enforceable undertaking from a yoghurt manufacturer in relation to allegedly false or misleading claims that its product packaging was made from "100% ocean plastic".[56]

In April 2024, the ACCC commenced its first greenwashing action in the Federal Court against a cleaning supplies manufacturer for allegedly making false or misleading representations that its kitchen tidy and garbage bags were made of "50% ocean plastic".[57] In April 2025, the Federal Court ordered the company, Clorox, to pay a total penalty of $8.25 million for making false or misleading representations to consumers.[58]

2.2.3 APRA

Climate and nature risk were among the nine strategic shifts foreshadowed in APRA's Corporate Plan 2024–25. APRA's key regulatory priorities in this area include: increasing expectations for regulated entities to consider climate-related risk in financial decision-making, using self-assessment survey data to provide insights on better practice and incorporating climate risk in the prudential framework.

In November 2021, APRA published its *Prudential Practice Guide CPG 229 Climate Change Financial Risks* (CPG 229) 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 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.

In April 2022, APRA conducted its first Climate Risk Self-Assessment Survey to understand the extent to which the climate risk management practices of medium-to-large APRA-regulated institutions are aligned with CPG 229. The results were published in an information paper released in August 2022.

A follow-on Climate Risk Self-Assessment Survey was conducted in April 2024, and the results were published in an information paper released in November 2024.

55. *See https://www.accc.gov.au/about-us/publications/greenwashing-by-businesses-in-australia-findings-of-acccs-internet-sweep*
56. *See https://www.accc.gov.au/media-release/moo-premium-foods-gives-undertaking-after-accc-investigates-ocean-plastic-claims.*
57. *See https://www.accc.gov.au/media-release/glad-bags-manufacturer-in-court-for-50-ocean-plastic-claims.*
58. *https://www.accc.gov.au/media-release/clorox-ordered-to-pay-825m-in-penalties-for-misleading-ocean-plastic-claims-about-certain-glad-products*

2.2.4 NOPSEMA

The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) is the independent expert regulator for offshore petroleum and greenhouse gas storage activities in Commonwealth waters.

NOPSEMA undertakes inspections, investigations and enforcement action to ensure compliance with the *Offshore Petroleum Greenhouse Gas Storage (Environment) Regulations 2023* (Cth). Under the regulations, a titleholder planning to conduct offshore activities must give the public an opportunity to comment on the proposal before submitting an environment plan to NOPSEMA for approval. The titleholder must demonstrate that the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable.

NOPSEMA considers climate change risks and the impact of direct greenhouse emissions when assessing environment plans for offshore projects.[59]

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 the Net Zero Commission, which is responsible for providing independent expert advice on the NSW Government's approach to addressing climate change. The Joint Standing Committee on Net Zero Future was established in June 2024 to monitor and review the work of the 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.

In October 2024, the NSW Government released the NSW Climate Change Adaptation Action Plan 2025–2029, the first state-wide adaptation action plan, aimed at helping NSW boost climate change resilience. The action plan outlines 46 actions developed in consultation with leading government agencies.

The NSW Climate Change Fund also invests in climate change mitigation and adaptation programs, including implementing 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'.[60]

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, but consultation is underway for what would be the first), load-based fees, pollution reduction plans and load reduction agreements. In accordance with its statutory

59. *See https://www.nopsema.gov.au/offshore-industry/environmental-management/greenhouse-gas-emissions-and-climate-change.*
60. *https://www.energy.nsw.gov.au/nsw-plans-and-progress/major-state-projects/electricity-infrastructure-roadmap.*

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.[61]

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). See also the Department of Planning, Housing and Infrastructure, *Renewable Energy Planning Framework* (including the revised *Private Agreements Guideline).*

2.4 NATURE AND BIODIVERSITY

2.4.1 Taskforce on Nature-related Financial Disclosures

In addition to the sustainable finance and climate related financial disclosure requirements, 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 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 requires 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 'volandatory',[62] to mandatory. The TNFD may have a quicker cycle and a more complex series of systems to consider under the conceptual framework. As at 16 January 2024, 320 organisations from over 46 countries had signed up as Early Adopters to TNFD and committed to start TNFD nature-related corporate reporting based on the TNFD recommendations published in September 2023.

See the TCFD Guidance and Knowledge Hub, and the full list of TNFD Early Adopters *here*.

2.4.2 Australia's Biodiversity Crediting Schemes

The Nature Repair Market scheme, established under the *Nature Repair Act 2023* (Cth), is a voluntary national biodiversity market scheme, where individuals and organisations can undertake nature repair projects to generate a tradable certificate.

The Nature Repair Market commenced in 2025.[63]

The Clean Energy Regulator is establishing systems and processes necessary for the effective operation of the market. See the Clean Energy Regulator website *here* for more information.

2.4.3 New South Wales Biodiversity Offsets Scheme (BOS)

The BOS was established under the *Biodiversity Conservation Act 2016* (NSW) and aims to avoid, minimise, and offset biodiversity impacts from development and land-clearing activities.

It focuses on offsets within NSW and state-listed biodiversity priorities, using a market-based system where biodiversity credits are purchased to offset the environmental impacts of development projects.

Credits are generated by landholders who enter into Biodiversity Stewardship Agreements, committing to the long-term conservation and management of their land's biodiversity values.

See the Environment and Heritage website *here* for more information.

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.

61. See sections 6 and 9.
62. Sarah Barker, Partner at MinterEllison, specialising in climate-risk governance… "describes the TCFD framework as "volandatory"; public companies aren't required to follow it, but the nudges in that direction, from shareholders as well as regulators, are not as gentle as they once were. And that has compounding effects. With more and more investors looking for TCFD reporting, it increasingly fits the description of being "useful to a reasonable investor", which makes it material information and therefore relevant to disclosure." See: *https://www.themonthly.com.au/march-2021/essays/changing-climate-risk*
63. See the Department of Climate Change, Energy, the Environment and Water, Nature Repair Market *https://www.dcceew.gov.au/environment/environmental-markets/nature-repair-market.*

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 climates risks. Further, directors of entities required to report under the Climate Reporting Legislation (see section 2.1.2) are required to issue a Directors' Declaration that their Sustainability Report complies with the Climate Reporting Legislation. In light of this, failure to take reasonable steps to ensure compliance may create a liability risk for directors. For guidance on what steps directors could take to discharge their obligations, see the AICD, Deloitte and MinterEllison's A director's guide to mandatory climate reporting (September 2024).See *here*.

To assist solicitors advising corporate clients on greenwashing risk, 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[64] 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.[65] 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.[66]

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, including corporate disclosures (such as the Climate Reporting Legislation) and those 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[67] 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.

64. See 2016 and 2019 opinion *here*, and Further Supplementary opinion dated 23 April 2021 *here*.
65. See also the August 2024 opinion of Michael Hodge KC and Sonia Tame on director's section 180 duty of care *here*.
66. For more information, see *here*.
67. 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:

- The adoption of the Climate Reporting Legislation in Australia. This is likely to have an impact even on those entities not captured by the regime for two reasons. First, because of the requirement for value-chain disclosures, such smaller entities are likely to be subject to information requests for those that are captured. Second, the mandatory climate reporting regime is likely to shape stakeholder expectations for how entities consider, address and disclose climate-related risk and opportunities.
- More guidance from Australian regulators, such as ASIC, the ACCC and APRA, directed to companies and directors concerning climate risks and greenwashing, 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 UK TPT and TNFD, that provide an indicative standard of conduct and serve as a springboard for investor and stakeholder expectations.
- 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 potential adoption of mandatory disclosure frameworks for nature and biodiversity risks, given the interconnection between climate and nature.

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 the 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?).

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 sustainably claims – including United Nations Sustainable Development Goals statements[68]), but in relation to climate risk specifically,

68. See *https://sdgs.un.org/goals*

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.

ESG factors are also driving M&A strategy and activity in the push towards decarbonisation.[69]

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.[70] The NSW Renewable Energy Planning Framework 2024 (REPF) is a framework that introduces guidelines and tools that are designed to help support renewable energy development and assessment.[71] The REPF contains technical guidelines for the use of materials, landscape and agricultural land use concerns, building standards and evaluative benchmarks for determining the effectiveness of wind, energy, and hydrogen projects, and explores transmission, large-scale solar energy, private agreements and benefit sharing with the goal of supporting the net zero target and securing an affordable supply of renewable electricity in NSW.[72]

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.

69. See, for example, *Play 2: Pursuing decarbonisation and other ESG goals via M&A | PwC Australia*
70. 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).*
71. See, for example, *The NSW Renewable Energy Planning Framework – significant changes for project proponents - Hamilton Locke*
72. *Overview of the Renewable Energy Planning Framework; New guidelines aim to improve NSW… | Energy & Resources Knowledge Hub*

The Infrastructure Sustainability Council and other peak bodies and government agencies have recently released the Infrastructure Net Zero strategy[73] to drive these processes. A number of major developers[74] have signed up to the Responsible Steel's Steel Zero[75] initiative and there are other sustainability initiatives, such as responsibly sourced concrete.[76] 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.[77] In recent years, sustainability and the circular economy have been at the forefront of guiding innovative design principles through the development of circular precincts. Circular precincts are resource-efficient shared spaces that promote sustainable waste and water management practices, renewable energy systems, green spaces and low-carbon transport alternatives to maximise the lifecycle of materials through cross-sector collaboration.[78] By maximizing the use and value of resources, circular precincts embed sustainability throughout all stages of the design, development, procurement and long-term lifecycle of the precinct, harnessing cross-sector collaboration between businesses and the community.[79] Circular construction strategies look toward reducing waste, time and maximising the efficiency of materials and labour through techniques such as the Modern Methods of Construction (MMC), which focusses on off-site construction, manufacturing and pre-fabrication of walls, floors and roofs to ensure faster construction timelines.[80] Circular precincts may also use modular construction principles that maximise repeatable componentry and design elements that can be easily assembled, disassembled and reconfigured, allowing for the reuse and repurposing of building materials over a longer lifecycle.[81]

Going forward, both State and Federal Government agencies have asserted their commitment to Australia's transition to a circular economy, with several current actions aimed at stimulating sustainable economic growth.[82] At the Federal level, the Australian Government has committed $400 million to the regional Precincts and Partnerships Program (rPPP),[83] and $150 million to the urban Precincts and Partnerships Program (uPPP),[84] both aiming to leverage the power of cross- sector collaboration to build multi-purpose, place-based precincts promoting sustainable practices in a regional or urban context. For a list of the successful projects that the Federal Government has funded through the rPPP please visit this *link*.

The NSW Government has provided funding under the *Department of Regional NSW Business Case and Strategy Development Fund* to developing the Circular Precincts and Futures Hub in the Hunter region of NSW, which aims to establish four multi-element circular economy precincts that focus on circular materials processing, renewable energy production, and value-added businesses.[85] Hunter Joint Organisation has partnered with GHD to leverage existing infrastructure and highlight meaningful stakeholder collaboration in achieving net zero outcomes, working with circular economy practitioners and industrial ecology experts to develop comprehensive concept plans and implementation pathways.[86]

3.4 REAL PROPERTY TRANSACTIONS

Overview

Climate-related risks will be relevant to many stakeholders in a transaction involving investment in real property. These climate-related risks (physical and transition risks) may be relevant to the land being purchased or sold itself, or risks to the businesses being conducted on that land. Solicitors should consider discussing with their clients, the need for, and the timing of, carrying out additional due diligence.

Whether that due diligence will be initiated by the solicitor, or the client, should be clarified preferably in writing.

73. *Infrastructure accelerates towards net zero - ISCouncil.*
74. *Lendlease joins SteelZero initiative to reduce carbon emissions in the steel industry.*
75. *SteelZero | ResponsibleSteel.*
76. *Responsibly sourced concrete and BES 6001 (concretecentre.com).*
77. *Embodied Carbon Footprint Database - Circular Ecology.*
78. *Circular Precincts Australia*
79. *Circular design guidelines for the built environment*
80. *Circular Precincts Guide.*
81. Ibid.
82. *Submission 139 - NSW Government - Opportunities in the circular economy - Public inquiry*
83. *Regional Precincts and Partnerships Program | Department of Infrastructure, Transport, Regional Development, Communications and the Arts.*
84. *Urban Precincts and Partnerships Program | Department of Infrastructure, Transport, Regional Development, Communications and the Arts.*
85. *Circular Precincts and Futures Hub - Hunter Circular.*
86. See: *Circular Economy Precincts and Futures Hub - Hunter Circular*

Physical risks

The physical risks of climate change include changing weather patterns, the increasing threat of extended periods of drought, fire, flood, other natural disasters and coastal erosion.

Those risks may directly impact on the suitability, for its intended purpose, of the asset being purchased or the business being conducted on the land. These risks may also have implications for the value of the asset, on its insurability, and on any relevant business activities.

Additional due diligence regarding possible physical risks may include obtaining a report or reports from specialist commercial search providers which identify climate factors and other environmental risks affecting a property.

Transition risks

Transition risks are institutional behaviour changes eg the behaviour of the government, regulators, commercial institutions, such as banks and insurers, and the community, which give rise to changes in legislation, regulation, targets or community or supplier expectations.

3.4.1. All real property sale transactions

Due diligence

A purchaser's solicitor would ordinarily advise on any matters disclosed in the planning certificate annexed to the contract for sale and purchase of land. The local council issuing the planning certificate must disclose a prescribed list of matters affecting the land, including whether the land is affected by an adopted policy that restricts the development of the land because of the likelihood of land slip, bush fire, tidal inundation, subsidence, acid sulfate soils, contamination, salinity, coastal hazards and sea level rise.[87] The council must disclose whether the land or part of the land is within the flood planning area and subject to flood related development controls, or between the flood planning area and the probable maximum flood and subject to flood related development controls.[88]

The planning certificate is a starting point for enquiries, indicating whether the council (or in limited circumstances another public authority) has adopted a policy because of the physical risk. Note that there may be questions as to the currency of the underlying information which informs the council's policies. For example, this may be relevant to questions such as the modelling of flood risk.

The planning certificate may provide a trigger for additional investigation through the commission of further expert reports as may be appropriate having regard to the perceived potential physical risks, proposed use or development of the property and the scale of the transaction.

Transition risks

Where physical risks have been identified, consideration should be given to the consequential impact this may have on transition risks. For example, if a property is in a high-risk bush fire prone area or a flood zone, will the property be insurable? In some circumstances, it may be prudent to advise the purchaser to make enquiries prior to the exchange of contracts as to whether the property is insurable. If it is currently difficult or prohibitively expensive to obtain insurance, consideration will need to be given to the likely long-term insurability of the property.

If the property is uninsurable, this will likely be an obstacle to obtaining mortgage finance, further compounding the transitional risk. This is another reason to thoroughly explore the question of the insurability of the property prior to the exchange of contracts.

3.4.2 Rural property transactions

In addition to the considerations above, rural property transactions can involve a higher level of climate related risks given the interdependence between rural land use and climate change. This is not limited to the physical risk factors, but also includes transition risk.

Agriculture is at risk of changes to laws affecting land management and environmental protection. In some cases, agricultural businesses will have to comply with laws regarding emissions.[89] Those laws may directly affect businesses, such as requiring a business to account for, reduce and/or offset emissions produced either through farming or livestock production. Those laws may also indirectly affect businesses through upstream purchasers of goods requiring suppliers to account for their emissions.

Agricultural markets may also be affected by regulatory and market risks. Much of Australia's produce is exported and regulations and/or consumer demand in other countries may affect the marketability of produce or the price obtained for produce.

Due diligence

There are areas in NSW which are now *dedicated renewable energy zones.* There are a number of statutory corporations undertaking compulsory acquisitions for the purpose of facilitating the building of renewable energy projects, including *EnergyCo* and *Transgrid*.

In addition to a property being directly subject to compulsory acquisition for this purpose, consideration needs to be given to the risk of purchasing a property that might

87. Environmental Planning and Assessment Regulation 2021, Schedule 2, clause 10.
88. Environmental Planning and Assessment Regulation 2021, Schedule 2, clause 9.
89. S*ee: https://www.dpi.nsw.gov.au/dpi/climate/Low-emissions-agriculture*

be neighbouring these projects, as they impact significantly on the amenity of the landscape and may affect future valuations, use and development.

While not subject to compulsory acquisition, there are significant numbers of existing and potential renewable energy projects in NSW, including solar farms, wind farms and battery storage. Again, there are potential environmental impacts on the properties directly affected and on neighbouring properties which should be considered.

Taxation

Renewable projects and associated transmission easements may affect the status of the property for taxation purposes. Land that has been historically primary production land may become subject to land tax and may lose primary production status (for example, see paragraph 17 of *DUT 050v2)*, or active assets concessions under income and capital gains tax legislation.

Opportunities

Land that has tracts of biodiverse vegetation or habitat may have added value as sources of biodiversity credits. There are a number of different State and Federal schemes relevant to land conservation and biodiversity credits and appropriate due diligence may include an analysis of existing schemes applying to the land or the different schemes that might be available and the risks and benefits associated with each.

See also section 2.4 in relation to the New South Wales Biodiversity Offsets Scheme and Federal Biodiversity Credit Initiatives.

3.4.3 Commercial Leases

In commercial leasing (office, retail, industrial), green lease provisions help landlords comply with sustainability mandates, which may provide benefits to tenants. Tenants may have committed to sustainable operations, and landlords can help tenants realise those commitments.[90] Green lease provisions can help landlords align their building management activities and upgrades with tenant sustainability goals.

Examples of important green lease provisions include:

- Requiring reasonable co-operation in meeting identified targets. Landlords may require reasonable tenant cooperation to achieve sustainability initiatives and comply with climate laws. Tenants often control energy and water usage, which largely determines a building's energy and water efficiency, as well as climate emissions. Tenant cooperation provisions aim to ensure that a tenant takes reasonable steps to follow the landlord's sustainability requirements including better management of energy and water usage, training employees in more efficient practices at the building, and using best practices when operating their business from the premises.
- Cost sharing of capital upgrades for efficiency and climate resilience. Sustainability upgrades may directly benefit tenants by reducing their utility and maintenance costs. Costs of upgrades to the tenant can be amortised over an agreed-upon timeframe.
- Provisions governing tenant improvements and alterations.
- Transport provisions (including electronic vehicle charging stations), including how to accommodate the needs of new types of low-emission or electric vehicles on site.
- Provisions relating to embedded networks.

The property may also be affected by the *Building Energy Efficiency Disclosure Act 2010* (Cth). A lessor (or vendor) of most commercial buildings with a net lettable area of more than 1000 square metres will be required to make certain disclosures under that Act.

3.4.4 Renewable energy leases

As investment in wind and solar farms and battery energy storage systems (BESS) increases, solicitors acting for landholders entering into long term leases (or options for such leases) for the construction and operation of such renewable energy projects on their land should consider the following issues:

- Where the developer wishes to lease only a part or parts of the landholder's land, whether the lease should be documented as a lease of part(s) of an existing lot (which will be subject to sections 23F(1) and s23G(d) of the *Conveyancing Act 1919* (NSW) in order to be registered) or as a premises lease (which will need to comply with the Registrar General's Guidelines for wind farms[91], solar farms and battery storage power stations/sites[92] in order to be registered), since this will affect the length of the term of the lease that can be granted to the developer.
- Whether the installation of renewable energy infrastructure will result in the reclassification of land use from agricultural to industrial and, if so, the effect that such reclassification may have on the amount of council rates, land tax and public liability insurance premiums (resulting from proximity to new energy facilities) payable by the landholder and whether the

90. The *Net Zero in Government Operations Strategy* describes the approach for implementing the Australian Government's commitment to achieve net zero in government operations by 2030. It provides a framework which focuses on improving the energy efficiency of office space in Commonwealth owned and leased buildings. See the Department of Climate Change, Energy, the Environment and Water website for more information here, including on Green Lease Schedules.

91. NSW Land Registry Services, *Registrar General's Guidelines Wind Farms (SSIR 2024).*

92. NSW Land Registry Services, *Registrar General's Guidelines Renewable Energy Leases (SSIR 2024).*

developer will pay for any such increases and be willing to indemnify the landholder for reasonable risk in relation to typical public liability cover.[93]

- Whether the grant of the renewable energy lease will create any tax issues for the landholder, for instance whether the receipt of rent will affect any tax advantage to which the landholder may have previously been entitled where the dominant use of the land was for primary production or any tax concessions available to primary producers.
- How the developer will access the leased land and provide electricity to the energy facilities and whether the landholder will need to grant any easements to the developer and/or its energy provider over the landholder's surrounding (non-leased) land and, if so, whether the landholder will receive any compensation for the grant of such easements.
- Whether the developer will seek to restrict the landholder's use of the non-leased parts of the landholder's land.
- What obligations should be imposed on the developer in relation to the remediation of contamination, soil erosion and invasive species attributable to the installation and operation of the energy facilities.
- Whether any noise or vibrations associated with the energy facilities may impact on the landholder's use and enjoyment of its land and possibly on the owners and occupiers of surrounding land.
- The extent of the developer's decommissioning and make good obligations at the end of the lease (for example, should the developer be required to remove underground cabling and below ground infrastructure) and whether the developer should provide security to the landholder to ensure the developer's compliance with such obligations (for example, a decommissioning bond).
- Useful resources include the following:
    - *Australian Energy Infrastructure Commissioner, Considerations for Landholders before entering into Commercial Agreements.*
    - Department of Planning, Housing and Infrastructure, *Renewable Energy Planning Framework* (including the revised *Private Agreements Guideline).*

93. *https://insurancecouncil.com.au/wp-content/uploads/2024/05/Updated-ICA_Briefing_Farm-Insurance-and-Energy-Infrastructure_May-2024.pdf.*

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

LS4037