Targeting net zero

A climate change guide for legal and compliance teams in Australia

MAY 2020

Legal and compliance teams increasingly participate in strategic and commercial decision making alongside senior management and other subject-matter experts. Understanding how climate change impacts those decisions is now as complex as it is essential. Recommending the right course of action to directors and senior management requires a nuanced and panoramic understanding of the issues, and the ability to anticipate key regulatory changes that may affect your business.

Even in a COVID-19 affected world, climate change will remain a material consideration for most businesses: from major investment decisions in carbon intensive sectors to discharge of directors' duties. Legal acumen is the foundation, but thinking strategically and anticipating key legal trends relevant to your organisation is essential. And while something may be legally compliant today, it's often necessary to stress test how well advice, and indeed decisions, will stand up in the future against your organisation's public commitments to climate change and a rapidly evolving regulatory environment. This guide presents our view on key areas of the law relating to climate change and is designed to be a reference guide that will prove useful in the months to come. As advisors to all sectors of the economy, we work closely with our clients to help them make sense of this rapidly evolving area of the law. We have an integrated team of climate change specialists, many of whom have contributed their insights to this guide.

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Welcome

Climate change is one of the defining issues of our generation. It is a phenomenon that goes to the very core of organisational strategy and holds vast potential to influence the flow of capital.

Increasing scrutiny around corporate governance and disclosure expectations relating to the management of climate risks, together with motivated and well-resourced public interest litigants, puts climate litigation high on the radar. Ancillary to this, human rights complaints are being levelled against governments and corporations. Individuals who believe their rights have been directly impacted by climate-induced physical phenomena such as bushfires, melting glaciers and rising sea levels, now seek accountability from those who are seen as contributing to a changing climate.

As such, the concept of 'climate change law' has, in a very short space of time, exploded out of the traditional confines of narrow regulation of emissions.

Our clients have demonstrated a keen appreciation of the nuanced task of establishing robust governance frameworks, providing accurate and relevant information to the market, and being open to change as the landscape evolves.

We have observed boards and management turning to their legal teams with novel questions about the legal implications of climate change, often in compressed timeframes.

Noting how new these issues are, we have also observed that one of the biggest challenges is identifying the right questions to ask. Where does the risk lie? Which Act, common law principle or case is relevant?

For this reason, we have made 'Asking the right questions' the core theme of this guide. Its purpose is to equip in-house legal and compliance teams with essential information in relation to the various areas of climate change law and, for each area, to identify some of the key questions to ask.

There is no 'one size fits all' approach to navigating the risks and opportunities climate change presents – each organisation will need to develop a bespoke approach which works for them. The questions identified in this guide will often be questions practitioners could ask themselves in the first instance. They are designed as a prompt to identify the internal stakeholders who need to be engaged in discussions about the management of climate change risk. They are also designed to help identify areas where an organisation's climate change risk and governance structures could be strengthened.

Inevitably, there is a strong theme of risk management in this guide, but we also highlight some of the opportunities for Australian business that will continue to grow as the country continues on the pathway scientists agree is needed: net zero by 2050.

We hope our in-house colleagues will find this document useful. Please get in touch with me, or any member of our team, if you'd like to discuss the implications for your business.

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The big picture: Australia's commitments under the Paris Agreement

In December 2015, the parties to the United Nations Framework Convention on Climate Change adopted the Paris Agreement: a landmark agreement to combat climate change and take steps to shift their economies towards a sustainable, low carbon future.

The purpose of the Paris Agreement is to hold the increase in global average temperature to 'well below 2°C above pre-industrial levels'. The Paris Agreement also sets an aspirational target of a 1.5°C limit. The parties also aim to reach carbon neutrality (ie achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases) by 2050.

The Paris Agreement is grounded in the idea of common but differentiated responsibility. It requires parties to communicate nationally determined contributions (***NDCs***), which are publicised intended reductions in greenhouse gas emissions, specific to each participating nation. These NDCs will be reviewed at five-year intervals, enabling parties to demonstrate a progression and increased ambition over time. The Paris Agreement has no mechanism for enforcing compliance against parties – rather it relies on transparency to incentivise ongoing participation in the framework it creates.

Australia's Intended NDC, which the Federal Government published in August 2015 in advance of the Paris Agreement being adopted, committed Australia to implementing an 'economy-wide target to reduce greenhouse gas emissions by 26 to 28 per cent below 2005 levels by 2030'. Australia has, however, qualified its targets by reserving the right to adjust its target 'should the rules and other underpinning arrangements of the agreement differ in a way that materially impacts the definition of our target'. Australia has not made a commitment in relation to carbon neutrality for the second half of this century.

The Federal Government outlined its approach to action on climate change in the Climate Solutions Package, published on 25 February 2019. This is a continuation of its direct action policies and promises direct investment in low-cost emissions abatement technology and clean energy through a climate fund. Federal Energy and Emissions Reduction Minister Angus Taylor has also flagged the development of a technology roadmap which will guide government investment in clean technology solutions. The focus of the investment will shift away from wind and solar, which Angus Taylor now considers to be 'commercially viable", to storage and grid integration technologies.

In addition to these policies, the Federal Government is seeking to rely on carry over units from the Kyoto Protocol (the targets for which Australia had managed to exceed). This practice was the subject of extensive negotiation at the Conference of the Parties to the UNFCCC in Madrid in December 2019 (***COP25***). Several groups of countries opposed the practice which Australia was proposing to adopt, although the issue was not resolved at COP25.

State governments, by contrast, have made more aspirational commitments, with all states and territories adopting a target of net zero emissions by 2050. Similarly, the Federal Labor opposition has adopted a 2050 goal of net zero emissions, a position supported by the Business Council of Australia and the Australian Industry Group. Third party research institutes, including Climate Action Tracker, have rated Australia's (as well as many other nations') commitments as being incompatible with a 1.5°C or 2°C limit.

The big picture

KEY RISKS AND OPPORTUNITIES

As with all areas of policy, the current Federal Government's approach is subject to change. We also note it is not comprehensive as there is no clarity on the country's commitments post-2030. However, Australia's climate policy landscape presents considerable risk due to:

- the diverging climate change policies of Australia's two major political parties;
- the increasing divergence between the Federal Government and developments at state and territory level, where schemes incentivise investment in certain areas and there is widespread legislation for zero carbon futures;
- other countries, including the UK, calling on countries not currently committed to carbon neutrality by 2050 to deepen their commitments to combatting climate change;
- the EU indicating it intends to use trading arrangements (including a free trade agreement, and potential border tax adjustments) to pressure Australia to deepen its commitment to carbon abatement;
- shifting public opinion on climate change and demands for more expansive action on climate change from the Government are increasing in regularity and force;
- the business community, which is facing an increasingly complex legal framework in relation to climate change risk and governance, is beginning to take the lead on climate change risk management. To an extent, this leadership appears to reflect a business imperative to future-proof businesses in a country where the policy framework lacks long-term certainty; and
- the shape of any post COVID-19 economic stimulus and recovery plan.

The Federal Government's current Direct Action Plan for managing climate change involves establishing funds or grants to support projects and emerging technologies which contribute to reducing carbon emissions. These present opportunities to businesses that can avail themselves of funding or other incentives.

A further opportunity exists for agile businesses – the law in this area is changing rapidly and nimble businesses which can change the way they work quickly and efficiently to navigate the changing environment will be better placed. For example, organisations will be able to benefit from incentive schemes if they are able to spot opportunities early and adapt. Similarly, businesses which prepare early for likely regulatory reform may be placed at a competitive advantage over peer organisations if incoming regulation restricts their business in material respects.

Global warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.

Intergovernmental Panel on Climate Change, Special Report: Global Warming of 1.5°C (Summary for Policy Makers)

The big picture

ASKING THE RIGHT QUESTIONS

- Based on the available data, is your organisation's investment strategy aligned with the Paris Agreement's 1.5°C warming target, and the goal of reducing emissions to net zero by 2050?
- Should your organisation consider adopting a 'shadow' carbon price to mimic the effect of the domestic implementation of the Paris Agreement's 1.5°C warming target?
- Has your organisation considered what opportunities may be presented to your business by the Paris Agreement (and domestic emissions abatement policies)?
- Does your organisation's board and executive team have sufficient support and resources to enable it to 'horizon scan' and identify early any key regulatory shifts which may have business model implications for your organisation, and consequential costs and expenses?
- Increasingly, the private sector is playing a greater role in shaping energy and climate change policy due to demands from stakeholders and changes in other aspects of regulation. Does your organisation have a clear idea of the climate change policy expectations of its peers, competitors and stakeholders, including investors, lenders, suppliers and customers?
- Should your business participate in the public debate on climate change, through industry groups and robust corporate reporting, to advocate for future federal and state government policy aligned with your organisation's objectives and strategy?
- Would any such engagement be compatible with the policy expectations of your organisation's key stakeholders and peers?

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1. ESTABLISHING STRONG GOVERNANCE

A ‘high risk jurisdiction’: climate change and directors’ duties

Australian law requires certain standards of conduct of company directors, including that directors act in the best interests of the company and exercise care and diligence in performing their role.

To date, no Australian court has considered whether a director’s duties require a director to take into account climate change-related risk that may be relevant to the company’s business.

However, following the conclusion of the Paris Agreement in 2016, the Australian think tank, the Centre for Policy Development, commissioned legal opinions from barrister Noel Hutley SC to assess the extent to which Australian corporate law requires company directors to respond to climate change risks.

Hutley’s opinions, the most recent of which was published in 2019, conclude that:

- climate change risks are capable of being foreseeable risks to the interests of a company;
- climate change risks may be relevant to a director’s duty of care and diligence under s180(1) of the *Corporations Act 2001* (Cth) to the extent that they interact with the interests of the company; and
- company directors can and, in some cases, should be considering the impact of climate change risks on their business, or else risk breaching their obligation to exercise care and diligence.

The opinions are confined in their scope to a director’s duty of care and diligence and did not consider other statutory or fiduciary duties of a director. Kenneth Hayne QC has subsequently remarked in a November 2019 speech that the duty of a director to act in the best interests of a company includes taking into account climate change risks relevant to that entity.[1]

‘Climate change risks’ refers to physical risks associated with rising temperatures, such as property destruction, and to transitional risks associated with adjusting towards a lower-carbon economy, such as regulatory changes or shifts in investor behaviour that may impact a company’s business. One type of transitional risk identified in the opinions is ‘stranded asset risk’ – the risk that companies will be unable to develop certain fossil fuel reserves if emissions targets are to be met. Climate change risk also extends to litigation risk, exposure to which Hutley SC considers will rise exponentially over time.

ASIC has endorsed the Hutley opinions. In a 2018 speech, ASIC Commissioner John Price considered that the opinions were ‘relatively unremarkable’ and said that, in ASIC’s opinion, the view expressed ‘appears legally sound and is reflective of our understanding of the position under the prevailing case law in Australia so far as directors’ duties are concerned’.[2] Commissioners Sean Hughes and Cathie Armour further emphasised ASIC’s agreement with the Hutley opinions, and stressed the importance for company directors of considering the impact of climate change on the company’s business, and ensuring that strong effective corporate governance practices are sustained in the company.[3]

KEY RISKS

Breach by a director of their duty of care and diligence (arising, eg from a failure to give appropriate consideration to climate change risks) can give rise to personal liability. A director may also be found to have breached their duty if they do not appropriately disclose the risks posed by climate change to the business.

In addition, ASIC has recently used a 'stepping stone' approach to litigate against directors personally. This requires an action against a company for contravention of legislation (such as the Corporations Act), which then allows ASIC to launch a derivative civil liability claim against a director for breaching their duty of care in exposing the company to risk of prosecution.

One way to mitigate against the risk of exposure is to ensure that robust governance frameworks are put in place, supported by effective implementation, execution and accountability. Directors should be able to demonstrate that they have considered climate change-related risk in their decision making, and that they have done so in a way that is more than 'cursory acknowledgment and disclosure'.[4] This means ensuring that directors have access to all necessary information, in an appropriate format and level of detail.

ASIC Commissioner John Price has spoken of a need for directors to adopt a 'probative and proactive' approach in gathering the information reasonably required to inform their decision making with respect to climate-related risk.[5] Whether directors have considered such information adequately may affect their ability to rely on the defence that they exercised their business judgment under corporate law if their decision making is ever impugned.[6]

While ensuring they are properly informed is the primary duty of the director, in some circumstances, further action may be required where a climate risk is identified. The magnitude of the risk and the probability of it occurring must be balanced against the difficulty, expense and inconvenience of taking action to alleviate it.

Australia's directors nominated climate change and energy as the top issues they want the Federal Government to address in both the short and long term.

Australian Institute of Company Directors, Director Sentiment Index: Research Findings Second Half 2019 (October 2019) (presenting the results of a survey of more than 1,200 company directors)

ASKING THE RIGHT QUESTIONS

- Has the board, from a technical, financial and commercial perspective, been educated on the specific risks that climate change poses to your organisation, and their level of materiality?
- Is the board composition appropriate, considering the nature and materiality of climate-related risk to the organisation?
- Has the board established a system of regular review on climate-related risk, noting it is a dynamic area?
- Is a robust system in place to document the briefing and deliberations of the board in relation to climate-related risk?
- Is there a system in place to ensure material climate-related risks are reported up to the board on an equal footing with non-climate related financial risks?
- Is the board aware of the importance of accessing and considering such information as part of its decision making processes?
- Have appropriate resources been made available, and governance frameworks established, to ensure that accurate, complete and timely information is provided to the board in relation to climate risk?

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Disclosure of climate-related financial risk: major change is underway

There has been a global proliferation of voluntary reporting standards that companies might adopt with respect to disclosure of climate change-related financial risk.

Notably, in 2016, the G20 Financial Stability Board established the Task Force on Climate-Related Financial Disclosures (***TCFD***), which released a set of recommendations for the voluntary disclosure of climate change-related financial risks in 2017, around which there has been widespread business convergence.

What sets the TCFD recommendations apart is their sophistication – they require companies to disclose qualitative data, including scenario analysis, which identify risks based on differing climate change-driven scenarios.

Despite being developed as a voluntary framework, the TCFD recommendations are rapidly becoming mainstream by virtue of their endorsement by major investors, regulators and many major companies worldwide.

For example, signatories to the United Nations Principles for Responsible Investment (***UNPRI***) are required, from 2020, to adopt and report under the TCFD recommendations. At the time of writing, UNPRI members include more than 160 organisations headquartered in Australia, including many of the country's major banks, investment managers and asset owners.

The New Zealand Government and a joint taskforce of UK regulators are also exploring the possibility of changing the law in those jurisdictions to mandate TCFD reporting.

There is currently no proposal to change the law in this way in Australia, but federal regulators have released guidance endorsing the TCFD framework (and climate-related risk disclosure more broadly):

> **The relevance of climate-related risks to today's financial decisions and the need for greater transparency have only become clearer and more urgent over the past two years. Nearly 800 public- and private-sector organizations have announced their support for the [Task Force on Climate-Related Financial Disclosures] and its work, including global financial firms responsible for assets in excess of $118 trillion.**
>
> Letter from Michael Bloomberg to Randal Quarles, Chair of the Financial Stability Board (31 May 2019)

- ***ASIC***: In 2019, ASIC published updates to two Regulatory Guides, RG228 and RG247, to provide guidance on climate-risk disclosure. Significantly, RG247 highlights climate change as a systemic risk that might impact the company's future financial prospects, and that may need to be disclosed in an operating and financial review (***OFR***). The updates followed the publication by ASIC in 2018 of ASIC Report 593 on *Climate Risk Disclosure by Australia's Listed Companies*. This confirmed that a listed entity must disclose any material business risks — including, where relevant, climate-related risks — affecting future prospects in its OFR in accordance with s229A(1)(c) of the Corporations Act.

- ***APRA***: APRA formally established a thematic supervisory priority on climate-related financial risk in 2016. Following the publication of the results of a survey of 38 large entities across all regulated industries in March 2019, in early 2020 APRA announced climate change financial risk as a key focus area over the coming 12–18 months. In its 24 February 2020 open letter to regulated entities, APRA reiterated that it encourages entities to disclose under the TCFD recommendations framework and signalled that it would prepare a new prudential practice guide aimed at encouraging regulated entities to better prepare for climate risks and clarify regulatory expectations. Consultation on the new prudential practice guide is expected to commence in mid-2020 and publication to occur before the year's end.
- ***ASX***: In the 4th edition of the *Corporate Governance Principles and Recommendations*, released in February 2019, climate change is expressly mentioned for the first time. The Principles and Recommendations provide that a listed entity should disclose whether it has any material exposure to ESG risks and, if so, how it manages or intends to manage those risks. The ASX Corporate Governance Council recommends that listed entities adopt the disclosure framework set out in the TCFD recommendations.

Further, in December 2018, the Australian Accounting Standards Board (***AASB***) and the Auditing and Assurance Standards Board (***AUASB***) released guidance on 'Climate-related and other emerging risks disclosures'. The AASB/AUSAB Practice Statement provides a decision tree to assist entities with the process of disclosing climate risks within their financial statements.

KEY RISKS

Companies that fail to report on climate-related risks in the manner required may contravene Australian corporations law or listing rules.

Companies should also consider the risks associated with inaccurate corporate disclosures constituting misleading and deceptive conduct under the Australian Consumer Law (Australian Consumer Law issues are discussed further on Page 25).

This risk of legal non-compliance is, in turn, a key driver of corporate behavioural changes in relation to climate change. Companies realise that, to report effectively in response to corporate reporting obligations, they need to conduct extensive internal due diligence to better understand their operations and potential impacts on the world around them. They also recognise that non-compliant reporting is considered 'low-hanging fruit' for activist NGOs seeking to draw attention to corporate behaviour in relation to climate change.

The sophistication of the required reporting will likely increase in line with the uptake of the TCFD recommendations. Market participants, including investors, lenders and consumers are increasingly expecting that companies will adopt voluntary disclosure frameworks such as the TCFD recommendations, and ASIC has recommended that companies with material exposure to climate change consider voluntarily reporting under the TCFD framework.[7] A failure to disclose risks in a way that allows stakeholders to assess their potential impact on a business may affect a company's ability to attract investment (see further below the section on 'Just Transition' commencing on Page 44).

ASKING THE RIGHT QUESTIONS

- Considering statutory duties, regulatory guidance and voluntary commitments through (eg) UNPRI, should your organisation adopt TCFD reporting?
- Are adequate systems in place to provide assurance on the accuracy and completeness of climate-related disclosures?
- Has your organisation considered who may rely on climate-related disclosures, and satisfied itself that those people will not be misled in substance by those disclosures?
- How do your organisation's climate-related disclosure practices compare to its industry peers?
- Do your organisation's climate-related reporting practices put it at a competitive disadvantage? Will this remain the case?
- If your organisation does not currently report, should it have a roadmap which sets out how it intends to progress towards reporting in the future? Is there an identified trigger point?
- Does your organisation have systems in place to regularly confirm its disclosure practices meet market and regulatory standards as this area continues to evolve?

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2. COMPLYING WITH REGULATORY OBLIGATIONS

Climate change and project approvals

Climate change impacts have for many years been accepted as a relevant consideration in the assessment of planning and environmental applications in Australia. Until recently, the focus of consent authorities has been primarily on the direct greenhouse gas (*GHG*) emissions of a project from owned and controlled sources (scope 1 emissions), with varying levels of scrutiny given to scope 2 emissions (emissions from purchased energy).

However, there is a growing trend for consent authorities to also require an assessment of scope 3 GHG emissions, being all indirect emissions of a company that occur in the company's value chain, such as emissions generated by the burning of Australian coal overseas. Consent authorities are also increasingly requiring proponents to demonstrate that measures have been taken to reduce, mitigate or even offset these emissions.

INCONSISTENT APPROACHES TO SCOPE 3 EMISSIONS BETWEEN STATES AND TERRITORIES

The Queensland courts have consistently held that scope 3 emissions are not a relevant consideration when assessing applications for environmental authorities for new mines, although scope 3 emissions have been considered relevant when determining whether the public right and interest will be prejudiced in the grant of a mining lease.

In contrast, a landmark decision of the NSW Land and Environment Court in February 2019 in relation to the proposed Rocky Hill coal mine held that a consent authority must consider scope 3 emissions, and cited climate change impacts as one of many reasons for refusing consent for the mine. The judge also noted the proponent's failure to commit to taking any specific actions to mitigate and offset the climate change impacts of the development.

Subsequent decisions of the NSW Independent Planning Commission (***IPC***) in the coal mining context have placed significant weight on scope 3 GHG emissions. The IPC has also set an almost impossibly high evidentiary burden for relying on the 'market substitution' and 'carbon leakage' principles, which have long been accepted by the Queensland courts (ie that coal that would have been produced by a proposed mine in Australia will be 'replaced' by a new mine in another country, with a net result that the same amount of coal is burned but the economic benefits transfer from Australia to the other country).

A recent Western Australian Government policy requires proponents of major projects to develop a GHG Management Plan to demonstrate how the project will address its scope 1 emissions in the context of the State's aspiration of net zero emissions by 2050. The Western Australian Environmental Protection Authority has also released a GHG Guideline, pursuant to which it may request credible estimates of scope 1, 2 and 3 emissions over the life of a proposed development.

Environmental groups are increasingly pursuing novel avenues to challenge coal mining and other emissions intensive projects on the basis of climate change. In May 2020, a group of young activists commenced proceedings in Queensland seeking to prevent a new coal mine in the Galilee Basin on the basis that the project will violate their human rights. This is the first time in Australia that a mine has been challenged on human rights grounds, although similar actions have previously been brought overseas.

FEDERAL ENVIRONMENTAL ASSESSMENTS

The Federal Department of Agriculture, Water and the Environment has recently provided guidance on when GHG emissions, including scope 3 emissions, will be relevant to an assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (***EPBC Act***).

The Department has indicated that it may request information in relation to GHG emissions (scope 1, 2 or 3) where those emissions may have a direct or indirect impact on a protected matter under the EPBC Act, but that this will be determined on a 'case by case basis' depending on the specific circumstances of the proposed action, including its context, scale, magnitude and nature. The Department stated that there is not a trigger point in terms of the scale of the emissions and that the relevant legislative test under the EPBC Act is whether an impact is significant.

As at the date of this guide, the EPBC Act is under review. Submissions to that review, including from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development and a number of environmental groups, have called for GHG emissions be added as a trigger for the assessment of a project under the EPBC Act. The inclusion of a climate change trigger that would require EPBC Act approval for any 'emissions-intensive activities' has also been proposed in a private member's bill introduced into the Australian Parliament in February 2020.

KEY RISKS AND OPPORTUNITIES

It is unclear if the principles emerging from the Rocky Hill decision and subsequent NSW IPC decisions will be applied in other Australian jurisdictions, and to projects beyond the mining sector.

It is clear, however, that proponents of all major projects will at least need to provide an assessment of the scope 1 and 2 GHG emissions of their projects, and demonstrate measures to reduce, mitigate and in some cases, offset those emissions. A failure to do so could potentially result in refusal.

At least in NSW and WA, the scope 3 emissions of a project (where relevant) should also be quantified and the overall contribution of the project to the 'global carbon budget' should be assessed. Proponents in other states should also expect greater scrutiny of scope 3 emissions in future, both from green groups / community objectors and consent authorities. Applicants for EPBC Act approval will need to provide information on GHG emissions, including scope 3 emissions, if requested by the Department.

Proponents can expect to incur greater costs in preparing their applications due to the additional assessment information that will need to be included regarding GHG emissions. It is also likely there will be significant additional costs to introduce measures to reduce, mitigate or offset emissions. In most cases, it will not be feasible to fully offset scope 3 emissions, which will be far greater than scope 1 and 2 emissions and are largely outside the control of proponents, often being generated by end-customers overseas.

There is an emerging risk that unique and unprecedented conditions of approval could be imposed to deal with climate change impacts. For example, the expansion of the United Wambo Coal Mine in NSW was approved subject to a condition limiting the export of coal only to countries that are signatories to the Paris Agreement or countries with emission reduction policies commensurate to those of Paris Agreement parties. This creates uncertainty for new projects, particularly in light of legislative proposals in NSW to prohibit the imposition of conditions seeking to regulate impacts occurring overseas.

There are, however, opportunities for proponents who can provide a robust assessment of the climate impacts of a proposed project upfront and come up with new and innovative mitigation and offset strategies. There also appears to be an emerging trend in the NSW mining context that approvals for expansion and continuation projects are easier to procure than approvals for greenfield projects.

ASKING THE RIGHT QUESTIONS

Before an application for consent is lodged for a project with material scope 1, 2 or 3 emissions, and preferably early in the planning phase for any new development, your organisation should consider:

- What information and assessment of GHG emissions is currently required in the state or territory in which the application is being made?
- Have the scope 1, 2 and 3 emissions of the proposal been adequately assessed and quantified? (Consideration of scope 3 emissions may be justified even if not currently required in the relevant state or territory at the commencement of the approvals process, given the rapid rate of change in this area and the long timeframes for environmental impact assessment and approval.)
- What measures are being proposed to reduce, mitigate or offset the GHG emissions of the development, and does the application clearly outline your organisation's commitment to implement these measures?
- Are there synergies between the proposed development and existing operations and infrastructure which create efficiencies and justify the development despite its climate change impacts?
- Where is the customer base for your end product and are those countries (if overseas) signatories to the Paris Convention? If so, could your organisation offer to accept a condition of approval limiting the export of your product only to signatory countries?
- Will your organisation be seeking to rely on a market substitution or carbon leakage argument and, if so, has sufficient evidence of market substitution and carbon leakage been put forward in the planning application?

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Emissions regulation and liability – NGERs and the Safeguard Mechanism

NGER SCHEME

The National Greenhouse and Energy Reporting (*NGER*) scheme requires some companies to account for the scope 1 and scope 2 emissions they are responsible for. Scope 1 emissions are direct emissions for which a company is responsible, whilst scope 2 emissions are indirect emissions from the purchase of electricity. The NGER scheme is administered by the Clean Energy Regulator under the *National Greenhouse and Energy Reporting Act 2007* (Cth).

The NGER scheme applies to corporate groups that exceed statutory emissions, energy use or energy production thresholds. If a facility operated by a company in a controlling corporation's corporate group exceeds a *facility level threshold*, the controlling corporation of the corporate group must register on the National Greenhouse and Energy Register.

If a corporate group exceeds a *corporate level threshold*, again the controlling corporation of the corporate group must register on the National Greenhouse and Energy Register.

The current thresholds for NGER registration are as follows:

- ***Facility threshold*:** emission of 25,000 tonnes CO_2 equivalent or more of greenhouse gases, production of 100TJ or more of energy, or consumption of 100TJ or more of energy per financial year.
- ***Corporate group threshold*:** emission of 50,000 tonnes CO_2 equivalent or more of greenhouse gases, production of 200TJ or more of energy, or consumption of 200TJ or more of energy per financial year.

Regardless of the trigger, once the controlling corporation is registered, that corporation will be responsible for preparing an annual report on the greenhouse gas emissions, energy production and energy consumption for the corporate group.

Current policies will only drive a further 9% decrease in emissions from electricity generation to 2030

Source: Climate Analytics

THE SAFEGUARD MECHANISM

In the absence of a carbon pricing mechanism in Australia, the Safeguard Mechanism remains one of the only tools at the Federal Government's disposal to cap emissions. Any entity that operates a facility with scope 1 emissions of more than 100,000 tonnes CO_2 equivalent per year is covered by the Safeguard Mechanism.

The Clean Energy Regulator sets emissions baselines for each facility covered by the Safeguard Mechanism. The person with operational control of that facility must keep the facility's emissions at or below the emissions baseline. If the facility exceeds the baseline, the operator of the facility must purchase and surrender an amount of Australian Carbon Credit Units equivalent to the excess.

There are four main types of emissions baselines – reported baselines (which will cease on 1 July 2020), calculated baselines, production-adjusted baselines and benchmark baselines. An emissions baseline cannot be set below the threshold of 100,000 tonnes of CO_2 equivalent .

The Clean Energy Regulator is required to publish information about all designated large facilities covered by the Safeguard Mechanism for each reporting year. In addition to keeping its emissions at or below its baseline, a company subject to the Safeguard Mechanism must also adhere to the general reporting and record keeping requirements of the NGER scheme.

KEY RISKS AND OPPORTUNITIES

The majority of large corporations that have been reporting under the NGER regime and have been operating under a Safeguard Mechanism baseline have, over time, become comfortable with these regulatory obligations and have developed the capabilities to measure and report their emissions.

However, it is frequently speculated that if the Federal Government adopted a more ambitious emissions reduction target, it would be underpinned and driven by amendments to the Safeguard Mechanism so that it covers more companies and imposes stricter baselines.

This is a key risk to large emitters in Australia. It also presents a key opportunity for those entities whose operations contain the potential for emissions abatement or sequestration. This is because a stricter Safeguard Mechanism will create a more robust carbon credit market in Australia which can create the opportunity for additional revenue streams.

ASKING THE RIGHT QUESTIONS

- Has your organisation undertaken diligence to establish whether its emissions, energy use or energy production trigger reporting under the NGER scheme? (Reporting can sometimes be missed where emissions and/or energy use occurs over many separate sites.)
- If currently registered under the NGER scheme, is your organisation likely or unlikely to meet the relevant threshold in the future?
- If currently registered under the NGER scheme, have suitable arrangements been made with third-party suppliers to require them to provide relevant data to support your compliance?
- Has your organisation undertaken diligence to establish whether the Safeguard Mechanism applies? If so, is it satisfied it can continue to meet its baseline?

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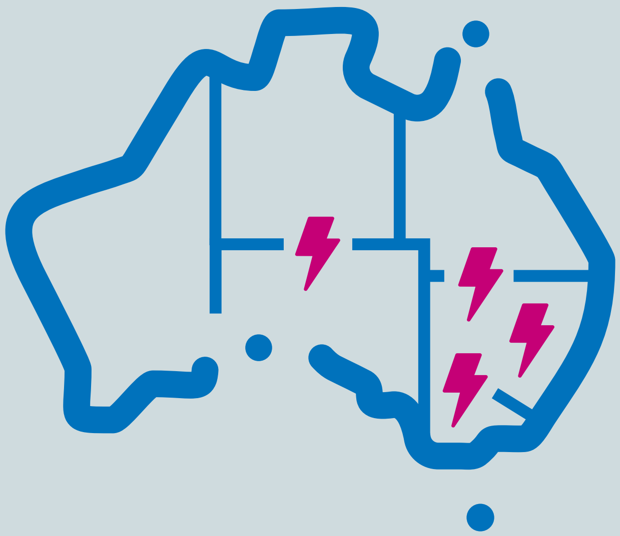
Energy efficiency schemes – retailer risk vs business and household opportunities

A number of states and territories have established schemes that provide electricity users with incentives to implement energy saving measures and which require electricity retailers to achieve energy saving targets.

These schemes are:

- the NSW ***Energy Savings Scheme***, which allows ***Accredited Certificate Providers*** to issue ***Energy Savings Certificates*** whenever businesses and households implement energy saving measures. Energy Savings Certificates can be sold to electricity retailers. Each year, electricity retailers must surrender enough Energy Savings Certificates to meet their energy savings targets (currently equivalent to 8.5% of the amount of electricity that retailer purchases for resale);
- the ***Victorian Energy Upgrades Program*** operates in a similar way to the NSW Energy Savings Schemes. Accredited providers can implement energy savings measures that generate ***Victorian Energy Efficiency Certificates*** that can be sold to electricity retailers who can surrender the certificates to meet mandated energy efficiency targets;
- the South Australian ***Retailer Energy Efficiency Scheme*** requires retailers to implement energy efficiency activities with households and businesses to achieve energy efficiency targets. Unlike NSW and Victoria, South Australia does not have a mechanism for trading energy savings certificates on the market. However, electricity retailers can subcontract their energy efficiency obligations to third-parties; and
- the Australian Capital Territory ***Energy Efficiency Improvement Scheme*** is similar to the South Australian Scheme. Electricity retailers can engage ***Approved Abatement Providers*** to deliver energy savings measures to satisfy mandated targets.

These state-based schemes sit alongside the Federal Government's Emissions Reduction Fund. For example, in NSW, projects that access the Emissions Reduction Fund are not entitled to participate in the Energy Savings Scheme.



KEY RISKS AND OPPORTUNITIES

Currently, the state-based energy efficiency schemes generally present:

- opportunities to businesses that wish to become an accredited provider to accrue and sell energy efficiency certificates;
- limited opportunities to businesses and households that could benefit from energy efficiency measures installed by accredited providers; and
- a limited risk to electricity retailers who are under an obligation to purchase and surrender certificates under state-based schemes.
- However, a National Energy Saving Scheme (***NESS***) has been under consideration for some time. A NESS was investigated by the Federal Government in 2015 and was most recently recommended by the Climate Change Authority in 2017. Depending on the nature and details of any such national scheme, a NESS could present opportunities for businesses to partner with accredited providers to implement energy efficiency measures throughout their operations, and it may be possible to split profits derived from the generation of energy savings certificates.

ASKING THE RIGHT QUESTIONS

- Are there any energy saving opportunities that your organisation can implement to take advantage of a scheme?
- Is there any appetite in your business to explore the possibility of partnering with an accredited provider to take advantage of any of these opportunities, and potentially split profits from the generation of certificates?

For more information, contact
Felicity Rourke | Patricia Saw | Dennis Smith

Carbon farming and the Emissions Reduction Fund / Climate Solutions Fund

The legislative regime for the generation of carbon credits from voluntary emissions reduction projects (otherwise known as 'carbon farming') in Australia was first established in 2014.

This regime allows land owners and managers to earn Australian Carbon Credit Units (***ACCUs***) by undertaking emissions avoidance or sequestration projects that comply with approved methodologies.

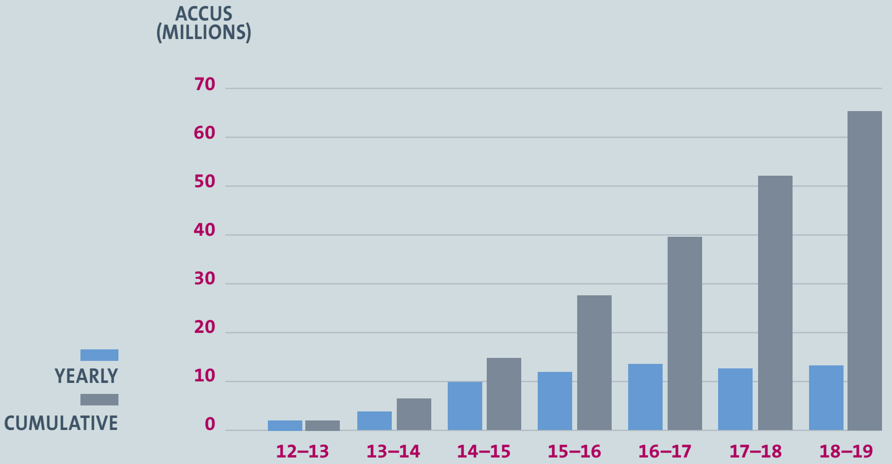
There are currently more than 30 approved methodologies, including those relating to:

- agricultural practices and vegetation management;
- increasing energy and fuel efficiency in public, commercial and industrial settings; and
- abatement projects in the mining, oil, gas, transport sectors, waste and wastewater sectors.

The Climate Solutions Fund (***CSF***) is a fund established by the Federal Government to support emissions reduction projects in Australia and to drive the Government's aim to reduce emissions 26–28% below 2005 levels by 2030.

Total ACCUs issued annually, compared with cumulative total, as at 30 June 2019

Source: CER's 2018–19 annual report, p 39



The CSF was originally established as the Emissions Reduction Fund (***ERF***) in 2014 with an initial $2.55B in funds. The ERF has since been rebranded as the CSF and has been provided with an additional $2B in funds, which is intended to extend the CSF for a further 15 years.

Funds in the ERF/ CSF are used by the Federal Government to enter into contracts to acquire ACCUs directly from individuals and businesses undertaking emissions reduction projects. Contracts are awarded via a reverse auction system.

ACCUs can also be sold into the voluntary market.

KEY RISKS AND OPPORTUNITIES

These projects are an opportunity for individuals and businesses to generate new income streams through the generation and sale of ACCUs. ACCUs are priced higher than many other types of international carbon credits, and their price has remained relatively stable.

New methodologies are developed by the Government from time to time, and it is open to individuals or businesses suggesting new methodologies or taking part in working groups.

In addition, in May 2020 the Federal Government agreed to investigate and implement a range of mechanisms to enhance and incentivise participation in the CSF / ERF, including:

- allowing for the earlier release of ACCUs for some types of projects which have significant upfront costs, instead of having to wait until the emissions abatement has occurred;

- creating a new carbon credit which can be granted where a facility covered by the Safeguard Mechanism reduces their emissions below their baseline (see Page 17 for the Safeguard Mechanism); and
- other incentives such as co-investment programs and fixed-price purchasing for small projects.

The key risks arise from political volatility in climate change policies. Although the scheme is a survivor of the previous government's carbon pricing mechanism, and a functioning high-quality carbon farming scheme is likely to have a place in the policy suite of any government on either side of the political spectrum, it still relies on a market for emissions which is generated from policy cycle to policy cycle and is not underpinned by a long-term mandatory emissions market.

Emissions reduction projects are often land-based, and it has been speculated that the devastating bushfires in NSW and Victoria may have damaged or destroyed many emissions reduction projects funded through the ERF/CSF.[8] The risk posed by bushfires to land-based projects highlights the importance of considering the effect of natural disasters in the drafting of contracts (eg under force majeure provisions).

ASKING THE RIGHT QUESTIONS

- What emissions avoidance or abatement methodologies are relevant to your organisation's assets and operations?
- Is your organisation interested in creating a carbon farming project, either to generate additional income or to offset its own emissions (particularly those under the Safeguard Mechanism – see Page 18)?
- Where emissions abatement activities are going to be undertaken jointly (eg by a principal/landowner and its contractor/operator):
  - how does your contract deal with the splitting of risk and revenue?
  - do existing contracts require amendment to allow you to undertake this project?
- What expertise will your organisation need to draw upon to develop this project?
- Will your organisation seek to enter into a contract with the Federal Government for the sale of ACCUs as a guaranteed revenue stream, or does your organisation have the interest and resources to sell ACCUs on the voluntary market?

Landholders throughout every state and territory have signed up to over 730 different carbon projects.

Source: Green Collar

For more information, contact
Jillian Button | Patricia Saw

In search of consistency: state schemes and policies

State and territory governments are increasingly willing to take action separate to the Federal Government to address climate change through state schemes, policies and, in some cases, legislation. This represents a change in approach at the state and territory level over the past decade, as climate change issues, particularly controls on greenhouse gas emissions, were traditionally seen as a national issue best addressed by the Federal Government.

All states and territories are now working towards a target of net zero emissions by 2050 (or earlier) and a majority have adopted a target of renewable energy consumption of 50% or greater by 2030. However, only four jurisdictions[9] have enacted specific climate change legislation which captures these targets and other commitments. In other jurisdictions, the commitments remain aspirational and subject to policy change.

State and territory climate policies continue to evolve. In 2019, there were a number of significant developments, eg the WA Government released its Greenhouse Gas Emissions Policy for Major Projects. There are also a number of reviews and public consultations concerning various climate change strategies and policies underway, which means there will be further change in this space in 2020.

The relationship between the federal and state / territory governments will also be important to monitor closely. In January 2020, the Federal Government announced a $2 billion partnership with the NSW Government that includes (amongst other things) funding for NSW-based emissions reduction initiatives and new generation projects. The Prime Minister has raised the prospect of further 'energy deals' with other state and territory governments.

The states and territories have proposed a number of measures to achieve their climate change commitments. Key areas of focus include:

a. increasing investment in renewable energy generation and battery storage projects;

b. improving energy efficiency in the areas of transport and infrastructure (eg by transitioning government fleet vehicles to electric alternatives);

c. establishing funds or grants to support projects that contribute to reducing carbon emissions. For example, Queensland has invested $500M to establish the Land Restoration Fund, which will support the land sector in Queensland to undertake carbon farming projects and South Australia has developed a Blue Carbon Strategy to encourage protection and restoration of coastal ecosystems; and

d. climate change adaption.

> **'If the states act decisively and act together on setting emissions targets, they can reduce pollution through an alternative route. Let's call it the Princes Highway to climate action.'**
>
> Jono La Nauze, Chief Executive of Environment Victoria, 'The Princes Highway to climate action', The Age (1 February 2020)

KEY RISKS AND OPPORTUNITIES

There is a risk that if state and territory governments 'go it alone' on climate change, this will create inconsistent policy between the federal and state / territory governments and between individual states and territories. This could result in increased or duplicative regulatory burden for companies in some states or territories compared with others and stifle investment and innovation in jurisdictions with less favourable policy settings.

However, the evolving landscape at the state and territory level offers companies the opportunity to engage with government to ensure that policies and schemes meet relevant industry needs. There is also an opportunity to access state schemes relevant to particular industries or businesses, eg energy efficiency schemes (referred to on Page 19) and Queensland's Land Restoration Fund.

ASKING THE RIGHT QUESTIONS

- Is your organisation's strategy aligned with the general policy adopted by the states and territories of achieving carbon neutrality by 2050 (and, where relevant, any interim targets)? If not, is there a plan in place to align strategy with these targets?
- Should your organisation consider adopting measures to enable it to operate effectively in an environment where policy measures were implemented to achieve carbon neutrality by 2050? Ie measures which would mimic the effect of the domestic implementation of the Paris Agreement's 1.5°c – 2°c warming target?
- What is the impact of current and proposed state policies and targets on your organisation's assets, project proposals and operations?
- Is your organisation comfortable that it is engaging with regulators and policymakers appropriately on the practical implications of proposed policies and schemes?
- Do the state and territory schemes create opportunities for your organisation, eg to generate offsets?

All states and territories are now working towards a target of net zero emissions by 2050 (or earlier) and a majority have adopted a target of renewable energy consumption of 50% or greater by 2030.

For more information, contact
Eve Lynch | Darcy Doyle

Consumer laws – ‘green’ marketing

Consumers and investors are increasingly conscious of climate change risks, and more demanding of businesses to adopt sustainable business practices. This has led to an increase in ‘green marketing’, which includes statements about environmental sustainability, carbon neutrality, recycling or impact on the environment. As a result, there has been growing regulatory scrutiny of, and enforcement against, potentially misleading environmental claims.

Courts have recently considered a number of cases brought by the Australian Competition and Consumer Commission (***ACCC***) relating to environmental claims. These cases, by analogy, are illustrative of the court’s likely attitude to similar claims being made in relation to climate-related risks or carbon neutrality. Recent actions include:

- ***ACCC v Volkswagen AG***: In December 2019, the Federal Court ordered Volkswagen AG to pay $125 million in penalties for making false representations to the Federal Government about compliance with Australian diesel emission standards. This is the highest penalty ordered by the court for contraventions of the Australian Consumer Law.
- ***ACCC v Woolworths Limited***: In March 2018, the ACCC brought proceedings against Woolworths Limited alleging that environmental representations, in particular the label ‘Biodegradable and Compostable’, made on the packaging of its disposable cutlery and dishes products were false or misleading. The Federal Court dismissed the ACCC’s allegations. The ACCC has appealed this decision.
- ***ACCC v Kimberly-Clark Australia Pty Ltd***: In December 2016, the ACCC brought proceedings against Kimberly-Clark alleging it made false or misleading representations that its Kleenex Cottonelle wipes were ‘flushable’. The ACCC argued that the wipes were not compatible with sewerage systems and that the international guidelines relied on by Kimberly-Clark to demonstrate compliance with ‘flushability’ standards were not established by an independent testing regime, and therefore not a credible standard. In June 2019, the Federal Court found there was insufficient evidence to establish that the wipes caused harm to sewerage systems, and that it was reasonable for Kimberly-Clark to rely on the guidelines. The ACCC has appealed this decision, which was heard by the Full Federal Court in February 2020. The judgment is yet to be published.

61% of millennials

58% of Gen Z

would pay more for eco-friendly products

Source: globalwebindex

KEY RISKS

The penalties for breaches of the Australian Consumer Law are significant. The ACCC's decision to appeal the findings in ACCC v Kimberly-Clark Australia Pty Ltd and ACCC v Woolworths Limited demonstrate its willingness to hold businesses to account for environmental representations made about their products and services.

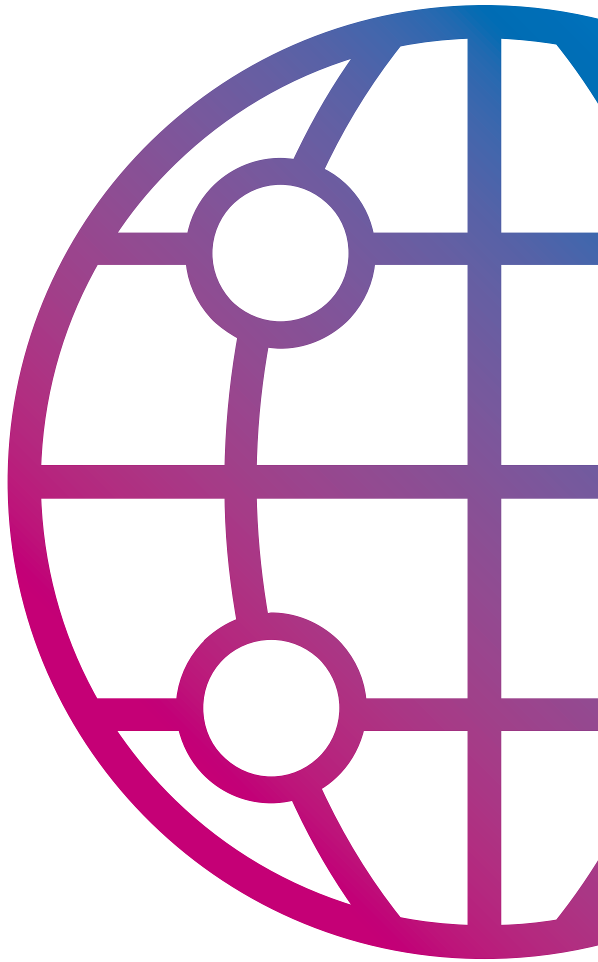
Some common traps businesses may make in making environmental claims include:[10]

- **making broad, vague or general environmental statements** such as 'safe for the environment', which could have more than one meaning without further explanation. Unqualified statements can be misleading if they do not adequately explain the environmental benefits of the product or service;
- **overstating the environmental benefit.** Representing that a product has significant environmental benefits (eg 'now with 50% more recycled content') may be misleading if the benefit is actually negligible (eg the product was previously only 1% recycled content);
- **overstating the level of scientific acceptance**; and
- **failing to consider the whole product life cycle when making claims.** For example, a claim that a product is carbon neutral may mislead consumers if it only relates to the carbon produced in the manufacture of the product and not its actual use and operation. Businesses should make clear if the claimed benefits relate only to one part of the product (eg packaging, content, production process etc).

ASKING THE RIGHT QUESTIONS

Before making environmental claims, an organisation should consider the following questions:

- Does your organisation rely on environmental claims as part of its marketing strategy? If so, what is the overall impression given to the consumer by the environmental claims?
- Are the representations appropriately qualified?
- Is there evidence to support the environmental claims being made? Have the claims been independently audited or verified? Is there a scientific authority that can be used to justify the basis of the claim?
- Do the claims overstate the level of scientific acceptance?
- Have you considered the whole product life cycle?



For more information, contact
Robert Walker | Annie Cao

Competition law – staying on the right side of 'collaboration vs cartel'

In the light of the mounting pressure on businesses to address climate change risks, there is growing impetus to collaborate on effective ways to approach climate change management.

Although well intentioned, collaboration between businesses on sustainability standards and practices can raise competition law concerns and expose the corporation (and individuals involved) to significant criminal and/or civil penalties if not managed appropriately.

Coordinating on industry-wide standards or practices may contravene Australian competition law if it amounts to cartel conduct or an otherwise anti-competitive arrangement. Cartel conduct involves agreements to fix prices, restrict supply or acquisition, allocate markets or customers, or rig bids. It is prohibited regardless of the effect on competition or the purported beneficial goal. Examples of conduct that may pose competition law risks include agreements between competitors to:

- restrict the acquisition of products or services from companies based on their emissions profile or environmental track record;
- limit the supply of products or services that involve environmentally unsustainable practices; and
- implement common industry standards or a code of practice.

Australia has a process through which corporations can seek authorisation for conduct that would otherwise breach Australian competition laws. The ACCC will authorise conduct if it is satisfied the likely public benefit from the conduct outweighs the likely public detriment. Public benefit can include increased economic efficiency and environmental benefits (eg reduction of greenhouse gas emissions).

Examples of arrangements that have been authorised by the ACCC include:

- **New Energy Tech Code (NETCC)**: In December 2019, the ACCC authorised the NETCC, which sets minimum standards that suppliers of 'New Energy Tech' products (eg solar panels, energy storage systems) must comply with when interacting with customers. The ACCC granted authorisation because it considered there to be a public benefit in providing higher standards of protection for consumers in their dealings with New Energy Tech vendors and finance providers.
- **Joint tender of green energy**: In March 2016, the ACCC authorised Melbourne City Council and 13 other entities, including three other local councils, two tertiary education institutions and two banks to establish a joint electricity purchasing group to pool their energy demand and jointly tender for green-electricity supply arrangements.
- **Greenhouse gas emission limitation arrangements**: In September 1998, the ACCC granted authorisation to the Association of Fluorocarbon Consumers and Manufacturers Inc to limit the importation of hydrochlorofluorocarbon gases and cease the importation or manufacture of disposable containers of hydrochlorofluorocarbon and hydrofluorocarbon gases.

KEY RISKS

There are examples of the ACCC taking cartel enforcement action in this area.

In 2013, the ACCC took action against laundry detergent suppliers and Woolworths for allegedly colluding to cease supplying standard concentrate detergent and simultaneously moving to the supply of ultra-concentrate detergent. Despite the environmental benefits of this action, the ACCC prosecuted the conduct due to concerns it would deny consumers a variety of choice. Some of the alleged participants admitted that their involvement amounted to cartel conduct. In relation to one of suppliers, PZ Cussons, the ACCC was ultimately unsuccessful in establishing a breach of the competition rules.

ASKING THE RIGHT QUESTIONS

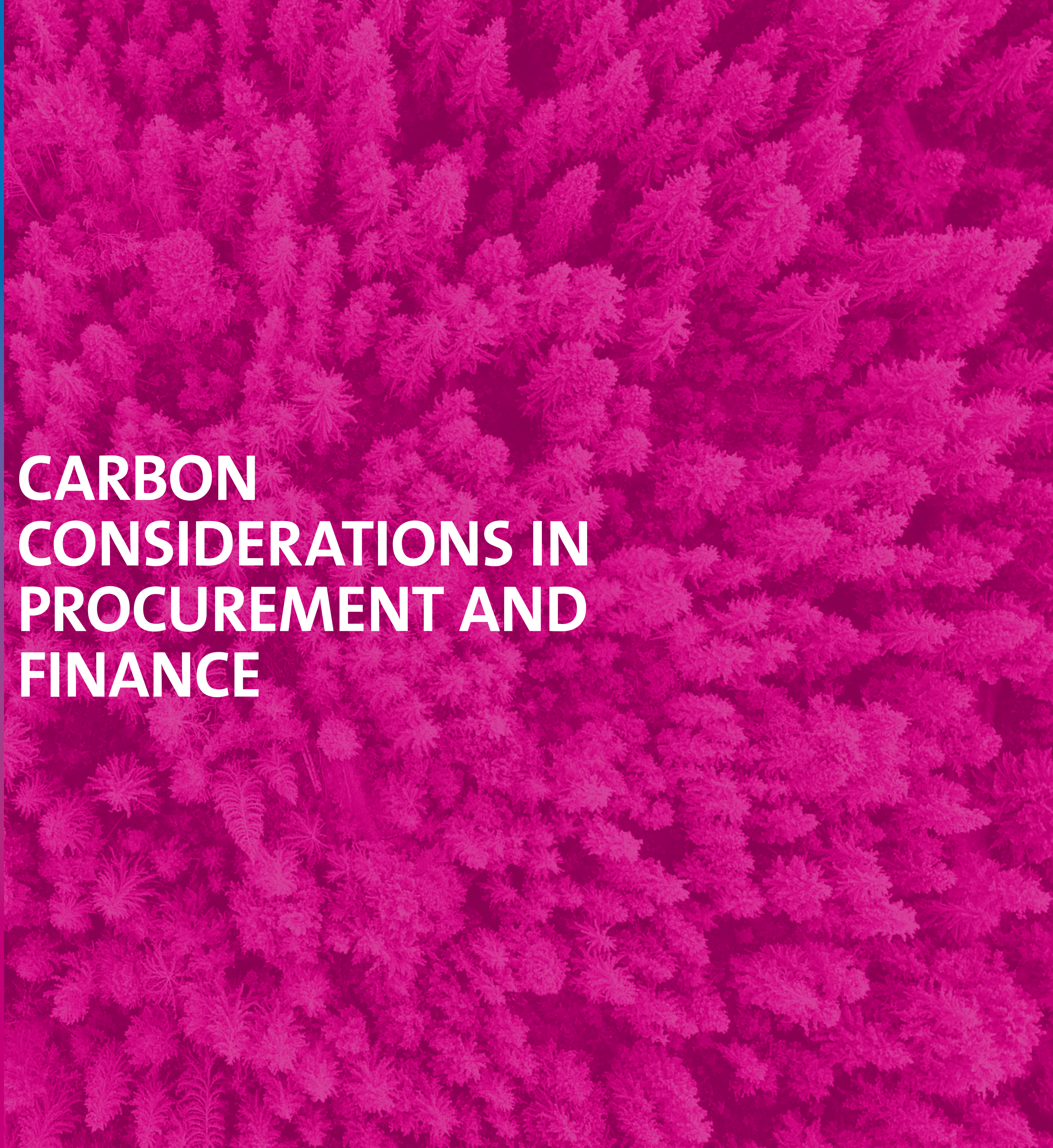
Corporations looking to cooperate with other businesses on sustainability issues should first seek legal advice before engaging in these discussions. If discussions with competing businesses take place, appropriate controls should be implemented. For example, the discussions should follow a written agenda, minutes of the discussions should be kept and competition law guidelines should be put in place.

Before engaging in these discussions, you should consider the following:

- Does the legal team have sufficient visibility over the sorts of engagements which your sustainability and technical teams may be having with other industry members or market participants?
- If no, do you have processes and procedures in place to inform your sustainability and technical teams of the risks that such engagement poses?
- Do any such discussions involve competitors or potential competitors?
- Will they involve discussions around pricing, restricting supply or acquisition of certain products or services, allocating markets or customers, or bid rigging?
- What is the intended outcome of these discussions? Could it lead to the alignment of commercial strategies?
- If so, has legal advice been sought? Have you considered whether ACCC authorisation is needed?

For more information, contact
Robert Walker | Annie Cao

3. CARBON CONSIDERATIONS IN PROCUREMENT AND FINANCE



The importance of carbon-ready contracts

Very few areas of law are more changeable and subject to the political tides as climate change law. A range of federal and state regulatory schemes and policies relating to greenhouse emissions have been implemented in recent years, some economy-wide and some industry-specific, and some more permanent than others. There is also the prospect that, at some point, a national carbon price will be reintroduced in Australia either by way of a 'tax' or an emissions trading scheme.

All contracts that could be materially impacted by rises in costs or that could face additional risks arising from new emissions regulatory regime(s) should contain specific clauses that enable your organisation to take advantage of future carbon opportunities, as well as pass on or allocate risks and costs of compliance.

Conversely, contracts that relate to activities that have the potential to generate tradeable units, such as Australian Carbon Credit Units, should contain provisions allocating rights to such units, and contain mechanical provisions to clarify each party's responsibilities in relation to the schemes under which those units are created. It is important that contracts are drafted to respond to current and potential future schemes, particularly for long-term contracts.

KEY RISKS AND OPPORTUNITIES

The introduction (and sometimes repeal) of these schemes has real and direct impacts on a wide range of services, procurement and operational contracts since they can:

- **increase costs** – administrative costs of compliance, the cost of procuring carbon credits, costs associated with implementing emissions abatement technologies or processes;
- **increase risks** – compliance and regulatory risk, reputational risks and litigation risk – particularly where contracts do not adequately address the impacts of these new regimes and give rise to disputes between parties;
- **create opportunities** – to devise new income streams from the generation and sale of carbon credit units; and
- **impose obligations that require cooperation between the parties to fulfil** – eg where the obligation holder may need to rely on its contractor to provide required information about activities and emissions.

In our experience, standard change-in-law provisions are ill-equipped to adequately address these new schemes. This is because they can rely on complex concepts to determine how to group and calculate emissions and define who is responsible for reporting and/or emissions abatement. In some circumstances those responsibilities can be shifted between parties (eg between a principal and their contractor/operator of a facility, or between different entities in a corporate group) and sometimes they cannot. In some circumstances these clauses are drafted in a way that cannot apply to these schemes at all as they exclude changes in law that are reasonably foreseeable.

ASKING THE RIGHT QUESTIONS

- What existing or proposed contracts are on foot in your organisation that are affected by current carbon policies and/or may be affected by the introduction of any new carbon price?
- What new costs and risks would your organisation wish to pass on to the other contracting party (such as clients, customers, service providers, operators) and do your contracts currently provide for this?
- Is it possible your organisation would wish to take advantage of opportunities arising under current offsetting schemes (such as the Climate Solutions Fund – see Page 21) or future expanded carbon emissions trading schemes, and do your contracts currently facilitate this?
- Do your organisation's contracts currently require reasonable cooperation between the parties to fulfil any new regulatory requirements?
- Does your organisation have processes to ensure any contracts into which your organisation enters appropriately consider where bespoke carbon-ready language is adopted?

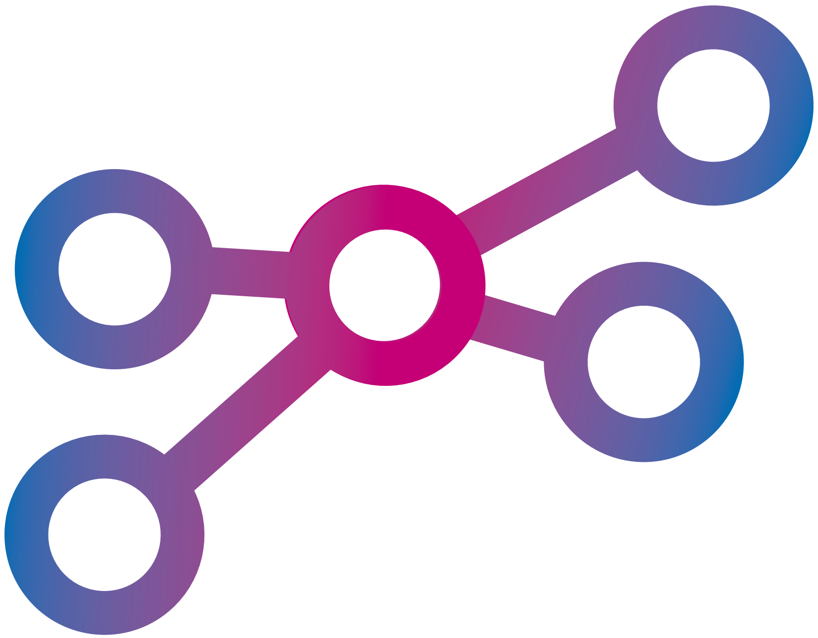
For more information, contact
Jillian Button | Patricia Saw

Corporate PPAs: questions to ask, traps to avoid

As electricity prices rise and we move towards a carbon constrained future, companies are looking for ways to manage their exposure to changing electricity prices and to purchase electricity from renewable sources. Generators are also looking beyond retailers as potential offtakers to support the development of new renewables facilities. Consequently, power purchase agreements with corporate offtakers (*Corporate PPAs)* for electricity from renewable facilities have become increasingly popular in Australia.

Companies looking to enter into Corporate PPAs can come from any industry or a group of industries where the load is large enough to support a generator's project, either in part or as a whole. Banks, local councils, water corporations, energy-intensive industry and universities have all ventured (or are looking to venture) into the world of Corporate PPAs.

The electricity industry is highly regulated, with set roles for generators, retailers and customers, which means there can be significant regulatory barriers for electricity users to contract directly with a generator. Generators and corporates have been innovative in tailoring the structure of their Corporate PPAs to suit the individual needs of a deal and to overcome these regulatory barriers.



KEY RISKS AND OPPORTUNITIES

Key drivers for entering into Corporate PPAs are:

- **Securing stable energy pricing:** a well-negotiated Corporate PPA can secure lower and predictable energy pricing to shield the energy buyer from the volatile energy prices it faces under its electricity retail contracts.
- **Green credentials:** large-scale generation certificates (***LGCs***) available from a renewable energy generator can be an important tool for demonstrating that the entity is achieving specific targets relating to renewable energy generation (eg emissions reduction targets or promotion of renewable energy in a particular jurisdiction).
- **Managing retail contract exposure**: a company can also use the LGCs to manage its exposure under its retail contracts to retailers.

Key risks to be managed include:

- **Connection delay**: as a result of an increase in the development of renewable facilities and network congestion in certain parts of the grid, some new generators are experiencing significant delays in achieving connection. If the renewable facility is not yet operational, it is important to undertake proper due diligence to understand the likelihood of your generator counterparty experiencing these types of connection delays, and to make sure risk of connection delay sits with the right party under the contract.

- **Change in law**: the energy regulatory landscape is one that is subject of constant policy discussions and reform, so change in law risk is a matter that is often heavily negotiated in corporate PPA arrangements.
- **Dealing with multiple offtakes**: generators will often contract with multiple offtakers in respect of the same renewable facility. You may need to consider whether this raises any issues regarding priority with other offtakers.
- **AFSL**: the transactions contemplated under a corporate PPA often fall within the broad definition of a 'derivative' under the Corporations Act. You may need to consider whether an Australian Financial Services Licence is required for entry into a corporate PPA, or whether an appropriate exemption applies.

ASKING THE RIGHT QUESTIONS

Once your organisation decides to enter into a Corporate PPA, the key questions to ask are: will your organisation require:

- The ability to terminate the Corporate PPA early? Generators, particularly those that require a power purchase agreement to underpin any project financing for their project, require longer-term agreements (traditionally around 10–15 years). While corporates may wish to include an early termination for convenience clause, generators may require an early termination amount or ask for the price under the Corporate PPA to reflect the additional risk that the generator takes on in return.
- A fixed commencement of the Corporate PPA (such as to align with any new retail contract)? If so, what liquidated damages will you require, if any, in the event of delay?
- A set load from the renewable energy generation? What will the minimum supply requirements be? A right to be able to use the renewable project's name and information in your marketing material?
- An Australian financial services licence (***AFSL***) or obtain the services of a third-party who holds an AFSL to act as an intermediary?

And finally:

- Can your organisation provide credit support (eg a parent company guarantee or a suitable bank guarantee)? Would your organisation prefer to negotiate credit support triggers such as a change to a company's net debt-to-net worth ratio or a decrease in the net asset level by a certain amount?

For more information, contact
Kate Axup | Kanana Fujimori | Luisa Colosimo

Green finance

Australia's 'green finance' market continues to grow steadily in response to global environmental challenges and to support sustainable development. Innovative financial products continue to be developed to direct capital towards green projects and to promote sustainability causes or ESG-related performance targets. These financial products include green bonds, green loans and sustainability-linked loans (or *SLLs*).

A 'green bond' is a debt security issued into domestic or offshore capital markets, with the money raised to be invested into green projects. Typically, green bonds are purchased by institutional investors with mandates to invest capital into the green economy. Green bonds are like other bonds issued into the relevant capital market, but with additional features that allow them to be marketed as a 'green bond'. Those additional features are increasingly becoming standardised, albeit by the market rather than regulation. The International Capital Markets Association (***ICMA***) has developed a set of 'Green Bond Principles' which are voluntary guidelines outlining recommend transparency and disclosure principles for green bonds.

Alongside green bonds, a market for green loans is emerging. Similar to green bonds, the use of proceeds of a green loan is for green projects. A set of Green Loan Principles has been established, and those are similar in nature to the Green Bond Principles.

The four key principles under the Green Bond Principles are

1. **the net proceeds of the bond issuance are to be used for green projects**

2. **the issuer is to provide clear communication of the process for project evaluation and selection**

3. **the net proceeds of the bond issuance are to be managed and tracked for the specified green purpose, and**

4. **the issuer is to have ongoing reporting obligations.**

SUSTAINABILITY-LINKED LOANS ARE EMERGING IN AUSTRALIA

Separately, a market for SLLs is developing in Australia and offshore. An SLL incentivises the borrower to meet agreed sustainability or ESG-related performance targets. Unlike a green bond or green loan, the money borrowed does not need to be used for green purposes. Rather, the borrower is given a reduced interest rate if it meets the agreed targets.

The target that may be agreed can vary, from performance objectives such as greenhouse gas emissions and sustainable sourcing, to matters relating to employment targets. An SLL takes the form of a bilateral or syndicated loan in a form typically seen in the loan market, but with features that address the sustainability requirements.

Similar to green bonds and green loans, the market has developed a set of principles for SLLs. These principles have been driven by the Loan Market Association, and include (1) the borrower to clearly communicate its sustainability objectives and how those objectives align with the sustainability performance targets (***SPTs***) identified in the SLL, (2) ambitious and meaningful SPTs should be identified and negotiated between the borrower and the lenders target setting, (3) where possible, a borrower under an SLL should maintain records in relation to SPTs and provide information to lenders and (4) the need for external review / audit is to be negotiated by the borrower and lenders.

KEY RISKS AND OPPORTUNITIES

The key opportunities for entry by Australian corporates into the green finance market include:

- **Diversified investor base**: Green bonds may attract a broader investor base for the issuance than typically available to a corporate, as they are typically held by institutional investors with mandates to invest in green projects.
- **Access to additional capital**: Similarly, as investors and banks continue to get pressure from their stakeholders to mitigate climate change impact within their own organisations, there is a significant and growing pool of capital looking to get exposure to green and sustainable investment.

A$15.6B

Australia's cumulative green bond issuance has grown to A$15.6B, which makes it the tenth largest market globally.

Source: Climate Bonds Initiative

(figures correct to 30 June 2019)

- **Social responsibility and promoting sustainability:** Green finance is one of the many ways Australian corporates can work towards positive environmental and climate change solutions and see tangible impacts within their businesses.
- **Pricing advantage**: The incentive-based structure of SLLs allows borrowers to benefit from a reduced margin if their sustainability performance targets are met. Stronger demands for green bonds into the future could see green bonds trading at a premium in the secondary market.

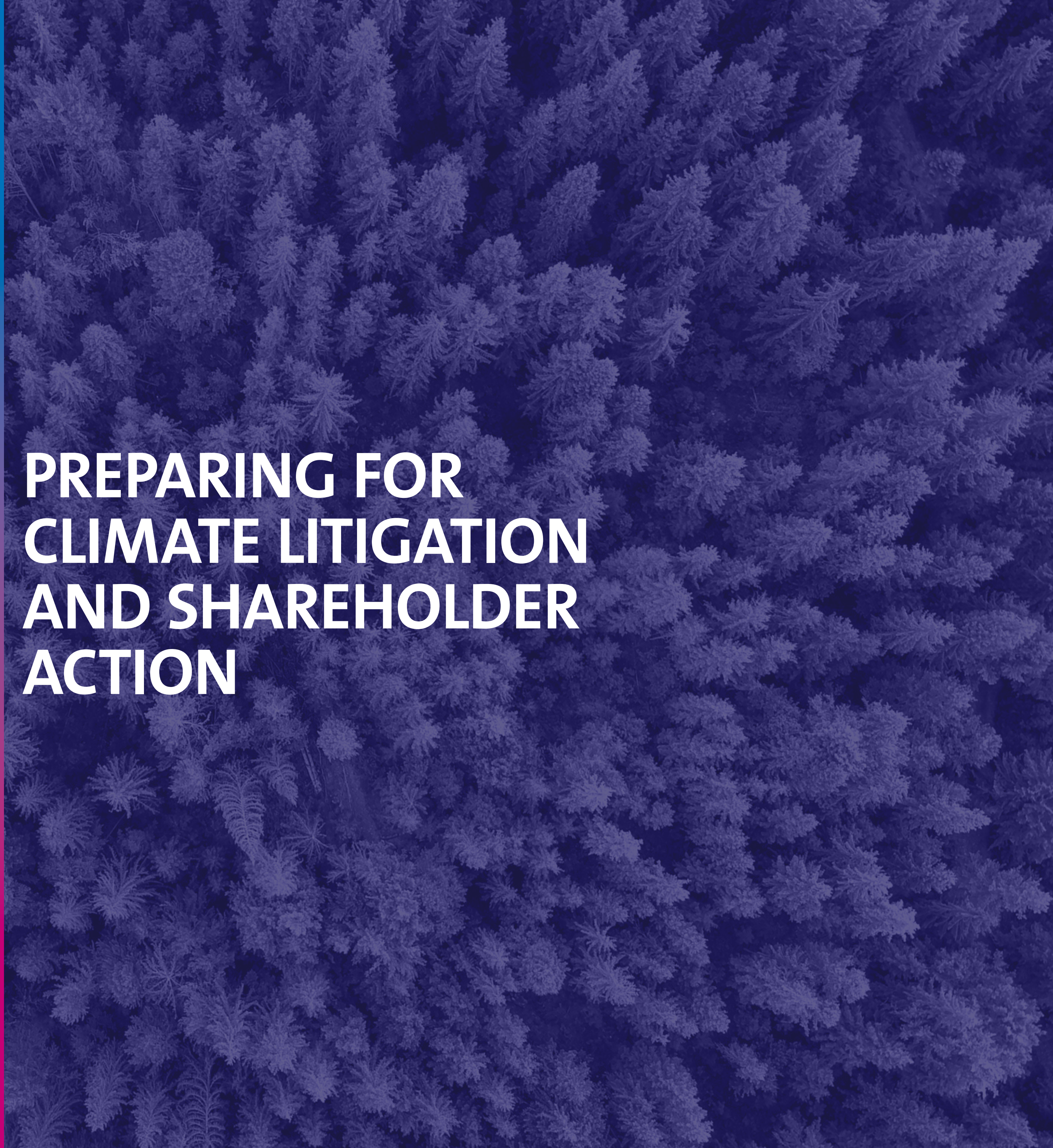
On the flipside, the risks to consider when entering this market include:

- **Regulatory and political uncertainty:** Conflicting political discourse around climate change and renewable energy in Australia hampers our attractiveness as a destination for foreign green investment, which may include green finance.
- **Costs:** There may be additional costs involved in verification and regular reporting compared to standard bond issuances or loans.
- **'Green washing':** Corporates risk losing integrity and brand credibility if they are unable to perform and meet their sustainability targets or portray their products or policies as producing positive environmental outcomes when in fact they do not.

ASKING THE RIGHT QUESTIONS

- Does your organisation have a robust ESG mandate that can be supported by green finance?
- Is there potential for new projects to be financed by the green finance market, or for established projects to be refinanced into the green finance market?
- Would raising green finance help your organisation demonstrate its commitment to green or sustainability-linked targets?
- What are the additional upfront and ongoing costs in putting in place a green bond, green loan or SLL, and are those costs acceptable by reference to the benefits?
- Has your organisation developed a green finance framework that sets out how an issuance would comply with the industry standard, such as the Green Bond Principles and Green Loan Principles?

For more information, contact
James Darcy | Mayuri Dharmakulasingam | Paul Cerche



4. PREPARING FOR CLIMATE LITIGATION AND SHAREHOLDER ACTION

Increasing climate litigation expected

There is a growing volume of climate-related legal actions globally, particularly against energy companies, financial firms and governments.

Many commentators, including former Chief Justice French, have predicted a continued rise in climate change litigation in Australia.

Climate litigation is taking a number of forms, across multiple jurisdictions. In Australia, a wave of climate activism and interest has given rise to increased litigation and regulatory action. Of the extensive actions in Australia and across the globe, pertinent cases include:

a. **Shareholder and investor litigation:** shareholder and investor action has been prolific in the United States. In Australia, litigation is on foot between superannuation fund REST and one of its members in relation to the disclosure and provision of information concerning climate-related risks. If the case proceeds to trial, it may provide judicial guidance on the scope of superannuation trustees' duties to obtain and disclose information about climate-related risks.

b. **Tort claims:** tort claims are emerging as a key means of recourse against corporates. These claims are often novel, relying on untested application of laws on nuisance and negligence to allegations of harm arising from localised emissions. In Germany, a Peruvian farmer has filed a claim against RWE in general nuisance under the German Civil Code. The plaintiff is suing for damage caused by environmental change that he alleges arises (in part) from RWE's percentage of global emissions since industrialisation. A number of claims have been filed in the US in public nuisance against large emitters. In Australia, plaintiff advocates are working to formulate claims against Australian-based companies, and so we believe such actions are imminent.

c. **Human rights complaints**: many judicial and non-judicial complaints are formulated as human rights harms arising from climate change impacts. A particularly interesting one is the Philippines Human Rights Commission, which has been hearing allegations that 51 major emitters, including a number of companies with a significant Australian presence, have collectively contributed to climate change, and as a result violated Filipinos' basic rights.

d. **Regulatory investigations**: Regulators are also taking more interest, and a number of investigations and actions are on foot. In 2019 ExxonMobil successfully defended proceedings in the New York courts concerning whether it had misled investors on the climate change-related costs associated with its business operations.

Claims against governments and regulatory agencies are another growing trend. In New South Wales, a group of bushfire survivors has recently issued proceedings against the Environmental Protection Agency to try to prompt the Agency to use its statutory powers in relation to climate change, including setting limits on greenhouse emissions and enforcing them.

Asset-specific litigation and public law challenges are also becoming more common (see **Climate Change and Project Approvals** for more information), as are complaints under soft law mechanisms (see **Voluntary Schemes and Soft Law** for more information).

KEY RISKS

The key drivers in Australia for climate change litigation against companies are:

- Dissatisfaction amongst the public interest sector in the Federal Government's strategy to mitigate climate change, making climate litigation an attractive avenue to attempt to drive change;
- Increasing cost to cities and states of climate adaptation and mitigation measures;
- Developments in event attribution and a better understanding of the causal links between emissions sources and climate-related loss and damage;
- Appetite among private plaintiffs (such as investors and NGOs) for litigation focused on corporate accountability for climate change;
- Better resourcing of public interest litigants, some of which are now able to, eg provide security for costs; and
- extreme weather events, such as bushfires, causing property damage.

In this environment, we consider there to be a significant risk of organisations discounting the possibility of climate-related litigation affecting their businesses, or (noting the broad range of causes of actions and forums available to litigants to prosecute climate-related cases) to misapprehend their greatest sources of climate litigation risk.

ASKING THE RIGHT QUESTIONS

An assessment of climate litigation risk should involve considering the following questions:

- Has your organisation identified its legal duties, both common law and statutory, in relation to the full spectrum of climate-related risks? Where are the vulnerabilities, and what is the potential quantum of exposure (to the extent this is known)?
- Has your organisation identified potential litigation pathways against it in relation to climate risk, and (noting the creativity displayed by public interest litigants) is it thinking broadly when doing so?
- Are your corporate governance and compliance management frameworks for climate-related risks in line with recent guidance?
- How is the business talking to stakeholders about climate risk mitigation? When compared with industry peers, is there a risk of standing out as a 'laggard' (and therefore possibly a target for public interest litigation)?
- Is your organisation comfortable that its responses to stakeholder inquiries about climate change are robust and, where appropriate, subject to legal review?
- Do you have continuous improvement processes in place to ensure you periodically assess your response to climate-related risks against regulatory requirements and community expectations, and against available data and modelling frameworks? The targets of litigation are more likely to be those considered out of step or lagging.

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Shareholder resolutions

Shareholders are becoming increasingly aware of climate change risks.

Since early 2017, both Australian and foreign companies have faced a wave of climate change-related shareholder activism. Ceres maintains a Climate and Sustainability Shareholder Resolutions Database, which at February 2020 showed around 1,068 resolutions that had been put to companies worldwide since early 2017.

In 2020, advisory resolutions requiring energy companies to set scope 3 emissions targets have attracted close to, or over, 50% support from investors and funds.

The 2015 Federal Court case of *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia,*[11] and its subsequent appeal,[12] demonstrate the limits of shareholder activism in Australia. Shareholders cannot propose resolutions that seek to 'usurp the powers' of directors, nor can shareholders propose advisory resolutions. This means shareholders typically cannot propose resolutions, eg expressing the opinion that the directors are failing to adequately account for climate change risk. Where shareholders can propose a resolution, it is open to — and indeed incumbent upon — directors to comment on the merits of the resolution (or lack thereof). This means directors may advise the general meeting that the proposed resolution is not in the best interests of the company.

During the 2019 AGM season, superfunds were present in pushing companies to act on climate change, while activist shareholders doubled down on the call from regulators to ensure disclosures align with the TCFD recommendations.

Shareholder resolutions were brought by Market Forces and the Australasian Centre for Corporate Responsibility (***ACCR***) against a number of companies.

In light of the decision in ACCR v CBA above, both Market Forces and the ACCR proposed special resolutions to amend the constitutions of these companies to allow shareholders by ordinary resolution at an AGM to express an opinion, make a request or ask for information about the way in which a power of the company vested in the directors had been, or should have been, exercised.

At the same time, Market Forces and the ACCR proposed ordinary resolutions contingent on the amendment of the company's constitution. The ordinary resolutions included:

- **'Transition planning disclosure'** – that companies disclose strategies and targets to reduce exposure to fossil fuel assets in line with the Paris Agreement, including eliminating exposure to thermal coal in OECD countries by 2030 (Market Forces).
- **'Lobbying inconsistent with the goals of the Paris Agreement'** – that the companies suspend memberships of industry associations where a major function of that association is to undertake lobbying that is, on balance, inconsistent with the goals of the Paris Agreement (ACCR).
- **'Paris goals and targets'** – that the board disclose details of how the company's capital expenditure is aligned with the Paris Agreement; targets for reductions in the company's emissions; and details of how the company's remuneration policy will incentivise progress against the targets (ACCR).

‘In 2018 there were 17 shareholder resolutions submitted to shareholder meetings, of which 14 related to disclosure of climate risk, emissions or targets.’

Governance Institute of Australia, Climate change risk disclosure: A practical guide to reporting against ASX Corporate Governance Council’s ***Corporate Governance Principles and Recommendations*** (February 2020)

- **‘Exposure reduction targets’** – that the company disclose targets to reduce investment and underwriting exposure to coal, oil and gas assets, along with plans and progress to achieve the targets (Market Forces).

As none of the special resolutions were passed, the ordinary resolutions above, which were contingent on the amendment, could not be put. However, the voting data is still available. The resolutions put by the ACCR relating to lobbying attracted the greatest support, receiving between roughly 15% and 30% support. The resolution put by Market Forces to a number of companies relating to ‘transition planning disclosure’ also attracted 30.33% support in one instance, but less than 10% support from the shareholders of some other companies.

KEY RISKS

While relatively few resolutions have been successful in Australia to date, some have resulted in changes to climate change practices, and shareholder support for such resolutions is increasing.

Shareholder resolutions can be a signifier of general interest in a company’s activities, and can be a precursor to more sustained activism, including judicial and/or non-judicial complaints. Unless managed appropriately, shareholder activism can also have adverse reputational and commercial impacts.

ASKING THE RIGHT QUESTIONS

- Has your organisation mapped out its stakeholder profile and assessed the likelihood that any stakeholder constituency might raise concerns about your organisation’s current approach to managing climate change-related risk?
- Does your organisation have a strategy for engaging with your stakeholders (such as investors and civil society) ahead of AGM season, and how effective is that strategy?
- Does your organisation assess likely resolutions to be put, and questions to be asked, and have appropriate responses?

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5. UNDERSTANDING AND NAVIGATING 'SOFT LAW'

Voluntary schemes and soft law

The term 'soft law' refers to rules, principles or guidelines that are not themselves legally binding, but nonetheless play an important role in promoting compliance with certain standards of behaviour. Rules of 'soft law' can often act as a precursor to the emergence of 'hard law'.

With many governments slow to act on climate change, there has been an increasing number of soft law instruments that seek to impact on corporate responses to climate change.

RELEVANCE OF SOFT LAW TO CLIMATE CHANGE

For example, in January 2019 the World Economic Forum (which hosts the annual Davos gathering) published a set of principles for effective corporate climate governance, building on the TCFD framework.[13] The principles have been rolled out globally through board networks and chapters. In August 2019, the Business Roundtable, an association of CEOs of leading US companies, issued a Statement on the Purpose of a Corporation, which included a commitment to 'protect the environment by embracing sustainable practices across our businesses'.[14]

Soft law can also have a narrower focus. For example, for the project finance sector the Equator Principles provide a risk management framework for financial institutions that allow them to assess and manage social and environmental risk associated with new projects.

Rules of soft law also intersect with other areas of climate-related risk, such as human rights considerations. The UN Guiding Principles on Business and Human Rights require certain conduct of businesses where their activities may affect human rights, including where those activities may have an adverse impact on the environment. Theories of human rights, once confined to the protection of social and political freedoms, continue to evolve and take into account rights to, among other things, clean air, health, water and food, along with the rights of indigenous and other groups whose cultural and political identity is tied to the environment.

CONSEQUENCES OF FAILURE TO COMPLY WITH SOFT LAW

For companies, a failure to comply with soft law can carry particular reputational risks due to an expectation of a certain standard of behaviour, even if not legally required. It may also provoke a backlash from the market, seen, eg in the response to Siemens' decision to honour its signalling contract for rail infrastructure for Adani's Carmichael coal mine. Soft law standards can also intersect with compulsory dispute resolution mechanisms.

A pertinent example of soft law having operation in relation to climate change risks can be found in the Friends of the Earth complaint made in January 2020 against ANZ to the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, which is a non-judicial dispute resolution body for alleged instances of non-observance of the Guidelines. The complaint alleges that ANZ has breached the Guidelines by failing to disclose high risk greenhouse gas emissions resulting from its lending and investment, to conduct adequate due diligence regarding climate-related risks, and to mitigate its adverse environmental impact. The complaint requests that ANZ divest from coal and phase out its investment in other fossil fuels, commit to emission targets in line with the Paris Agreement and disclose climate-related scenario analyses for all sectors it finances.

KEY RISKS AND OPPORTUNITIES

Although rules of soft law and voluntary schemes to which a company might subscribe do not themselves impose legal obligations, they still present risks. A business that states a commitment to rules of soft law, but fails to comply with them, may be exposed to reputational and commercial risks, as well as a risk of legal action, such as for misleading and deceptive conduct.

Conversely, failing to pursue soft law standards may also carry a reputational risk, or the risk of non-litigious dispute resolution processes being triggered through the OECD NCP, particularly where other businesses within the same industry have made such a commitment. Additionally, there is a risk that widely accepted norms of soft law may create an accepted 'reasonable standard' for the purposes of bringing legal claims in negligence or for breach of directors' duties, even where the business in question has not made its own commitment.

There may be opportunities for businesses that anticipate the development of hard law and commit to those standards as they exist as rules of 'soft law' ahead of others. Doing so may assist in both heading off conflict with stakeholders and anticipating risks that may arise from non-compliance with those standards.

Two recent decisions demonstrate an increased willingness on the part of courts to hold companies to standards found in policies and guidelines, and in rules of international soft law.

The 2019 decision of the UK Supreme Court in *Lungowe v Vedanta Resources Plc* allowed for the possibility that a company might be held liable for the adverse environmental and human rights consequences of a foreign subsidiary's activities, based, in part, on the public statements and commitments of the parent.[15] 1,826 Zambian villagers brought a claim in the UK against a Zambian mining company, KCM, and its UK-based parent, Vedanta. The court held that it was arguable Vedanta itself owed a duty of care to the claimants as it had published a sustainability report emphasising it had oversight over its subsidiaries; released public statements on its commitments to addressing environmental risks and technical shortcomings in KCM's mining activities; provided environmental, health and safety training across its group companies; and both funded and controlled KCM's activities. In this sense, a commitment by a parent company to adhere to soft law standards, such as the UN Guiding Principles on Business and Human Rights, and to implement such commitments through training, monitoring and enforcement throughout the group, may be used as a hook by claimant groups to bring a claim against a business to the extent it fails to meet such standards at an operational level.

A claim currently before court in Canada concerns the liability of a Canadian-based mining company for alleged violations of international human rights law in Eritrea. In late February 2020, the British Supreme Court rejected an attempt by Nevsun Resources to have the suit dismissed[16] The ultimate decision in the case will be important in determining the extent to which companies can be held liable for their actions under international human rights law and customary international law, and the role of domestic courts in determining such questions.

ASKING THE RIGHT QUESTIONS

- What are your organisation's publicly stated commitments in relation to climate change-related risks, and are these aligned with soft law instruments to which it is committed?
- Who within your organisation is responsible for approving any commitment to a soft law instrument before it is published?
- How is your organisation assessing its alignment with these commitments, and is this being done on an ongoing basis?
- Are there key additional soft law standards in your organisation's sector to which your organisation is not currently committed? How does this situate you in relation to the rest of your industry, and is there any associated reputational and/or commercial exposure?

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Just transition

The 'just transition' is frequently used to refer to a framework for a transition to a low-carbon economy that takes into account the associated economic and social costs and opportunities.

It has been defined as:

> 'An economy-wide process that produces the plans, policies and investments that lead to a future where all jobs are green and decent, emissions are at net zero, poverty is eradicated, and communities are thriving and resilient'.[17]

A just transition is particularly relevant in Australia given that much of our economy and workforce is devoted to carbon-intensive activities.

At the same time, the last few years have seen rapid investment and growth in Australia's renewables market (such as in solar, wind, energy efficiency, hydro, bioenergy, energy storage, geothermal and marine energy). In April 2019, the Clean Energy Council reported that there was a 100% increase in investment in large-scale energy projects in 2018, and around 14,000 jobs had been created as a result of the renewable energy construction boom in the same year.[18] The discussions around just transition are pertinent in the context of the post-COVID-19 economic stimulus and recovery plan.

While not specific to Australia, there is increasing interest within the investment community in whether companies are adequately aligned with the 'just transition' framework. For example:

- Signatories to the United Nations Principles for Responsible Investment (***UNPRI***) are committed to integrating environmental, social and governance factors into their decision making. The 'social' element is likely to include aspects of the just transition framework. Signatories also commit to assessing and disclosing their progress and can be delisted if they do not do so. At the end of 2019, more than 2,500 investors with over US$90 trillion in assets had signed up to the UNPRI.
- In December 2018, the Grantham Institute, together with the Initiative for Responsible Investment at the Harvard Kennedy School, the UN PRI and the International Trade Union Confederation, published a report entitled 'Climate Change and the Just Transition: A Guide for Investor Action'. The report recommends investors support a 'just transition' by incorporating just transition factors in investor expectations, requesting disclosure, benchmarking performance and pressing for improvement. The report also encourages investors to promote disclosure by companies, asset owners and asset managers using the framework of the Task Force on Climate-related Financial Disclosures (***TCFD***). The Investor Group on Climate Change (***IGCC***), a collaboration of more than 70 institutional investors from Australia and New Zealand with total funds under management of over $2 trillion, is encouraging investors to implement a climate change policy and to report against the TCFD. This includes implementing long-term strategies that would support 'a just transition in communities impacted by shifting global and domestic markets'.[19]
- In his 2020 letter to CEOs, BlackRock Chairman Larry Fink announced BlackRock's intention to require the companies it invests in to disclose sustainability information and climate-related risks.[20] Writing of his belief that 'we are on the edge of a fundamental reshaping of finance', he described the need to 'be mindful of the economic, scientific, social and political realities of the energy transition', and for the private sector to work with government to ensure a transition that is 'just and fair'. According to Fink, a company's prospects for growth are 'inextricable from its ability to operate sustainably', and operating sustainably requires engagement with the full set of a company's stakeholders. It is by being transparent about this engagement that companies will attract investment most effectively.

KEY RISKS AND OPPORTUNITIES

We consider it unlikely that there will be legislative reform in relation to mandate planning regarding a just transition in Australia in the near-to-medium term. Nevertheless, overlooking just transition at an organisational level could result in commercial disadvantage or reputational damage as investor and market expectations on the topic continue to evolve.

Where investors have made commitments to act, assess and report on progress towards a just transition, investee companies may experience increased requests by investors for details of their relevant strategy.

In the United States, the Shareholder Association for Research and Education has sought information from utility companies planning the closure of coal-fired plants as to their strategy for ensuring a just transition. Some major Australian companies are already responding to actual or perceived demands for such an approach, incorporating statements of their position on social or community risks associated with the transition to a low-carbon economy in recent AGM notices.[21]

ASKING THE RIGHT QUESTIONS

- Is your organisation aware of the concept of just transition, and aware of the relevance to its business?
- Does your organisation have a realistic just transition strategy in place? Is it effectively communicating this strategy to stakeholders?
- Are your organisation's strategy, governance and risk managements teams talking to each other on these issues?
- How does your organisation engage with investors on issues relating to a just transition, and does it adequately allow for investors to report on these issues?
- How will your organisation respond to a shareholder resolution requesting detail on your assessment of risks related to the just transition?

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The secretariat of the UN Framework Convention on Climate Change has identified 1.5 billion people employed in sectors that are critical to climate stability.

Those sectors include energy, agriculture, transport, resource-intensive manufacturing and forestry.

Source: UNFCCC, Just Transition of the Workforce, and the Creation of Decent Work and Quality Jobs (Technical Paper) (2016)

Endnotes

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