

ESG Legal Outlook 2023
– Australia



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ESG is continuing to gain momentum across the Australian landscape. Looking forward to 2023, we expect to see businesses align towards best practice approaches to ESG issues.

Businesses are now expected to engage proactively with ESG principles and reporting trends, including in their operational and strategic decision making. Propelling this is an expanding suite of ESG-related standards that are influencing stakeholder expectations and the law. Climate and environmental issues remain at the forefront of ESG-related litigation, with social issues gaining prominence as modern slavery, sexual harassment and discrimination attract greater regulatory attention. Litigation that tests the veracity of business' ESG commitments will continue to grow in 2023, with bluewashing and greenwashing claims growing amongst stakeholders including regulators and civil society organisations.



01 The 'E' in ESG - Environment

Climate and biodiversity

Climate and biodiversity related law reforms

Throughout 2022, there were developments in climate, environment and energy policy at both the Commonwealth and State level. The new Federal Government has introduced a range of reforms and national policies aimed at addressing climate change and biodiversity.

Below are four key developments that occurred in 2022 that are set to shape climate change, biodiversity and energy policy in 2023:

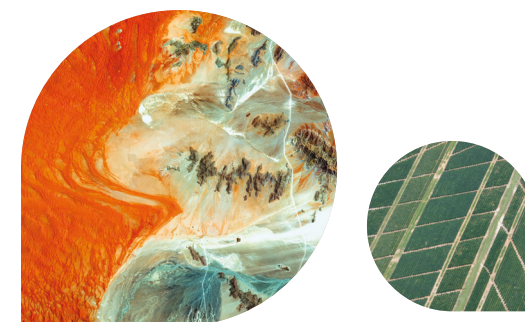
- > **New climate change laws:** The *Climate Change Act 2022* (Cth) (**Climate Act**) and corresponding consequential amendments legislation came into effect on 14 September 2022. The Climate Act operates as 'umbrella' legislation to implement Australia's net-zero commitments and codifies Australia's net 2030 and 2050 GHG emissions reductions targets under the Paris Agreement.
- > **Regulatory environmental reforms:** On 8 December 2022, the Federal Government released a long-awaited response to a review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), 'Nature Positive Plan: better for the environment,

better for business'. The Government has outlined an ambitious package of reforms to national environmental law which are aimed at addressing environmental decline and focusing on 'nature-positive outcomes'. The centrepiece of these reforms will be the establishment of a federal Environment Protection Agency, with responsibility for assessing actions and granting approvals under the EPBC Act.

- > **Mandatory climate risk disclosure framework:** Following support from Australian corporate regulators, the Federal Government has commenced consultations on whether to introduce climate reporting requirements that would align with the ISSB Standards. This would see climate reporting requirements apply to 'large, listed companies' and 'large financial institutions'. This suggests that the ISSB Standards may move from being voluntary to mandatory for certain Australian companies.
- > **Safeguard Mechanism:** Following an extensive consultation process, in November 2022 the Government introduced the *Safeguard Mechanism (Crediting) Amendment Bill 2022* which will enable the issuance (by the Clean Energy Regulator), transfer and surrender of Safeguard Mechanism Credits. It is expected that the reforms may take effect from 1 July 2023.

Climate and biodiversity litigation and investor activism

'Say On Climate' votes continue in prominence in Australia. Say On Climate votes are resolutions seeking shareholder approval or rejection of a company's climate transition plan. 2022 saw a number of companies respond with commitments to put 'Say On Climate' advisory resolutions to their shareholders at AGMs.



Regulatory responses to greenwashing: guidance and enforcement activity

In 2022, ASIC issued guidance directed at certain entities about misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical.¹ While ASIC's guidance focuses on sustainability-related products issued by funds, ASIC has stated that its principles may apply to other entities that offer or promote financial products that take into account sustainability-related considerations.

2022 saw ASIC significantly ramp up their regulatory enforcement activity in relation to greenwashing claims, which included a total of four enforcement actions, including:

- (i) An action against Diversa Trustees Limited (**Diversa**), the issuer of superannuation product Cruelty Free Super (CFS), as trustee for Professional Super (a sub-fund of the Tidswell Master Superannuation), for alleged false and misleading statements on the CFS website that overstated exclusions. CFS claimed to exclude investments in companies involved in "polluting and carbon intensive activities", "financing or support of activities which cause environmental and social harm" and "poor corporate governance". ASIC was ultimately not satisfied that appropriately broad investment screens were applied that would be consistent with the aforementioned statements;

- (ii) An action against Black Mountain Energy Limited (**BME**), for greenwashing and alleged false or misleading sustainability-related statements BME made in three ASX announcements. ASIC claimed that BME did not have a reasonable basis to make certain representations or that certain representations were factually incorrect. Those representations were in relation to net zero emissions.

ASIC's regulatory enforcement in relation to greenwashing shows no sign of slowing as we head into 2023.

Other regulators, such as APRA, have released guidance on how certain entities can integrate ESG risk considerations into investment analysis, decision making and oversight to ensure that appropriate resources are available to identify and respond to material ESG factors in the entity's investments.²

¹ [How to avoid greenwashing when offering or promoting sustainability-related products | ASIC](#)

² [Prudential Practice Guide - Draft SPG 530 Investment Governance \(apra.gov.au\)](#)



02 The 'S' in ESG - Social

ESG regulation and disclosure requirements

Modern slavery

On 31 March 2022, the Australian Federal Government announced a statutory review of the *Modern Slavery Act 2018* (Cth). As part of the review, the Australian Government released an issues paper inviting submissions on issues including 'New climate change laws', and whether additional enforcement measures should be introduced for noncompliance. Other issues contemplated included the appropriateness of the current reporting requirements.

Whilst the outcome of the review remains to be seen, there is scope for the review to consider international legislation in determining whether Australian reporting requirements should be updated. This could result in more stringent requirements, given that comparable regimes in other jurisdictions (such as the EU's proposed Corporate Sustainability Due Diligence Directive) represent a higher standard than some aspects of the Australian legislation as it currently stands. The review is expected to be finalised by March 2023.

Respect at work

On 12 December 2022, the Government made significant changes to Australia's workplace anti-discrimination landscape by enacting the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) (**the Respect at Work Act**). The most significant change introduced by the Respect at Work Act is the new duty on employers and persons conducting a business or undertaking to take positive measures to eliminate, as far as possible, sex discrimination, sexual harassment, harassment on the ground of sex, conduct that subjects another person to a workplace environment that is hostile on the ground of sex, and acts of victimisation.

The Respect at Work Act is part of the growing body of Australian law targeting sexual harassment, discrimination and similar forms of wrongdoing in the workplace.



03 The 'G' in ESG - Governance

Data breaches and cybersecurity

The Optus data breach has resulted in intense public and political scrutiny of cybersecurity and data handling practices by Australian companies. Shortly after the Optus data breach, another significant data breach occurred at Medibank. The Federal Government may implement law reforms that could address some of the current obstacles to data breach class actions in Australia. We expect increased regulatory scrutiny and enforcement activity around cybersecurity.


In response to the data breach incidents, the *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (Cth) was passed on 12 December 2022. The Act increases the maximum penalties for serious or repeated privacy breaches from the current US\$2.22m penalty to whichever is the greater of US\$50m or three times the value of any benefit obtained through the misuse of information.

Anti-corruption / bribery / sanctions

2022 saw increased attention from policymakers in relation to corporate crime. The following developments were proposed or adopted, to increase transparency and accountability in Australia in relation to bribery and corruption:

- > **Domestic anti-corruption law reform:** On 30 November 2022, the Australian Federal Parliament passed legislation to establish the long-awaited National Anti-Corruption Commission (**NACC**). The NACC will operate independently of government and have wide-ranging powers to investigate and report on serious or systemic corruption in the federal public sector. The NACC is expected to commence operation in mid-2023.
- > **Foreign bribery law reform:** A bill to implement long-awaited reforms to Australia's foreign bribery laws lapsed for a second time in 2022. The completion of an OECD periodic review that is currently underway may provide a renewed impetus for reform of foreign bribery laws. Separately, penalties for foreign bribery offences was recently considered by the High Court, where the outcome may be significant for future foreign bribery cases in Australia.³
- > **Potential increased jurisdiction of the Federal Court:** The Attorney-General's Department concluded public consultation on an exposure draft for the Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill, which proposes to expand the Federal Court's jurisdiction to include hearing corporate crime offences administered by ASIC.

Further reading:

-  [Everything you need to know about cyber risks, resilience and responsibilities \(May 2022\)](#)
-  [New ASIC guidance on how superannuation and managed funds can avoid 'greenwashing' \(June 2022\)](#)
-  [Recent industry guidance for fund managers on climate risk disclosure \(September 2022\)](#)
-  [Diversity and inclusion in the boardroom and beyond \(November 2022\)](#)
-  [Best practice ESG due diligence for energy investments \(November 2022\)](#)
-  [Sustainability reporting – what you need to know to be prepared for the ISSB Standards \(December 2022\)](#)



³ *R v Jacobs Group (Australia) Pty Ltd formerly known as Sinclair Knight Merz* [2022] HCATrans 193 (10 November 2022).

ESG key resources



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In conversation with the ESG team – media hub

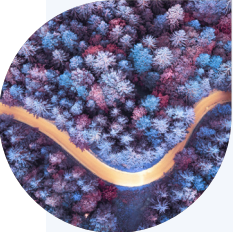


Sustainable Finance Survival Guide



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ESG Legal Outlook 2023 - Global Themes



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We welcome the opportunity to discuss our publication with you and to hear your thoughts and feedback.

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Linklaters' Global ESG Team

Our global, multidisciplinary ESG team is at the forefront of supporting clients on all aspects of climate change, human rights and other ESG matters. We have a strong appreciation of the opportunities and challenges arising out of the growing focus on sustainability and are perfectly positioned to support businesses in meeting their net zero and ESG goals.



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